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

Citation: *T. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 662

Tribunal File Number: AD-17-216

BETWEEN:

T. C.

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 17, 2017

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, T. C., worked in an office environment until April 2014, when she became ill. She returned to the workforce later that year, but upon experiencing pain, as well as other symptoms, she left after only three weeks.

[3] Shortly thereafter, the Applicant applied for a Canada Pension Plan disability pension, but the Respondent denied 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, 2016. (The minimum qualifying period is the date by which an applicant is required to be disabled, to qualify for a Canada Pension Plan disability pension.) The Applicant now seeks leave to appeal the General Division's decision, on the ground that the General Division erred in law. I must consider whether the appeal has a reasonable chance of success on this ground.

ISSUE

[4] The issue before me is whether the appeal has a reasonable chance of success on the basis that the General Division erred in law.

GROUNDS OF APPEAL

[5] 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.

[6] Before leave can be granted, 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 of Canada endorsed this approach in *Tracey.*[1]

ANALYSIS

[7] The Applicant claims that the General Division misinterpreted the term "severe" under the *Canada Pension Plan* and that, by requiring her to provide evidence of any medical restrictions, it placed an "unduly high onus" on her to prove the severity of her disability. The Applicant maintains that the pain from her fibromyalgia is so persistent and severe that she is unable to successfully engage in any regular employment.

[8] The General Division referred to and set out the definition for a severe disability under paragraph 42(2)(*a*) of the *Canada Pension Plan*. It noted that an individual is considered to have a severe disability if they are incapable regularly of pursuing any substantially gainful occupation. The General Division agreed that "medical certainty" was unnecessary for the Applicant to prove, but determined that the Applicant had to adduce some medical evidence to corroborate her claims that she was incapable regularly of pursuing any substantially gainful occupation.

[9] The General Division found that there was insufficient evidence to make out a case that the Applicant was incapable regularly of pursuing any substantially gainful occupation. In particular, it wrote that a diagnosis alone is insufficient and that there must be sufficient evidence of the impact the condition or conditions have on the Applicant's capacity. This restatement demonstrates that the General Division was cognizant of the approach that the

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

Federal Court of Appeal advocated in *Villani.*[2] The Court clearly indicated that not everyone with a health problem who has difficulty finding and keeping a job would be entitled to a disability pension. Claimants would still need to adduce medical evidence. In this regard, I see no error on the part of the General Division when it required the Applicant to provide medical evidence to support her claim to a disability pension.

[10] However, I find that the General Division may have misapprehended the evidence or may have based its decision on an erroneous finding of fact made without regard for the evidence before it.

[11] The Applicant testified that a nurse practitioner with Integrated Chronic Care Services (ICCS) had advised her against working because it would exacerbate her symptoms. The General Division found that the ICCS reports did not confirm that advice and therefore found that the Applicant remained capable of working. However, the October 25, 2016 ICCS report – which was prepared close to the end of the Applicant's minimum qualifying period – not only documented the Applicant's complaints, but also stated that she "remains unable to work due to these conditions."

[12] Although the nurse practitioner may not have expressly advised the Applicant against working, it may have been implicit in her opinion when she wrote that the Applicant remains unable to work. Accordingly, the General Division may have based its decision on an erroneous finding of fact that the Applicant had not received any advice against working, when in fact a nurse practitioner had indicated that the Applicant remained unable to work.

[13] The General Division did not address the nurse practitioner's opinion that the Applicant "remains unable to work due to these conditions" and assumed that she should pursue work. In some respects, this resembles the circumstances in *Ingram*,[3] in which the Federal Court found that the General Division had apparently made an assumption that Ms. Ingram should continue to ignore the advice of her physician and maintain her employment despite debilitating pain. In light of this, as well as internal inconsistences in the General

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[2] *Villani v. Canada (Attorney General)*, 2001 FCA 248.
[3] *Ingram v. Canada (Attorney General)*, 2017 FC 259.

Division's decision, the Federal Court found in that case that the appeal had a reasonable chance of success.

CONCLUSION

[14] For the reasons I have set out above, I am satisfied that the appeal has a reasonable chance of success. Accordingly, the application for leave to appeal is granted.

[15] 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