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

Citation: *K. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 611

Tribunal File Number: AD-17-295

BETWEEN:

K. 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: November 6, 2017

REASONS AND DECISION

DECISION

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

OVERVIEW

[2] The Applicant, K. C., seeks a disability pension under the *Canada Pension Plan* (CPP). She claims that depression, fibromyalgia, perianal cancer, shoulder and back pain, bulging disks, and spinal stenosis prevent her from working. She last worked in 2013.

[3] 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 continuously prevented her from doing some type 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. The General Division found that the Applicant was able to return to school and work after her MQP. Therefore, she did not establish that she had a severe disability as required to qualify for a disability pension.

[5] The Applicant seeks leave to appeal the General Division decision on the basis that it made serious errors by concluding that the Applicant's efforts to return to work amounted to evidence of work capacity rather than a failure of her efforts because of her medical condition.

[6] I find that this appeal has a reasonable chance of success, because the General Division may have erred in law by failing to consider whether the Applicant's efforts to return to school and work were unsuccessful due to her medical condition.

ISSUE

[7] Is there an argument that the General Division erred in law or made a serious error in its finding of facts by concluding that the Applicant's return to work amounted to evidence of work capacity?

ANALYSIS

[8] An applicant must seek leave to appeal in order to appeal a General Division decision. The Appeal Division must either grant or refuse leave to appeal, and an appeal can proceed only if leave to appeal is granted. [1]

[9] 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?[2]

[10] 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 had made in a perverse or capricious manner or without regard for the material before it.

[11] The Applicant submits that the General Division made an error of law and serious errors in fact finding. Her representative's submissions, however, lacked detail. For example, one Federal Court of Appeal case is referred to without explanation of its specific applicability to the present matter.

[12] Although the Applicant has submitted more than one ground of appeal, the Appeal Division need not address all the grounds 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 to appeal.[5] Therefore, I will address one possible error that warrants further review and not every possible error.

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[1] *Department of Employment and Social Development Act* (DESD Act) at subsections 56(1) and 58(3).
[2] *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.
[3] DESD Act at subsection 58(1).
[4] Ibid. at subsection 58(2).
[5] *Mette v. Canada (Attorney General)*, 2016 FCA 276.

Is There an Argument That the General Division Erred by Concluding that the Applicant's Return to Work Amounted to Evidence of Work Capacity?

[13] I find that there is an arguable case on the ground of appeal that the General Division may have made an error of law, specifically as it relates to failing to consider whether the Applicant's efforts to return to work were unsuccessful due to her health condition.

[14] In the *d'Errico* case, the claimant had made "numerous attempts to pursue work" during a period of time when her condition worsened from "its already poor state."[6] Her actual real world attempts to work demonstrated that she was unable to pursue "with consistent frequency" or "regularly" any "truly remunerative occupation."[7]

[15] The Applicant argued before the General Division that, notwithstanding her efforts to obtain and maintain employment, she was incapable of working on a regular basis.

[16] The General Division may have failed to consider this argument. Its decision concludes that the fact "she was able to return to school and work" demonstrated that she did not have a severe disability. It did not appear to consider whether her efforts to return to school and work were unsuccessful due to her health condition despite written submissions of the Applicant on this point.

[17] If the General Division fails to reasonably determine a claimant's workforce attachment, then the real-world assessment required by the jurisprudence is incomplete.[8]

[18] I also note that the General Division's treatment of the medical evidence warrants further review. Despite an appeal record exceeding 400 pages and medical evidence making up much of record, the General Division described most of the medical information in the file as "it refers to symptoms or treatment received after the MQP and prorated MQP and was therefore not considered in this matter."[9]

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[6] *D'Errico v. Canada (Attorney General)*, 2014 FCA 95.
[7] Ibid.
[8] *Murphy*, *supra*.
[9] General Division decision at paragraph 16.

[19] While the General Division referred to a few medical documents near the 2005 MQP, my review of the documentary evidence revealed clinical notes and the report of at least one specialist in the period January to June 2013 (the prorated MQP), which may have been overlooked.

[20] 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 the General Division made in a perverse or capricious manner or without regard for the material before it.

CONCLUSION

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

[22] 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