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

Citation: *J. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 599

Tribunal File Number: AD-17-270

BETWEEN:

J. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Kate Sellar

Date of Decision: November 2, 2017

REASONS AND DECISION

INTRODUCTION

[1] On January 30, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable. The hearing proceeded via a process of written questions and answers, the form of hearing the Applicant had requested.

[2] The Tribunal found that the Applicant's minimum qualifying period (MQP) ended on December 31, 2011, that she had ceased working due to a spinal injury in May 2009, and that although she had attempted some work hardening for her old job, which was unsuccessful, she did not attempt to return to any other job after the spinal injury. The Tribunal found that the medical evidence did identify restrictions that impacted the Applicant's ability to work, but that the evidence did not support that she was restricted from all work including sedentary options.

[3] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on March 27, 2017. The Application was incomplete as it was not clear on which grounds of appeal the Applicant sought to rely. On March 31, 2017, the Tribunal requested that the Applicant provide more information in order to complete her Application, and the Tribunal received further information from the Applicant accordingly on April 20, 2017.

ISSUE

[4] The Appeal Division must decide whether the appeal has a reasonable chance of success.

THE LAW

Leave to Appeal

[5] According to ss. 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), 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.

[6] Subsection 58(2) of the DESDA provides that the Appeal Division refuses leave to appeal if it is satisfied that the appeal has no reasonable chance of success. An arguable case at

law is a case with a reasonable chance of success [see *Fancy v. Canada (Attorney General)*, 2010 FCA 63].

Grounds of Appeal

[7] According to s. 58(1) of the DESDA, the only grounds of appeal 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.

SUBMISSIONS

[8] The Applicant argues that the General Division a) disregarded medical evidence that was supportive of her entitlement to a disability pension; b) failed to observe a principle of natural justice by failing to contact or ask any questions of her proposed witness; and c) provided inadequate reasons, as para. 34 of the decision appears to have been copied and pasted from a template: it contains a reference to the Applicant's disability using the incorrect pronoun.

ANALYSIS

Alleged error in disregarding medical evidence

[9] The Applicant alleges that the General Division disregarded medical evidence that supported her eligibility for a disability pension. The Applicant alleges that the General Division reached its finding that she was capable of sedentary work without regard to the medical evidence before it, and that therefore there is a reasonable chance that she will prove an error under s. 58(1)(*c*) of the DESDA.

[10] Specifically, the Applicant argues that the General Division failed to consider the medical report from her family physician, Dr. Campbell, dated November 12, 2010. That letter concludes that the Applicant

> […] attended the tertiary program, and results show that, she continues to have symptoms and functional restrictions. She did not meet required goals, for job demands. J. S. is not capable of any type of work, due to permanent incapacity and ability to weight bear, or stand, or sit, for long periods of time. (emphasis added)

[11] The General Division outlined Dr. Campbell's report and its conclusion as stated above in the review of the evidence at para. 14 of the decision. In reaching its decision, the General Division stated at para. 29,

> The Tribunal notes that the Appellant's family doctor indicated in November 2010 that she was not able to return to any type of work. The discharge report from Summit Physiotherapy from August 2010 indicated that the Appellant had participated in the rehabilitation program for eight weeks and for four weeks in a work hardening program and while the Appellant had shown improvement in her symptoms she had not met the goals needed in order to return to her past job duties. The evidence also indicates that by February 2014 the Appellant's family doctor was still reporting that the Appellant was unable to do any work that required prolonged sitting or standing or lifting over 20 pounds which indicates to the Tribunal that the Appellant's condition had shown some improvement since her MQP. The Tribunal finds that although the evidence indicates that the Appellant was unable to return to her previous job there is no medical evidence to indicate that she was unable to be substantially gainfully employed. While the Appellant's doctors have placed limits on her abilities to work the Tribunal is unable to ascertain that she is unable to work at all positions, including a sedentary position. (emphasis added)

[12] Dr. Campbell clearly indicated that the Applicant was not capable of any type of work, but the General Division concluded that there was no medical evidence to indicate that the Applicant was unable to be substantially gainfully employed. Dr. Campbell's opinion of November 12, 2010, was at least some evidence that the Applicant was unable to be substantially gainfully employed. It is not clear precisely what weight the General Division gave that evidence or why. It is arguable that the General Division's finding about the Applicant's capacity to work was in error under s. 58(1)(*c*) of the DESDA. The General

Division may have made the finding without due regard to the material before it, namely Dr. Campbell's evidence of November 12, 2010.

Other Alleged Errors

[13] Given that the Applicant has identified a possible error under s. 58(1)(*c*) of the DESDA, the Appeal Division does not need to consider any other grounds raised by the Applicant at this time. Subsection 58(2) of the DESDA does not require that individual grounds of appeal be considered and accepted or rejected [see *Mette v. Canada (Attorney General)*, 2016 FCA 276].

[14] The Applicant is not restricted in her ability to pursue the additional grounds she has raised under b) and c) above.

[15] The Applicant is not restricted in her ability to pursue the additional grounds raised under b) and c) above. The Appeal Division would benefit from further submissions on these grounds, including submissions on the applicability of *Kouama v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1852; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708; and any other pertinent case law.

CONCLUSION

[16] Given the rather intemperate nature of some of the Applicant's submissions to the Appeal Division, and the fact that she is no longer represented, it is worth noting before this matter proceeds further that many applicants experience limitations (and/or pain) associated with their disabilities, and they are denied a disability pension in accordance with the CPP. This is not a reflection on applicants or their conditions. It is a reflection only of the difficult standard applicants must meet in order to demonstrate a "severe" and "prolonged" disability within the meaning of the law to qualify for the disability pension [see *Gaudet v. Canada (Attorney General)*, 2013 FCA 254].

[17] The Applicant has a reasonable chance of success under s. 58(1) in the DESDA. The Application is granted. This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Kate Sellar
Member, Appeal Division