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

Citation: *C. H. v. Minister of Employment and Social Development,* 2017 SSTADIS 670

Tribunal File Number: AD-17-209

BETWEEN:

C. H.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Nancy Brooks

Date of Decision: November 21, 2017

REASONS AND DECISION

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated December 9, 2016, which determined that she was not eligible for a disability pension under the *Canada Pension Plan* (CPP).

[2] Pursuant to s. 58(1) of the *Department of Employment and Social Development Act* (DESDA), the only grounds of appeal to the Tribunal's Appeal Division 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.

Pursuant to subsection 58(2), leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[3] The leave to appeal proceeding is a preliminary step to an appeal on the merits. It presents a different and appreciably lower hurdle to be met than the one presented at the appeal stage: at the leave to appeal stage, the Applicant is required to establish that the appeal has a reasonable chance of success on at least one of the grounds in s. 58(1) of the DESDA, whereas at the appeal stage, the Applicant must prove his or her case on the balance of probabilities: *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC). In the context of an application for leave to appeal, having a reasonable chance of success means having some arguable ground upon which the proposed appeal might succeed: *Osaj v. Canada (Attorney General)*, 2016 FC 115; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41.

NEW DOCUMENTATION AND INFORMATION

[4] The Applicant has included with her application four documents that were not before the General Division: (i) the report of Dr. J. Shu, Toronto Western Hospital, dated

January 10, 2017[1]; (ii) a psychiatric consultation note of Dr. R. Rizwan dated January 13, 2017[2]; (iii) the Applicant's Canada Revenue Agency Disability Tax Credit application dated March 9, 2017[3]; and (iv) documentation relating to proceedings before the Criminal Injuries Compensation Board (Ontario) dated May 16 and 26, 2017.[4] She also makes a number of statements concerning developments to her health that took place after the hearing before the General Division. For example, she describes a recent diagnosis on January 13, 2017 of borderline personality disorder and somatic symptom disorder, and associated therapies she is currently undergoing.[5]

[5] The Appeal Division has only limited powers under the DESDA. Its role is to review the General Division decision to determine whether the member hearing the appeal committed an error falling within one or more of the three grounds set out in s. 58(1) of the DESDA. Adducing new facts is not a ground of appeal under the DESDA: *Belo-Alves*, at para. 108. Furthermore, an appeal to the Appeal Division does not constitute a hearing *de novo* (*Marcia v. Canada (Attorney General)*, 2016 FC 1367). Accordingly, as a general rule and as recently confirmed in *Parchment v. Canada (Attorney General)*, 2017 FC 354, the evidentiary record before the Appeal Division consists of the evidentiary record that was before the General Division. Accordingly, the new documentation and information concerning diagnosis and treatment post-dating the General Division hearing are not admissible and I have not considered this material further on this application.

GENERAL DIVISION DECISION

[6] In this case, as found by the General Division, the minimum qualifying period (MQP) ended on December 31, 2015. The General Division member considered whether the Applicant had a severe and prolonged disability on or before December 31, 2015.

[7] In her decision, the member devoted 36 paragraphs to a review of the evidence and the Applicant's submissions on the appeal. These paragraphs included a lengthy recitation of the medical evidence and the oral testimony given by the Applicant and her spouse at the hearing.

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[1] AD1C-12 to AD1C-5.
[2] AD1-9 to AD1-12.
[3] AD1-13 to AD1-17.
[4] AD1D-1 to AD1D-3.
[5] AD1-3.

[8] In her analysis, the General Division member accepted that the Applicant had experienced numerous symptoms over the previous few years and that by the end of the MQP her symptoms were affecting her functioning.[6]

[9] The member noted, with reference to the medical evidence, that none of the Applicant's doctors had stated she was unable to work at any employment. The member also considered the Applicant's work history around the MQP date. She stated:

> [46] It is significant that from about September 2015 to April 2016 (a few months before and a few months after the Appellant's MQP), the Appellant was working and, at times, she was working two jobs. For example, the Appellant's letter of September 26, 2015 indicates that she was working two part time jobs at that time. Also, the Appellant testified that during the time she worked as a housekeeper from about January to April 2016 she was also working two days a week in a secretarial position. It is also significant that, although the Appellant acknowledged that the secretarial job was easier on her physically she still nonetheless pursued jobs in and around her MQP that were more demanding in that the job at Shoppers Drug Mart involved a lot of standing and the housekeeping job involved physical activity.

[10] The member noted that there was no suggestion in the evidence that any of the Applicant's employers from September 2015 to April 2016 were neither benevolent nor offered flexible work arrangements, which suggested that the Applicant was able to pursue work, including some physically demanding work, in the months before and after her MQP.[7]

[11] The member took into account both the physical and mental health components of the Applicant's condition. She reviewed the evidence and concluded that the Applicant's mental health condition did not affect her ability to work by December 31, 2015.

[12] The member considered the factors identified by the Federal Court of Appeal in *Villani v. Canada (Attorney General)*, 2001 FCA 248, stating:

> [51] The Tribunal considered the *Villani* decision in that the Tribunal is mindful that when deciding whether a person's disability is severe, the Tribunal must keep in mind factors such as an appellant's age, level of education, language proficiency, and past work and life experience.

[6] Reasons, para. 40.
[7] Reasons, para. 47.

> Consideration of these factors ensures that the severe criterion is assessed in a real world context (*Villani* v. *Canada (Attorney General)*, 2001 FCA 248)
>
> [52] In this case, the Appellant's employability at the time of her MQP could not be said to be adversely affected by the *Villani* factors. She was only 42 years of age at the time of her MQP, had completed grade 11, and is proficient in at least one of Canada's two official languages. She also has held several types of different jobs, which have afforded her the ability to acquire a variety of transferrable skills. Her jobs have included work as a health care aide, a waitress, an administrative assistant (secretary), a supervisor at Shoppers Drug Mart, and a photographer.

[13] The member concluded the Applicant's disability was not severe by December 31, 2015.

DISCUSSION

[14] In submissions filed in support of her application for leave, the Applicant states her disagreement with the General Division decision and says it is wrong because she does suffer from a disability that is preventing her from working. She states her disagreement with the findings made by the General Division member, which she says do not accurately reflect the impact of her medical condition on her life and ability to work. She provides a description of her medical situation in the period from October through December 2016 and currently (as of the date of the application for leave to appeal), and says her medical condition is getting worse.

[15] The Applicant argues that the list of symptoms itemized in para. 11 of the decision does not include all of the symptoms she has experienced. This is correct. However, the General Division's description of the Applicant's symptoms and the evidence continues in paras. 12 through 36, covering some 13 pages. The General Division member has comprehensively addressed both the documentary and oral evidence relating to the totality of the Applicant's health condition.

[16] In her submissions, the Applicant also argues that her symptoms worsened in 2016 to the time of filing her application for leave. However, the issue before the General Division was whether the Applicant had proved on a balance of probabilities that she had a severe and prolonged disability within the meaning of the CPP *on or before the MQP date of*

December 31, 2015. The Applicant's medical condition at the end of 2016 and at the date of her application for leave to appeal is not relevant to this issue.

[17] In support of her argument that she is entitled to a disability pension, the Applicant submits that she is not capable of holding a full-time job. She also submits that she worked only because of financial pressures.

[18] In reaching a conclusion that the Applicant's disability was not severe by the MQP date, the General Division member relied, in part, on the fact that the Applicant was working, and at times working two part-time jobs, in the period before and after the MQP date.[8] The member also relied on the medical evidence to support her conclusion that the Applicant's disability was not severe by the MQP date.

[19] The Federal Court of Appeal recently confirmed in *Miceli-Riggins v. Canada (Attorney General),* 2013 FCA 158, that engaging in part-time work may demonstrate that a claimant is able to work, and therefore not entitled to a CPP disability pension. The Court stated:

> As is well-known, the test under paragraph 42(2)(*a*) of the Plan [CPP] is difficult to meet. A disability is "severe" only if the person is not regularly able to pursue any substantially gainful employment. The severity is judged not by the severity of the disease or ailment afflicting the claimant. Rather, it is judged according to whether the claimant is unable to work.
>
> And the "unable to work" standard is most difficult to meet. In order to meet it, the claimant must demonstrate more than just an inability to perform his or her former job. Instead, the claimant must show that he or she cannot engage in "substantially gainful employment." <u>This includes modified activities at the claimant's usual workplace, any part-time work whether at the claimant's usual workplace or elsewhere, or sedentary jobs</u>. [underlining added]

[20] As the Court noted in *Klabouch v. Minister of Social Development*, 2008 FCA 3, it is an applicant's capacity to work and not the diagnosis of his or her disease that determines the issue of severity under the CPP: at para. 14. In the present case, the General Division member was entitled to take into account the Applicant's work activities in the period directly before and after the MQP date. Whether the Applicant worked due to financial pressures or for another

[8] Reasons, para. 46.

reason is not relevant to the inquiry of whether she had a capacity to work. I find the Applicant has not raised an argument that has a reasonable chance of success on the proposed appeal.

[21] In her application, the Applicant is essentially rearguing the case and asking for a different outcome, rather than asserting an error falling within the scope of s. 58(1) of the DESDA. The Federal Court has recently confirmed that leave to appeal is appropriately refused where an applicant seeks only to reargue his or her position, or to have the evidence that was before the General Division reweighed: *Canada (Attorney General) v. Tsagbey*, 2017 FC 356.

[22] I bear in mind the Federal Court's decision in *Griffin v. Canada (Attorney General)*, 2016 FC 874, where Justice Boswell provided guidance as to how the Appeal Division should address applications for leave to appeal under s. 58(1) of the DESDA:

> [20] It is well established that the party seeking leave to appeal bears the onus of adducing all of the evidence and arguments required to meet the requirements of subsection 58(1): see, e.g., Tracey, above, at para 31; also see *Auch v. Canada (Attorney General)*, 2016 FC 199 at para 52, [2016] FCJ No 155. Nevertheless, the requirements of subsection 58(1) should not be applied mechanically or in a perfunctory manner. On the contrary, the Appeal Division should review the underlying record and determine whether the decision failed to properly account for any of the evidence: *Karadeolian v. Canada (Attorney General)*, 2016 FC 615 at para 10, [2016] FCJ No 615. [Underlining added]

[23] I have reviewed the underlying record and have not identified any instance of where the General Division member failed to properly account for any of the evidence.

[24] In her reasons, the General Division member refused to accept a document submitted by the Applicant on October 14, 2016 because it was filed late and because the Respondent had not had an opportunity to review the document prior to the commencement of the hearing. The member also noted that on the day after the hearing, the Tribunal received from the Respondent an addendum to its submissions, which appeared to have been prepared in response to the documents filed by the Applicant on October 14, 2016. I note that the October 14, 2016

document referred to by the General Division member consists of a fax cover sheet and one page of submissions.[9]

[25] A tribunal's refusal to accept submissions may constitute a breach of a principle of natural justice. In the present case, while it may have been preferable for the member to have accepted both the late filing by the Applicant and the Respondent's addendum responding to the Applicant's submissions, I have concluded that the member's refusal to consider the Applicant's October 14 submissions does not constitute a breach of a principle of natural justice. I reviewed the October 14 submissions in detail and they do no more than repeat submissions already made by the Applicant in other documents previously filed with the Tribunal, which formed part of the record before the General Division member. Thus, even though the member did not accept the October 14 filing, she had before her, and based her decision on, all the evidence and submissions put forward by the Applicant.

DISPOSITION

[26] Having reviewed the matters raised in the Applicant's pleadings, I conclude the proposed appeal has no reasonable chance of success on any of the statutory grounds of appeal. Accordingly, in accordance with s. 58(2) of the DESDA, the application for leave to appeal is refused.

Nancy Brooks
Member, Appeal Division

[9] GD9-1 to GD9-1.