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

Citation: *M. C. v. Minister of Employment and Social Development,* 2017 SSTADIS 546

Tribunal File Number: AD-16-1394

BETWEEN:

M. C.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: October 24, 2017

Canada

REASONS AND DECISION

DECISION

[1] The application for leave to appeal (Application) is granted.

OVERVIEW

[2] The Applicant, M. C., seeks a disability pension under the *Canada Pension Plan* (CPP). The Respondent, the Minister of Employment and Social Development, denied her request, because while the Applicant had certain restrictions due to her medical condition, the information did not show that those limitations prevented her from doing some type of work.

[3] The Applicant claims that fractures sustained in a motor vehicle accident (MVA), chronic headaches, chronic pain, difficulty sleeping and depression prevent her from working. She last worked regularly in 2007 and, since then, has not attempted any kind of work.

[4] The Applicant appealed the Respondent's denial of a CPP disability pension to the General Division of the Social Security Tribunal of Canada (Tribunal). The General Division found that the Applicant's disability was not severe before the end of her minimum qualifying period, because Dr. McKee opined that the Applicant would be capable of light, sedentary, clerical work and because the Applicant had not pursued additional psychological treatment.

[5] I find that this appeal has a reasonable chance of success, because the General Division placed little or no weight on a number of medical reports with an explanation that they were "medical-legal assessments."

ISSUES

[6] Before I can grant leave to appeal, I must decide whether the appeal has a reasonable chance of success. In other words, is there an arguable ground upon which the proposed appeal might succeed?[1]

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[1] *Osaj v. Canada (Attorney General)*, 2016 FC 115 at paragraph 12; *Murphy v. Canada (Attorney General)*, 2016 FC 1208 at paragraph 36; *Glover v. Canada (Attorney General)*, 2017 FC 363 at paragraph 22.

[7] More specifically, is there a reasonable argument that the General Division based its decision on an error when it placed more weight on the reports of her treating doctors (especially Dr. McKee) than on "medical-legal assessments"?

ANALYSIS

[8] An appeal to the Appeal Division may be brought only if leave to appeal is granted and the Appeal Division must either grant or refuse leave to appeal.[2]

[9] Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success[3] based on a reviewable error.[4] The only reviewable errors are the following: the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; it erred in law in making its decision, whether or not the error appears on the face of the record; or it 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.

[10] The Applicant submits that the General Division made all three kinds of reviewable errors and provided arguments on each one.

[11] It is unnecessary for the Appeal Division to address all the grounds of appeal that an applicant has raised. Where individual grounds of appeal are interrelated, it may be impracticable to parse the grounds. One arguable ground of appeal may suffice to justify granting leave.[5] Therefore, the remainder of this decision discusses one possible error that warrants further review and not every alleged error.

Weight Attributed to Medical Reports

[12] The General Division decision summarizes more than fifteen medical reports in the appeal record and states that all the medical evidence had been reviewed. Five of the summarized reports were written by Dr. McKee, orthopedic surgeon,[6] and two of these

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[2] *Department of Employment and Social Development Act* (DESD Act) at subsections 56(1) and 58(3).
[3] DESD Act at subsection 58(1).
[4] DESD Act at subsection 58(2).
[5] *Mette v. Canada (Attorney General)*, 2016 FCA 276.
[6] Dr. McKee's reports dated June 18, 2009; August 12, 2011; December 5, 2011; February 14, 2013; and June 11, 2015.

included an opinion that the Applicant was capable of light, sedentary or clerical activity. The Applicant had also been examined by or treated by at least eight other medical professionals whose reports are in the appeal record. Three of them had given the opinion that the Applicant cannot work.[7]

[13] The General Division preferred Dr. McKee's opinion over the other opinions. The decision noted that "[the] Tribunal acknowledges that there were many medical-legal assessments included in the file; however, the Tribunal placed little weight on these reports and placed more weight on the reports from her treating doctors, for example, Dr. McKee."

[14] It is the role of the General Division to review and weigh the evidence. In so doing, it must give reasons for its analysis. It is not the role of the Appeal Division to re-hear the case anew or to re-weigh the evidence with a view of substituting its own findings. The role of the Appeal Division at the leave stage is to determine whether a reviewable error may have been made by the General Division

[15] The General Division appears to have discounted the medical reports of a number of specialists who assessed the Applicant during her qualifying period because these reports were prepared in a "medical-legal" context and their authors were not her "treating doctors."

[16] I am concerned that the General Division may have discounted relevant medical evidence solely or primarily on the basis that these reports were produced in the context of MVA insurance litigation. There is medical evidence that appears to contradict Dr. McKee's opinion that the Applicant is capable of light, sedentary or clerical work.

[17] If the General Division decides that contradictory evidence should be dismissed or assigned little or no weight, it must explain the reasons for that decision in an adequate manner.[8] A failure to do so presents a risk that its decision will be marred by an error of law or that it will be qualified as capricious.

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[7] Insurer's Vocational Evaluation, completed on October 20, 2009; Dr. Miller's report dated December 10, 2012; Dr. Soligo's Vocational Assessment report dated February 19, 2013.

[8] *Oberde Bellefleur OP Clinique dentaire O. Bellefleur (Employer) v. Canada (Attorney General)*, 2008 FCA 13.

[18] I am satisfied that the appeal has a reasonable chance of success on the basis of a possible error of law or an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

CONCLUSION

[19] The Application is granted pursuant to paragraphs 58(1)*(b)* and *(c)* of the DESD Act.

[20] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Shu-Tai Cheng
Member, Appeal Division