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

Citation: *C. F. v. Minister of Employment and Social Development*, 2017 SSTADIS 643

Tribunal File Number: AD-17-29

BETWEEN:

C. F.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: November 15, 2017

REASONS AND DECISION

DECISION

[1] The application requesting leave to appeal is granted.

OVERVIEW

[2] The Applicant, C. F., stopped working in October 2013 for family reasons, but she claims that she would have been unable to continue working anyway, because of progressively deteriorating chronic pain.

[3] The Applicant applied for a Canada Pension Plan disability pension, but the Respondent turned down her application. She appealed the decision to the General Division but it too determined that she was ineligible for a Canada Pension Plan disability pension, as it found that her disability had not been "severe" by the end of her minimum qualifying period on December 31, 2014. (An appellant's minimum qualifying period is the date by which she is required to be found disabled.) The Applicant now seeks leave to appeal the General Division's decision.

[4] I must consider whether there are any grounds of appeal that would satisfy me that the appeal has a reasonable chance of success.

ISSUES

[5] Has the Applicant identified any grounds of appeal that have a reasonable chance of success? If not, are there any potential legal errors on the face of the record?

ANALYSIS

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to 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.

[7] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey*.[1]

Has the Applicant identified any grounds of appeal that have a reasonable chance of success?

[8] The Applicant submits that the General Division erred in considering her age and that the General Division was unfair as it failed to consider the severity of her condition. She explains that she suffers from fibromyalgia, severe depression, bursitis in her hips, neck pain, back pain, bilateral leg pain and deteriorating knees and spine. She argues that she is unable to work and is in need of a Canada Pension Plan disability pension. She seeks compassion and requests that I reverse the General Division's decision.

[9] The General Division identified the issue before it as determining whether the Applicant had a severe and prolonged disability on or before the date of her minimum qualifying period. In this regard, the General Division also examined the Applicant's fibromyalgia and myofascial pain syndrome, as well as her major depression and general anxiety order. The General Division was also aware of the Applicant's complaints relating to her bursitis and neck, back and bilateral leg pain. Hence, it cannot be said that the General Division failed to consider whether the Applicant's disability was severe, or that it failed to consider each of her medical conditions.

[1] *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[10] The Applicant maintains that she is unable to work. The General Division accepted that the Applicant is now disabled but found that she became disabled only well after the end of her minimum qualifying period had passed. However, to qualify for a disability pension, she must be found disabled on or before the end of her minimum qualifying period.

[11] The Applicant suggests that the General Division erred in considering her age, but it did so when assessing her disability in a "real world" context. *Villani*[2] requires that a decision-maker adopt a "real world" approach and that they consider an appellant's particular circumstances, such as their age, education, language proficiency, as well as their work and life experience. In following *Villani*, the General Division therefore did not err when it considered the Applicant's age, along with other personal characteristics.

[12] The Applicant seeks compassion, but as the Supreme Court of Canada has held, the Canada Pension Plan was never intended to meet everyone's needs. The Court described the Canada Pension Plan as "a contributory-based compulsory insurance and pension scheme designed to provide some assistance – far from complete assistance – to those who satisfy the technical qualification criteria."[3]

[13] Disability benefits are not available to everyone who suffers from a disability. It is clear that an applicant must meet certain requirements in order to qualify for a disability pension under the *Canada Pension Plan*. The *Canada Pension Plan* does not permit the General Division (or the Appeal Division for that matter) to consider an applicant's financial needs, nor does it confer any discretion upon the General Division to consider other factors outside of the Canada Pension Plan in deciding whether an applicant is disabled as defined by that Act.

[14] I am not satisfied that the Applicant has identified any grounds of appeal that have a reasonable chance of success.

Are there any potential legal errors on the face of the record?

[2] *Villani v. Canada (Attorney General)*, 2001 FCA 248.
[3] *Miceli-Riggins v. Canada (Attorney General)*, 2013 FCA 158.

[15] In the hearing before the General Division, the Applicant complained primarily of fibromyalgia, myofascial pain syndrome with constant generalized pain throughout, depression, anxiety, and a mood disorder. She also reported having temporomandibular joint dysfunction, headaches and sleep impairment. X-rays of her lumbosacral spine confirmed that there were early degenerative changes throughout the lumbar spine.

[16] In mid-2014, the Applicant's family physician diagnosed her with fibromyalgia and a myofascial pain syndrome; he indicated that her myofascial pain was affected by her mood. He was of the opinion that the Applicant's mood disorder "should improve" (GD2-79).

[17] The family physician prepared an updated brief medical letter dated October 14, 2014. He had seen the Applicant recently for bilateral trochanter bursitis. He was of the opinion that the Applicant was unable to perform any work that was physically demanding, and that she should be able to perform more sedentary work when her mood disorder improved (GD2-44).

[18] In a follow-up letter dated December 11, 2015, the family physician noted that, although the Applicant's mood disorder had improved, her fibromyalgia and myofascial pain syndrome had progressed and persisted to the point that she was unable to work, including at more sedentary positions (GD3-1). The Respondent had argued that there was no basis to support the family physician's opinion that the Applicant's condition had deteriorated: there was no objective medical evidence of any deterioration; he did not refer the Applicant for any active treatment or to any specialists and he did not start her on any new medication (GD5).

[19] In a further follow-up letter, dated September 26, 2016, the family physician noted that the Applicant's mental condition had deteriorated, secondary to increased stress and anxiety and decreased mood because her marriage had ended. She was seeking mental health services. He deemed her "incapable of work for the next six months" (GD6-2). The Respondent had argued that this suggested that the Applicant had only recently started being treated by mental health specialists and a psychiatrist and that there was potential for improvement in her mental health (GD7).

[20] The family physician provided a further opinion, dated November 4, 2016. He indicated that the Applicant saw a psychiatrist on October 31, 2016, who had made some recommendations. The family physician had implemented some of these pharmaceutical changes. He diagnosed the Applicant with major depression and general anxiety disorder (GD8-2).

[21] The General Division referred to each of these medical opinions. It noted that the family physician had not mentioned any restrictions against sedentary employment in his report of October 6, 2014. The General Division seemed to suggest that there were no restrictions from the perspective of the Applicant's fibromyalgia or myofascial pain disorder.

[22] The General Division was mindful that the Applicant's mental health restricted her from contemplating sedentary employment in late 2014, but, even so, it noted that the family physician "contemplated an improvement" in the Applicant's mood disorder. Hence, it found that, while her mental health condition was severe, it was not prolonged.

[23] However, the family physician clearly suggested in his report of October 2014 that the Applicant remained unfit for sedentary employment until her mood disorder improved. In this regard, although the General Division may have been contemplating that there were no physical contraindications to sedentary employment, the Applicant's mental health clearly restricted her from contemplating sedentary employment at that time.

[24] While each of the medical conditions — considered separately —may not have been severe, the General Division was required to determine whether the Applicant's disabilities — considered together —could be found severe. Hence, the General Division may have erred in failing to consider the cumulative impact of the Applicant's various medical conditions. It is on this basis that I am prepared to grant leave to appeal.

[25] I might have been prepared to acquiesce to the submissions that the Respondent had made before the General Division, that there remained potential for improvement in the Applicant's mental health, and that she therefore could not be considered severely disabled,

but I note that the General Division found the Applicant to be severely disabled in or around September 2016, after both her physical and mental health conditions had deteriorated.

CONCLUSION

[26] The application for leave to appeal is granted.

[27] In accordance with subsection 58(5) of the DESDA, the application for leave to appeal becomes the notice of appeal. Within 45 days after the date of this decision, the parties may (a) file submissions with the Appeal Division or (b) file a notice with the Appeal Division stating that they have no submissions to file. The parties may make submissions regarding the form the hearing of the appeal should take (e.g. by teleconference, videoconference, in person or on the basis of the parties' written submissions), together with submissions on the merits of the appeal.

Janet Lew
Member, Appeal Division