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

Citation: *T. F. v. Minister of Employment and Social Development*, 2017 SSTADIS 566

Tribunal File Number: AD-17-543

BETWEEN:

T. F.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Valerie Hazlett Parker

Date of Decision: October 30, 2017

REASONS AND DECISION

INTRODUCTION

[1] On April 28, 2017, 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 July 31, 2017.

ANALYSIS

[2] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operations. According to subsections 56(1) and 58(3) of the DESD Act, 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.

[3] The only grounds of appeal available to the Appeal Division under the DESD Act are 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] Subsection 58(2) of the DESD Act provides that leave to appeal is to be refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[5] I must determine whether the Applicant has presented a ground of appeal that may have a reasonable chance of success on appeal.

[6] The Applicant presented a number of grounds of appeal, contending that the General Division breached the principles of natural justice because the hearing recording was not

completely audible, and that the decision contains both errors of law and errors of fact made in a perverse or capricious manner or without regard to the material before it. The Applicant also filed a further medical document with the Application. Each ground of appeal is examined below.

Natural Justice

[7] The Applicant submits that the General Division hearing recording was not completely audible, and that this lack of perfect recording hampered the Tribunal member in his review and deliberations as he did not refer to the recording in the decision. First, the General Division is not required to record its hearings. Therefore, the fact that a recording was not completely audible does not disclose any error by the General Division that is reviewable on appeal. Second, the fact that the decision does not specifically refer to any portion of that recording discloses no error. While it is unfortunate that the recording is difficult to hear, this in no way impaired the parties' ability to present their case, to meet the case against them or to have the decision made by an impartial member based on the law and the evidence. This ground of appeal does not have a reasonable chance of success on appeal.

Error of Law

[8] The first ground of appeal based on an error of law that the Applicant presented was that the General Division did not consider the Supreme Court of Canada decision in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR, 2003 SCC 54. This decision is often cited as it clearly states that chronic pain can be a disabling condition. This is not challenged. It is also clear that the Applicant in this case suffered from ongoing pain and limitations. The fact that the decision may not specifically refer to a particular diagnosis for this pain is not a reviewable error. It is not the diagnosis of a condition, but the impact of that condition on a claimant's capacity regularly to pursue any substantially gainful occupation that is to be considered: *Klabouch v. Canada (Social Development)*, 2008 FCA 33. This ground of appeal does not have a reasonable chance of success on appeal.

[9] Next, the Applicant contends that the General Division decision contains an error of law because it does not discuss the impact of chronic pain and fibromyalgia on her ability to find substantially gainful work. The decision notes that the Applicant was not diagnosed with fibromyalgia until after the minimum qualifying period (the date on which she must have been found to be disabled in order to receive the disability pension). The decision summarizes the evidence regarding all of the Applicant's conditions. The General Division preferred the evidence of the Applicant's medical specialist over the family physician and gave little weight to the Applicant's fibromyalgia symptoms apart from limitations regarding hand use. The evidence was weighed in a logical and intelligible manner. The General Division's mandate is to receive evidence and weigh it to make a decision. The decision contains no error of law in this regard. This ground of appeal does not have a reasonable chance of success on appeal.

[10] Another ground of appeal based on an error of law that the Applicant presented was that the General Division did not consider the totality of her physical and psychological conditions. However, the General Division summarized the evidence before it regarding all of her conditions, and considered each one alone and cumulatively in reaching its decision. Specifically, in paragraphs 43 and 44 of the decision, the General Division set out the law on this issue and applied it to the facts before it. This ground of appeal does not have a reasonable chance of success on appeal.

[11] The Applicant also argues that the General Division decision contains an error in law as it did not specifically consider the "regular" aspect of the test for severity under the *Canada Pension Plan*. The law is clear that "regularly" means a claimant must be capable of going to work as often as is necessary (*Chandler v. Minister of Human Resources Development* (November 25, 1996), CP 4040 (PAB); *Atkinson v. Canada (Attorney General)*, 2014 FCA 187). It appears that this argument was not presented to the General Division. The Applicant has not pointed to any error in the decision that indicates that the General Division failed to consider this issue. I am not satisfied that this ground of appeal has a reasonable chance of success on appeal.

Error of Fact

[12] The Applicant also argues that the General Division decision was based on a number of errors of fact made in a perverse or capricious manner, or without regard to the material before it. For the reasons set out below, I am not satisfied that any of these grounds of appeal may have a reasonable chance of success on appeal.

[13] First, in this regard, the Applicant submits that the General Division relied unreasonably on Dr. McNeil's observations of improvement after receiving injections for pain without considering that she had been undergoing injections for a long time and continues to experience the same pain, or how long her pain is relieved after an injection. With this argument, she essentially asks this Tribunal to re-evaluate and reweigh the evidence that was put before the General Division. This is the province of the trier of fact. The tribunal that is deciding whether to grant leave to appeal ought not to substitute its view of the persuasive value of the evidence for that of the tribunal that made the findings of fact: *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

[14] The Applicant also contends that the General Division decision contains an error of fact because it does not acknowledge that the Applicant was suicidal at one time. The General Division summarized and examined the evidence regarding the Applicant's mental health and concluded, based on the evidence before it, that her depression was secondary to pain, and that once her pain was managed, her mental health would improve. The General Division also relied on Dr. Lejarza's October 2015 report that she was doing well psychiatrically. I am satisfied that the General Division considered the Applicant's mental health, and this ground of appeal does not have a reasonable chance of success on appeal.

[15] In addition, the Applicant asserts that the decision contains an error because it does not set out all of the medications that the Applicant was taking at the hearing date, or that she continues to suffer from depression, anxiety and insomnia. These conditions are considered in paragraph 43 of the decision. The Federal Court of Appeal has decided that the Tribunal is presumed to have considered all of the evidence before it, including testimony and written material. Each and every piece of evidence need not be mentioned in the written decision (see *Simpson*). The General Division made no error in this regard.

[16] The Applicant further argues that the decision was based on an erroneous finding of fact because it does not acknowledge that she was not typing when she returned to work. However, in paragraph 12, the decision states that she returned to work with modified duties. I am not satisfied that any error of fact was made perversely, capriciously or without regard to the material before the General Division.

[17] In addition, the Applicant contends that the decision was based on an erroneous finding of fact because it states that she did not exercise regularly or quit smoking. The decision acknowledges that both of these are difficult to accomplish and summarizes the evidence on this. The decision states that the Applicant reduced the amount she smokes, and outlines that she does some stretches. Again, the General Division is presumed to have considered all of the evidence. The fact that the decision does not state specifically that the Applicant tried aqua therapy without benefit is not material to the decision.

[18] The Applicant also disagrees with how the General Division weighed some of the medical evidence, including that of Dr. McNeil, the occupational and hand therapist. It is for the General Division, however, to give weight to evidence and reach a decision in this case. This ground of appeal does not have a reasonable chance of success on appeal.

[19] Additionally, the Applicant submits that the General Division erred in its finding that she could retrain because she testified that she could not. Again, it is for the General Division to consider all of the evidence and weigh it to make a decision. It is not for the Appeal Division to reweigh this evidence to reach a different conclusion. I am not satisfied that the General Division made this finding of fact in a perverse or capricious manner or without regard to the evidence.

[20] Finally, I have reviewed the written record and am satisfied that the General Division did not overlook or misconstrue any important evidence.

New Evidence

The Applicant also enclosed a letter from Dr. McNeil with the Application. The Appeal Division's mandate is not to hear evidence, or to reweigh the evidence that was before the General Division, but to consider whether the General Division decision contains an error under

section 58 of the DESD Act. The provision of new evidence is not a ground of appeal under section 58 of the DESD Act, and leave to appeal cannot be granted on the basis of new evidence.

CONCLUSION

[21] The Application is refused for these reasons.

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

Department of Employment and Social Development Act

58 (1) The only grounds of appeal are that

(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.

58 (2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.