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

Citation: *E. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 676

Tribunal File Number: AD-16-1375

BETWEEN:

E. C.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Jude Samson

Date of Decision: November 23, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant's health deteriorated precipitously in 2010 to the point that she stopped working, primarily on account of the pain in her left leg and knee. She applied for a disability pension under the *Canada Pension Plan* in July 2013, when she was just 29 years old. Her application was denied by the Respondent, the Minister of Employment and Social Development (Minister), at the initial and reconsideration levels. She then appealed to the General Division of the Social Security Tribunal of Canada (Tribunal), where a hearing was held in August 2016, but the appeal was dismissed a month later.

[2] In December 2016, the Applicant filed this application requesting leave to appeal at the Tribunal's Appeal Division. For the reasons described below, I have decided that leave to appeal ought to be granted.

THE LEGAL FRAMEWORK

[3] The Tribunal is created and governed by the *Department of Employment and Social Development Act* (DESD Act). The DESD Act establishes a number of important differences between the Tribunal's General Division and its Appeal Division.

[4] First, the General Division is required to consider and assess all of the evidence that has been submitted, including new evidence that was not considered by the Minister at the time of its earlier decisions. In contrast, the Appeal Division is generally prohibited from considering any new evidence and is more focused on particular errors that the General Division might have made. More specifically, the Appeal Division can interfere with a General Division decision only if one of the following errors set out in subsection 58(1) of the DESD Act has been established:

a) Did the General Division fail to observe a principle of natural justice or otherwise act beyond or refuse to exercise its jurisdiction?

b) Did the General Division err in law in making its decision, whether or not the error appears on the face of the record?

c) Did the General Division base 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?

[5] A second important difference created by the DESD Act is that most appeals before the Appeal Division must follow a two-step process:

a) The first step is known as the application for leave to appeal stage. This is a preliminary step that is intended to filter out those cases that have no reasonable chance of success.[1] The legal test that applicants need to meet at this stage is a low one: Is there any arguable ground upon which the proposed appeal might succeed?[2]

b) If leave to appeal is granted, the file moves on to the second step, which is known as the merits stage. It is at the merits stage that appellants must show that it is more likely than not that the General Division committed at least one of the three possible errors described in subsection 58(1) of the DESD Act. The expression "more likely than not" means that appellants have a higher legal test to meet at the second stage as compared to the first.

[6] This appeal is now at the leave to appeal stage, meaning that the question I must ask myself is whether there is any arguable ground on which the proposed appeal might succeed. It is the Applicant who has the responsibility of showing that this legal test has been met.[3]

ANALYSIS

[7] In her application requesting leave to appeal (AD1), the Applicant submits that the General Division breached the principles of natural justice, based its decision on an erroneous finding of fact, and made an error of law. In general, the Applicant alleges that the General Division:

a) denied her the opportunity to present all of her evidence in that the Applicant's mother and spouse were present at the hearing and were ready to give evidence, but the Member said that it was not necessary for them to testify on account of the written statements

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[1] DESD Act, at s. 58(2).
[2] *Osaj v. Canada (Attorney General)*, 2016 FC 115, at para. 12; *Ingram v. Canada (Attorney General)*, 2017 FC 259, at para. 16.
[3] *Tracey v. Canada (Attorney General)*, 2015 FC 1300, at para. 31; *Griffin v. Canada (Attorney General)*, 2016 FC 874, at para. 20.

that they had already filed with the Tribunal. In its decision, the General Division then failed to acknowledge the presence of these people at the hearing and to explain why it would not hear their testimony;

b) focused almost exclusively on those aspects of the evidence that were contrary to the Applicant's case and failed to deal with contradictions in the evidence;

c) misinterpreted the Global Assessment of Functioning (GAF) scale at paragraph 48 of its decision when it wrote that a score of 50–65 is indicative of "moderate to mild symptoms of impairment"; and

d) failed to consider how the Applicant's subjective symptoms affect her capacity to work, particularly in light of the fact that the Applicant's credibility was never put into question.

[8] The Minister has not filed any submissions on the question of whether leave to appeal should be granted.

Errors of Fact and Law

[9] Based on my review of the General Division decision and of the underlying record, I am satisfied that the possible errors of fact and law raised by the Applicant are sufficiently borne out that an arguable case has been shown under paragraphs 58(1)(*b*) and (*c*) of the DESD Act. As a result, leave to appeal ought to be granted.

[10] It is well established that the General Division need not refer to every piece of evidence that it has in front of it. Rather, it is presumed to have reviewed all of the evidence.[4] However, the General Division may fall into error if it fails to assess evidence that is sufficiently relevant or ignores important contradictions in the evidence.[5]

[11] In support of her case, the Applicant relies heavily on the following pieces of evidence:

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[4] *Simpson v. Canada (Attorney General)*, 2012 FCA 82, at para. 10.
[5] *Lee Villeneuve v. Canada (Attorney General)*, 2013 FC 498, at para. 51; *Canada (Minister of Human Resources Development) v. Quesnelle*, 2003 FCA 92; *Canada (Attorney General) v. Ryall*, 2008 FCA 164.

a) the report of Dr. Naidoo, her family physician, in which she concludes that the Applicant suffers from an ongoing permanent disability that renders her incapable of even the simplest of day-to-day activities and tasks of self-care (GD2-136);

b) the report of Dr. Gandhi, a psychiatrist, in which the Applicant is diagnosed with major depression, her recovery from which is complicated by chronic pain, and in which she is assessed as having a GAF score of 50–65 (GD2-59);

c) reports from three massage therapists that generally indicate that the Applicant's condition has improved minimally over time and that she is unable to return to work (GD6-11 to 13);

d) her own oral testimony, in which she described her pain, her deteriorating physical and mental health, and increasing functional limitations; and

e) written statements prepared by the Applicant's mother and spouse, both of which speak to a sudden and dramatic deterioration of the Applicant's health, the challenges that she faces when performing her activities of daily living, and the side effects associated with the powerful pain medication that she takes on a daily basis (GD2-42 to 46). In the statement written by the Applicant's spouse, he also describes the toll that the Applicant's deteriorating health has had on him too.

[12] While the General Division summarized most or all of the evidence described above, very little of it features in the analysis section of the decision. In addition, the Applicant highlights how the Supreme Court of Canada recognized in *Nova Scotia (Workers' Compensation Board) v. Martin*[6] that there may be cases of chronic pain for which no objective findings can be identified. In such circumstances, it is arguable at least that the Applicant's testimony took on a heightened sense of importance and that the General Division ought to have assessed that evidence in greater detail before discounting it in any way.

[13] I am satisfied, therefore, that the Applicant has raised sufficient concerns that the General Division might have failed to assess relevant evidence and/or ignored important

[6] 2003 SCC 540.

contradictions in the evidence. Moreover, such concerns could give rise to an error of law or fact, as described in paragraphs 58(1)(*b*) and (*c*) of the DESD Act.

[14] Having granted leave on these grounds, it is not necessary for me to consider all of the other issues that were raised by the Applicant, though all may be argued at the second step of the proceeding (i.e. the merits stage).

[15] In addition to the issues raised by the Applicant, I would also invite the parties to make submissions on whether the General Division might have erred in law in its application of binding legal authorities, such as *Villani v. Canada (Attorney General)*[7] and *Bungay v. Canada (Attorney General).*[8]

[16] It is worth stressing at this point that nothing in this decision prejudges the result of the appeal on its merits. It is at the merits stage that the Applicant will have to show that it is more likely than not that the General Division committed at least one of the errors set out in subsection 58(1) of the DESD Act.

[17] Moving forward, I note that the application requesting leave to appeal raises questions concerning the fairness of the hearing (AD1). Specifically, that the General Division Member may have refused to hear two of the Applicant's witnesses. For that reason, I will ask that the parties be provided with a copy of the recording of the General Division hearing that took place on August 23, 2016. To the extent that either party wishes to rely on something that was said during the hearing, their submissions on appeal ought to include timestamp references to the recording, so that all participants are able to quickly find the relevant discussion.

CONCLUSION

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

Jude Samson
Member, Appeal Division

[7] 2001 FCA 248.
[8] 2011 FCA 47.