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

Citation: *D. O. v. Minister of Employment and Social Development*, 2017 SSTADIS 585

Tribunal File Number: AD-17-662

BETWEEN:

D. O.

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 31, 2017

REASONS AND DECISION

INTRODUCTION

[1] On July 18, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a Canada Pension Plan disability pension was not payable. The Applicant filed an application for leave to appeal with the Tribunal's Appeal Division on October 10, 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] Therefore, I must decide whether the Applicant has presented a ground of appeal under the DESD Act that may have a reasonable chance of success on appeal.

[6] The Applicant presents three grounds of appeal. First, she contends that the General Division decision was based on an erroneous finding of fact made in a perverse or capricious manner when it concluded that the Applicant had not reasonably cooperated in her health care, as it related to quitting smoking. She referred to the oral and written evidence regarding her numerous attempts to quit smoking and their ultimate failure. The General Division decision summarized this evidence, acknowledged how difficult it is to quit and concluded that "the evidence indicates the Appellant did not follow her medical provider's advice to quit smoking and to lose weight and both these factored significantly in her medical problems." I am not satisfied that this finding of fact was made in a perverse or capricious manner or without regard to the material that was before the General Division. The evidentiary basis for this conclusion was clearly set out. The Tribunal member weighed this evidence and reached a conclusion. This ground of appeal does not have a reasonable chance of success on appeal.

[7] Second, the Applicant argues that leave to appeal should be granted as the General Division erred in law. She contends that the General Division did not consider whether the Applicant was able *regularly* to pursue any substantially gainful occupation (my emphasis). In *Atkinson v. Canada (Attorney General),* 2014 FCA 187, the Court decided that predictability with respect to working was a key consideration. The Applicant argued that her need to nap daily precluded this, and that this should have been considered by the General Division. It is not clear whether the General Division considered this, or whether it was argued at the hearing before the General Division. If the issue of regularity or predictability of work attendance was not considered, the General Division erred in law. This is a ground of appeal that may have a reasonable chance of success on appeal.

[8] Finally, the Applicant also contends that the General Division erred because it did not consider that she was accommodated by her last employer, and that these accommodations were such that her employer would be considered a benevolent employer (*Atkinson*). This argument was presented to the General Division. It does not appear to have been considered in the decision. This may also be an error of law, so it is a ground of appeal that may have a reasonable chance of success on appeal.

CONCLUSION

[9] The Application is granted as the Applicant has presented grounds of appeal that may have a reasonable chance of success on appeal.

[10] The parties are invited to provide a transcription of the General Division hearing or to refer to the time stamp on the hearing recording to demonstrate when legal issues were raised at the General Division hearing.

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

Valerie Hazlett Parker
Member, Appeal Division