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

Citation: *P. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 545

Tribunal File Number: AD-16-1297

BETWEEN:

P. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Kate Sellar

Date of Decision: October 24, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On August 22, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* was not payable. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on November 21, 2016. The General Division found that the Applicant failed to prove that she had a severe disability that rendered her incapable regularly of pursuing any substantially gainful occupation.

ISSUE

[2] The Appeal Division must decide whether the appeal has a reasonable chance of success.

THE LAW

Leave to Appeal

[3] According to ss. 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Appeal Division may be brought only if the Appeal Division grants leave to appeal, and the Appeal Division must either grant or refuse leave to appeal.

[4] Subsection 58(2) of the DESDA provides that the Appeal Division refuses leave to appeal if it is satisfied that the appeal has no reasonable chance of success. An arguable case at law is a case with a reasonable chance of success [see *Fancy v. Canada (Attorney General)*, 2010 FCA 63].

Grounds of Appeal

[5] According to s. 58(1) of the DESDA, the following are the only grounds of appeal:

> (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.

SUBMISSIONS

[6] The Applicant submits, *inter alia*, that the General Division erred under ss. 58(1)(*b*) and (*c*) of the DESDA in relying on evidence about her work activities to conclude that she did not meet the test for a "severe disability," without considering her evidence about why she ceased working and whether her work was substantially gainful.

[7] In the "facts" section, the General Division outlined the Applicant's evidence about whether she was able work regularly at her photography business beginning in 2007. At paras. 15 through 18, the General Division summarized the Applicant's evidence that she would show up late for sessions due to her washroom-related needs, that she got bad reviews, that clients were not happy, and that the most she made in a year was $7,000 net. The General Division acknowledged the Applicant's evidence that she would have to reschedule portrait sessions many times due to her condition, and then clients would cancel. The General Division acknowledged the Applicant's evidence that she

> …stopped her business in 2011 because of the two aspects of the job; being present for the photo shoots and editing at the computer. She thought she would be able to edit on her own time at home close to the washroom, but she could not do it. Some days she would try to edit and then go to the washroom and lie down. She was late providing the finished product to her clients as she took so long to edit (para. 17).

[8] However, in its analysis, the General Division concluded that the only evidence that the Applicant was unable to work as a self-employed photographer was her testimony, and that her evidence was that she "regularly" worked throughout three years managing one to two portrait sessions per week, along with the more lucrative wedding sessions (para. 57). The General Division decision does not analyze whether the Applicant's work as a self-employed photographer was substantially gainful.

ANALYSIS

[9] The Applicant raises arguments under ss. 58(1)(*b*) and (*c*) that have a reasonable chance of success on appeal. The General Division may have erred in both law and fact in its approach to determining whether the Applicant has a "severe" disability to qualify for a disability pension. It seems that the General Division concluded that the Applicant does not have a severe disability simply because she has worked in her own photography business. That conclusion may be erroneous and may have been reached without considering the Applicant's own evidence about why she stopped working at her business, which is arguably an error under s. 58(1)(*c*) of the DESDA. It seems the General Division failed to engage in the required analysis as to whether that work in the photography business was "substantially gainful," which is arguably an error of law under s. 58(1)(*b*) of the DESDA. This analysis failed to account for the rest of the relevant evidence from the Applicant already described by the General Division in the facts, namely that the Applicant said she stopped her business because of disability-related restrictions preventing her from being present for the photo shoots and editing at the computer.

[10] The General Division is presumed to have considered all the evidence before it, but that presumption will be set aside when the probative value of the evidence that is not expressly discussed is such that it should have been [see *Villeneuve v. Canada (Attorney General)*, 2013 FC 498; *Kellar v. Canada (Minister of Human Resources Development)*, 2002 FCA 204; and *Litke v. Canada (Human Resources and Social Development)*, 2008 FCA 366].

[11] The Applicant's evidence about why she stopped working was relevant in determining whether the Applicant is incapable *regularly* of pursuing any substantially gainful occupation. While the General Division referred to the Applicant's testimony in the "facts" section, there is no indication that the General Division considered or weighed the Applicant's evidence on this point in the analysis, except to say at para. 56 that "[t]he only evidence that she was unable to work as a self-employed photographer is her testimony." The General Division appears to have accepted the Applicant's evidence about how often she was working but discounted her evidence about the difficulties she had in carrying out the work in a consistent manner and, this, without any explanation. The General Division did not expressly weigh or consider that evidence in its analysis, which is arguably an error under s. 58(1)(*c*) of the DESDA.

[12] The General Division appears to have concluded that the Applicant does not have a severe disability *because* of her work post-minimum qualifying period. However, if that was to be a basis for the General Division's decision, the decision must address whether that work was "substantially gainful," or whether the Applicant could have worked more than she was, i.e. at a substantially gainful level. It seems the General Division's decision did not address whether the work was substantially gainful, which is arguably an error under s. 58(1)(*b*) of the DESDA.

[13] Given that the Appeal Division has identified possible errors under ss. 58(1)(*b*) and (*c*) of the DESDA, the Appeal Division does not need to consider any other grounds or arguments raised by the Applicant at this time. Subsection 58(2) does not require that individual grounds of appeal be considered and accepted or rejected [see *Mette v. Canada (Attorney General)*, 2016 FCA 276].

CONCLUSION

[14] The Application is granted. This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Kate Sellar
Member, Appeal Division