Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *H. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 551

Tribunal File Number: AD-17-344

BETWEEN:

H. B.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: October 24, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the General Division's decision dated January 30, 2017, which determined that the Applicant was not eligible for a Canada Pension Plan disability pension. The General Division found that she did not have a severe disability as defined by the *Canada Pension Plan* by the end of her minimum qualifying period on December 31, 2016. The Applicant submits that the General Division made several errors.

ISSUE

[2] Does the appeal have a reasonable chance of success?

ANALYSIS

[3] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

> (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[4] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

(a) Alleged error of law

[5] The Applicant argues that the General Division erred in law, though she did not particularize her claim in this regard, other than to state that the General Division based its decision "on the wrong section of the applicant." Presumably, the Applicant intended to refer to the "wrong section of the *Canada Pension Plan*." The General Division referred to paragraphs 44(1)(*b*) and 42(2)(*a*) of the *Canada Pension Plan* as the sections that set out the eligibility requirements for the disability pension and that define a severe and prolonged disability. In assessing the Applicant's eligibility for the disability pension, the General Division relied on these paragraphs. I do not see any error on the General Division's part in having relied on these paragraphs.

[6] I have also reviewed the General Division's decision and do not see any errors on the face of the record. The General Division appropriately assessed whether the Applicant had a severe and prolonged disability; it examined the totality of the medical evidence and assessed whether her disability rendered her incapable regularly of pursuing any substantially gainful occupation.

[7] The Applicant suggests that the General Division failed to consider the fact that she is unable to sit or stand or do anything of a repetitive nature, or the fact that her pain interferes with her concentration.

[8] It is well-established in the jurisprudence that a decision-maker is not required to refer to all of the evidence before it, as the decision-maker is presumed to have been considered all of the evidence: *Simpson v. Canada (Attorney General)*, 2012 FCA 82. This presumption can be rebutted if an applicant can establish that the evidence was of such probative value that the decision-maker ought to have considered it.

[9] That being so, I see that the General Division did in fact consider this evidence. It set out the Applicant's testimony in this regard and noted that some of the Applicant's evidence was not supported by the documentary record. At paragraph 25, the General Division noted the Applicant's questionnaire in which she had disclosed that she could sit for three to four hours. The General Division also noted that the Applicant indicated that her concentration was

affected by pain medication, although the Applicant had actually indicated that her concentration "[could] be affected with use of pain medication." (GD2-70) The Applicant made no mention then of any issues involving standing. At paragraph 54, the General Division noted that, when the Applicant's family physician completed a health status report in 2015, there had been no mention of any problems with concentration or memory.

[10] While there was other evidence regarding the Applicant's ability to sit and stand or concentrate, the General Division clearly preferred any evidence that it considered independent, reliable and corroborative, as well as not being seen as self-serving. It is clear that the General Division preferred the Applicant's evidence in the questionnaire regarding her ability to sit and stand, and that, although the Applicant reported in the questionnaire that pain medication could interfere with her concentration, the General Division found that it was not a pronounced issue, otherwise her family physician would have noted it in his health status report.

[11] The General Division also examined the Applicant's disability in a real-world context. The General Division also considered whether the Applicant had reasonably followed treatment recommendations, and whether any refusal to comply with recommendations were unreasonable, as well as what impact that had on her medical status.

[12] The General Division identified the applicable sections of the Canada Pension Plan and appropriately conducted its assessment of the Applicant.

[13] Essentially, the Applicant disagrees with the General Division's assessment and interpretation of the medical evidence, and she is urging me to conduct my own assessment. Some measure of deference is owed to the General Division. As the primary trier of fact, it is best-positioned to assess and make findings on the evidence, as well as to determine whether, after considering the medical evidence on a cumulative basis, it could lead to a finding that an appellant's disability was severe and prolonged on or before the end of his or her minimum qualifying period and that it is likely to be long continued and of indefinite duration or likely to result in death. Furthermore, subsection 58(1) of the DESDA provides for only limited

grounds of appeal. It does not allow for a reassessment or rehearing of the evidence: *Tracey*, *supra*.

(b) Alleged failure to observe principle of natural justice

[14] The Applicant submits that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction. In particular, she claims that a medical report and document that she had submitted were not included in the appeal hearing file before the General Division.

[15] It is unclear which documents were not included in the hearing file. The General Division indicated that, as a preliminary matter, the Applicant attempted to file two sets of documents with the Tribunal. These included reports from the Applicant's physiotherapist, for the period from March 22 to April 19, 2016 (GD10), and the records of Dr. Cheema's pain clinic, for the period from October 2013 to August 2016 (GD11). The General Division reviewed these records and determined that they were relevant, and it therefore admitted them into evidence. Clearly, these documents were before the General Division. Indeed, the General Division referred to these records throughout its decision, specifically, at paragraphs 21, 27, 31, 32, 33 and 34.

[16] The Applicant attached a copy of a medical note dated February 22, 2017, prepared by Dr. Gupta, together with a magnetic resonance imaging report done on January 25, 2017. She suggests that these two records could have had a persuasive effect on the General Division. It seems that the Applicant alleges that these two particular documents were missing from the hearing file before the General Division.

[17] In his note of February 22, 2017, Dr. Gupta wrote that the Applicant "is incapable of any type of work due to her severe chronic pain conditions. The restrictions and limitations are permanent." It appears that portions of the note were excised (AD1A-6).

[18] The MRI was compared with a previous scan done on April 23, 2010. The recent January 2017 scan indicated that findings were worse at the C4-5, C5-6 and C6-7 levels of the Applicant's cervical spine.

[19] The hearing before the General Division took place on January 9, 2017. Both the MRI report and Dr. Gupta's medical note were prepared after the hearing had already passed and, in the case of Dr. Gupta's note, after the General Division had already rendered its decision. In fact, it appears that the Applicant first produced these documents in mid-April 2017, approximately two and a half months after the General Division had rendered its decision. There is no indication that the Applicant had ever requested leave to file additional medical records, or that she had notified the General Division that she anticipated obtaining and filing additional medical records. Hence, I see no basis for the Applicant's claims that the General Division failed to observe a principle of natural justice or that somehow she had been deprived of the opportunity to fully and fairly present her case because some of her medical records did not appear in the hearing file before the General Division. The General Division did not have access to these medical records at the time of or shortly after the hearing for the simple fact that they had yet to come into existence. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(c) New evidence

[20] At the same time, the Applicant acknowledges that the MRI done on January 24, 2017 represents new evidence.

[21] New evidence generally is not permitted on an appeal under section 5 of the DESDA. In *Canada (Attorney General) v. O'Keefe*, 2016 FC 503, at para. 28, Manson J. determined that:

> [u]nder sections 55 to 58 of the DESDA, the test for obtaining leave to appeal and the nature of the appeal has changed. Unlike an appeal before the former [Pension Appeals Board], which was de novo, an appeal to the [Social Security Tribunal – Appeal Division] does not allow for new evidence and is limited to the three grounds of appeal listed in section 58.

[22] In *Cvetkovski v. Canada (Attorney General)*, 2017 FC 193, at para. 31, Russell J. determined that "new evidence is not admissible except in limited situations […]." More recently, in *Glover v. Canada (Attorney General*), 2017 FC 363, the Federal Court adopted and endorsed the reasons in *O'Keefe*, concluding that the Appeal Division had not erred in refusing to consider new evidence in that case, in the context of the application for leave to appeal. The

Court also noted that the DESDA makes provisions under section 66 for the General Division to rescind or amend a decision where new evidence is presented by way of application.

[23] Based on the facts before me, I am unconvinced that there are any compelling reasons why I should admit the updated medical records, as there is no indication that they fall into any of the exceptions. As the Federal Court has determined, generally, an appeal to the Appeal Division does not allow for new evidence.

[24] I note that the Federal Court in *Glover* indicated that the DESDA makes provisions under section 66 of the DESDA for the General Division to rescind or amend a decision where new evidence is presented by way of application. However, there are strict deadlines and requirements under section 66 of the DESDA. For instance, the section requires an application to demonstrate that the new fact is material and that it could not have been discovered at the time of the hearing with the exercise of reasonable diligence. Section 66 of the DESDA also requires that an application to rescind or amend be made within one year after the day on which the decision in question had been communicated.

CONCLUSION

[25] Given the foregoing considerations, the application for leave to appeal is refused.

Janet Lew
Member, Appeal Division