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

Citation: *S. D. v. Minister of Employment and Social Development*, 2017 SSTADIS 680

Tribunal File Number: AD-17-370

BETWEEN:

S. D.

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 24, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On January 29, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* was not payable. The General Division concluded that the Applicant has capacity to work (para. 59), and that the Applicant was not able to show that her effort at obtaining and maintaining employment was unsuccessful by reason of her health condition.

[2] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on May 2, 2017.

ISSUE

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

THE LAW

Leave to Appeal

[4] According to ss. 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an applicant may bring an appeal to the Appeal Division only if the Appeal Division grants leave to appeal. The Appeal Division must either grant or refuse leave to appeal.

[5] 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

[6] 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

[7] The Applicant initially relied on two grounds: first, that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction under s. 58(1)(*a*) of the DESDA; and second, that the General Division made an error of fact under s. 58(1)(*c*) of the DESDA.

[8] The Applicant argues that "on [her] very first application" (by which the Appeal Division understands the Applicant to refer to her first application to the Respondent for the disability pension), she faxed a particular piece of evidence dated October 28, 2011, but that document was not in the record before the General Division. The document is titled "Clinical Consultation" and in summary indicates that the Applicant has degenerative disc disease of the cervical and lumbar spines and that these conditions were "aggravated by her recent employment with Service Canada." The Applicant referenced this document in her notice of appeal to the General Division (GD1-1): "in my original documents you will find a referral from a physiatrist seen while still working for Service Canada that clearly indicates that my condition was worsening due to my work environment."

[9] The Applicant also argues that she realizes now that she needed a lawyer during the proceedings at the General Division, and that her identified disability impacted her ability to understand and participate in the process. The Applicant also submits that given the way in which her awareness of her disability has evolved and the way her treatment has progressed, there were not many documents about her mental health available at the time of the General

Division's decision, and she asks the Appeal Division to review new evidence in the form of a physician's letter dated April 14, 2017.

ANALYSIS

[10] The Applicant has the onus of proving, on a balance of probabilities, that she had a severe disability on or before her minimum qualifying period (MQP) [see *Bagri v. Canada (Attorney General)*, 2006 FCA 134]. In her Application, she identified a document that was not before the General Division at the hearing. However, it is for the Applicant to raise any issue with the sufficiency of the record before the General Division hearing closes. The fact that the Applicant realizes now that this document was not in the record at the time of the General Division hearing does not raise any arguable case for an error by the General Division under s. 58(1) of the DESDA.

[11] When the Applicant realized during the hearing before the General Division that some other documents were not in the record and she sought to rely on them, the General Division granted her time after the hearing to file those documents and parties were permitted to make additional submissions. As a result, the Applicant filed additional documents on November 22, 2016, and December 9, 2016 (paras. 1-3), and the General Division considered those documents.

[12] The General Division gave the Applicant ample opportunity to ensure the documents she sought to rely on were in the record. The Applicant's argument here about another missing document does not have a reasonable chance of success under s. 58(1) of the DESDA, as it does not raise any error on the part of the General Division.

[11] The Applicant does not raise any other argument that falls under s. 58(1) of the DESDA. The Applicant's current view that she would have benefitted from counsel at the hearing before the General Division does not raise a possible error by the General Division under s. 58(1) of the DESDA. She did not make any request to adjourn the oral hearing in order to seek counsel, and she did not indicate at the hearing that she was unable to present her arguments. In fact, she did ask for and was granted a different form of hearing so that she could better communicate.

[12] The Appeal Division does not normally grant leave to appeal on the basis of new evidence [see *Mette v. Canada (Attorney General)*, 2016 FCA 276]. The evidence the Applicant seeks to rely on about her mental health disability does not raise any ground of appeal under s. 58(1) of the DESDA. The document provides further medical opinion in support of the Applicant's claim that she had a severe disability on or before the MQP. This new evidence will not form the basis of leave to appeal to the Appeal Division, and would not be considered by the Appeal Division if leave was granted. The Appeal Division does not provide a new (*de novo*) hearing in which applicants are permitted to gather more medical evidence and present it again along with all of the previous evidence in support of the claim.

[13] The Applicant bears the onus of providing all the evidence and arguments required under s. 58(1) of the DESDA [see *Tracey v. Canada (Attorney General)*, 2015 FC 1300]. However, the Appeal Division should go beyond a mechanistic review of the grounds of appeal [see *Karadeolian v. Canada (Attorney General)*, 2016 FC 615]. The Appeal Division examined the record and is satisfied that the General Division did not overlook or misconstrue the evidence.

[14] The General Division relied on evidence from several sources to conclude that the Applicant has capacity for some work (see para. 59). Certainly Dr. Lariviere was supportive of the Applicant's claim, and at the oral hearing the General Division member canvassed the many symptoms and treatments that Dr. Lariviere detailed in her medical opinion contained in the Application. Ultimately, the General Division placed greater weight on other reports that were more proximate in time to the hearing in relation to both the Applicant's physical restrictions (Dr. Gammon at GD7-22) and her mental health (Dr. Carriere at GD7-21).

[15] At the oral hearing, the General Division took particular care to (i) explain to the Applicant that she could raise new conditions since the MQP had not yet expired at the time of the hearing, and (ii) resolve concerns about medical documents that the Applicant was familiar with that were not in the record. The General Division clarified with the Applicant that the focus of the hearing was on evidence that would assist the General Division to understand what prevented the Applicant from working, rather than on all medical issues that the Applicant had over the years that did not impact her ability to work.

CONCLUSION

[16] The Application is refused.

Kate Sellar
Member, Appeal Division