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

Citation: *H. D. v. Minister of Employment and Social Development*, 2017 SSTADIS 616

Tribunal File Number: AD-17-474

BETWEEN:

H. D.

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: November 7, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant applied for a Canada Pension Plan (CPP) disability pension. The Respondent refused her claim initially and upon reconsideration. She appealed this decision, and the appeal was transferred to the General Division of the Social Security Tribunal (Tribunal) in April 2013. On April 24, 2014, the General Division dismissed her appeal. The Applicant was granted leave to appeal this decision to the Tribunal's Appeal Division. On July 29, 2016, the Appeal Division granted the appeal and directed that the matter be returned to the General Division for reconsideration. On March 29, 2017, the Tribunal's General Division again determined that a disability pension was not payable. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on June 27, 2017.

ANALYSIS

[2] The *Department of Employment and Social Development Act* (DESD Act) governs this Tribunal's operation. 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 that the General Division failed to observe the principles of natural justice, erred in law or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard to all the material before it. The General Division must refuse to grant leave to appeal if the appeal has no reasonable chance of success (see the Appendix to this decision for the legislative provisions).

[4] The Applicant presents a lengthy and detailed Application in which she argues that the General Division failed to observe the principles of natural justice, erred in law and based its decision on erroneous findings of fact. For the reasons set out below, I am not convinced that any ground of appeal has a reasonable chance of success on appeal. I have also reviewed the written record and am satisfied that the General Division did not overlook or misconstrue any important evidence.

Natural Justice

[5] First, the Applicant argues that the General Division failed to observe the principles of natural justice because the recording of the hearing was partially inaudible and the Tribunal member did not refer to the recording in the decision. The principles of natural justice are concerned with ensuring that all parties to a proceeding have the opportunity to present their case, know and meet the case against them, and have an impartial arbiter make a decision based on the law and the facts. The Tribunal is not required to record its hearings. Although it is unfortunate that the recording was not perfect, any imperfection does not point to any breach of the principles of natural justice. There is no suggestion that the Applicant was unable to present her case, that she was unable to respond to the case against her or that the decision was not made based on the law and the facts. Similarly, the failure of the decision to specifically refer to the hearing recording does not suggest that the principles of natural justice were not observed. This ground of appeal does not have a reasonable chance of success on appeal.

Error of Law

[6] The Applicant also argues that the General Division erred in law. First in this regard, she argues that the General Division did not take into account the aspect of regularity with respect to her capacity to pursue any substantially gainful occupation. It would be an error if this were the case, especially as it was specifically argued at the hearing. However, in paragraph 118, the General Division considers and analyzes the evidence regarding the Applicant being bedridden on some days and thereby not able to attend to her obligations. The decision also considered her other limitations in making the decision. I am satisfied that the General Division turned its mind to this issue and analyzed it.

[7] The Applicant also contends that the General Division erred because it did not apply the law as stated in *Nova Scotia (Worker's Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504. This decision clearly states that chronic pain can be a disabling condition. This is not disputed. The General Division in this case accepted that the Applicant suffered from various pain symptoms, although a formal diagnosis may not have been made until after the relevant time. The decision also correctly states that it is the effect of a claimant's condition on their ability to work and not the diagnosis that is relevant.

The decision carefully considered the Applicant's pain and its impact on her functioning. The fact the *Martin* decision was not specifically referenced in the General Division decision does not point to an error in law.

[8] The Applicant suffers from numerous medical conditions including chronic pain, thyroid issues and cancer, sleep issues, diabetes, fatigue, depression, anxiety and others. She submits that, although the General Division considered each of her conditions individually, it neglected to consider the cumulative impact of these conditions on her capacity regularly to pursue any substantially gainful occupation. The decision, in paragraph 90, correctly states that a claimant's condition is to be assessed in totality in that all possible impairments are to be considered, not just the biggest or main impairment (*Bungay v. Canada (Attorney General)*, 2011 FCA 47). The decision then analyzes each of the Applicant's conditions in detail and sets out comprehensive reasons why each condition did not render the Applicant disabled under the *Canada Pension Plan*. The General Division concluded that it was not able to find that the totality of the conditions resulted in a disability under the CPP and in paragraph 115 provides detailed reasons for this conclusion based on the evidence. I am not persuaded that this ground of appeal has a reasonable chance of success on appeal.

Errors of Fact

[9] The Applicant also argues that the General Division decision was based on erroneous findings of fact made in a perverse or capricious manner or without regard to the material before the General Division. These arguments ask this Tribunal to retry the evidence to reach a different conclusion. In *Gaudet v. Attorney General of Canada*, 2013 FCA 254, the Federal Court of Appeal held that a reviewing tribunal is not to retry the issues. For the reasons below, I am not satisfied that the grounds of appeal for errors of fact have a reasonable chance of success on appeal.

[10] The Applicant claims that the General Division relied on Dr. Maheshwari's April 2013 note that stated that she should be able to return to work in 26 weeks. This evidence was before the Tribunal. It was considered with the other evidence, including later reports by this doctor and others, diagnostic testing, etc. The Applicant's invitation to reweigh this evidence is not a ground of appeal that has a reasonable chance of success on appeal.

[11] The decision also states that Dr. Maheshwari's notes for a period of time near the minimum qualifying period were not filed with the Tribunal (paragraph 96). The Applicant now argues that the General Division should have focused on other medical reports and not the fact that these notes were missing. The decision provides an exhaustive summary of all the medical evidence that was filed with the Tribunal. It analyzed the medical evidence as it related to each of the Applicant's medical conditions and her overall capacity. That the decision states that some medical notes were not filed does not point to any erroneous finding of fact.

[12] In addition, the Applicant submits that the General Division ignored the evidence of Dr. Maheshwari and Dr. Goldstein. Clearly Dr. Maheshawari's evidence was not ignored, as it was specifically considered in the decision. Regarding Dr. Goldstein, he was not consulted until after the minimum qualifying period, so there is some question of the relevance of this evidence. It is, however, summarized in the decision. In addition, it is not necessary for the decision to set out each and every piece of evidence that was before the General Division, as it is presumed to have considered it all (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). The failure to specifically mention one medical report does not point to any erroneous finding of fact in the decision.

[13] The Applicant also suggested that the General Division erred when it found that her evidence was vague regarding when she began to be bedridden in light of her testimony that she suffers from cognitive and memory issues. This argument does not point to an erroneous finding of fact. If the Applicant suffers from cognitive and memory issues, it stands to reason that her testimony would be vague and perhaps unreliable regarding when she began to be bedridden some years in the past.

[14] Finally, the Applicant contends that the General Division erred in paragraph 115 when it refers to an unidentified handwritten note. Although the decision speculates about who the author was and the reason the note was written, it concludes that little weight was given to this document. This concurs with the Applicant's argument that this note was not relevant to the decision. This argument does not point to any erroneous finding of fact.

CONCLUSION

[15] The Application is refused for the reasons set out above.

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.