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

Citation: *R. L. v. Minister of Employment and Social Development,* 2017 SSTADIS 709

Tribunal File Number: AD-16-1233

BETWEEN:

R. L.

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: December 6, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal), dated July 26, 2016, which determined she was not entitled to a disability pension under the *Canada Pension Plan* (CPP).

[2] Pursuant to s. 56(1) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Tribunal's Appeal Division may only be brought if leave to appeal is granted. Subsection 58(1) states that the only grounds of appeal 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 s. 58(2), leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success. Accordingly, the issue before me is whether the proposed appeal has a reasonable chance of success. 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.

SUBMISSIONS

[3] Applicant's counsel submits that "[t]he evidence supported a continuum that [the Applicant] suffered a severe and prolonged disability following a motor vehicle accident. She has been unable to return to any gainful employment following the motor vehicle accidence of March 11, 2011 and the present day. The hearing officer ignored the weight of medical evidence that clearly supported a severe and prolonged disability." He points to a number of documents which, he asserts, establish that the Applicant suffered from a severe and prolonged disability.

DISCUSSION

Overview

[4] The General Division found that the Applicant's minimum qualifying period (MQP) date was December 31, 2011. Under the terms of the CPP, a claimant must establish a severe and prolonged disability on or before the MQP date.

[5] Although not articulated in terms of s. 58(1)(*c*) of the DESDA, the Applicant's assertion appears to be that the General Division member based his decision on erroneous findings of fact that he made in a perverse or capricious manner or without regard for the material before him. Applicant's counsel argues the Applicant's disability was both severe and prolonged.

[6] Because the General Division member concluded that the Applicant's disability was not severe as defined by s. 42(2)(i) of the CPP, he did not need to consider, and did not consider, whether her disability was prolonged as required by s. 42(2)(ii). Therefore, only the submissions in relation to the General Division's finding that the Applicant's disability was not severe as at the MQP date are relevant on this appeal. The submissions relating to whether the disability was prolonged are not relevant on this appeal.

[7] Applicant's counsel itemizes a number of medical reports that he asserts should have led the General Division member to conclude the Applicant's disability was severe. As discussed below, the medical reports relied on by the Applicant are of no assistance because (a) the reports do not say what the Applicant's counsel asserts; (b) the matters addressed by those reports were recognized by the General Division member in his reasons; or (c) certain of the medical reports were created long after the MQP date and are not relevant to whether the Applicant was able regularly to engage in a substantially gainful occupation as at the MQP date.

[8] In essence, the Applicant disagrees with the General Division's assessment of the medical evidence. It is the role of the General Division, as the trier of fact, to review and weigh the evidence and reach a decision based on the facts and the law: see *Simpson v. Canada (Attorney General)*, 2012 FCA 82 . It is not the role of the Appeal Division to reweigh the evidence. Nor is an appeal to the Appeal Division an opportunity to reargue the case and ask for a different outcome: *Marcia v. Canada (Attorney General)*, 2016 FC 1367. For the reasons that follow, I

conclude the Applicant's proposed appeal does not have a reasonable chance of success and, therefore, leave to appeal must be refused.

Dr. Alikhan's June 16, 2011 report

[9] Applicant's counsel points to the report of Dr. Alikhan from June 2011[1] and asserts that this report "indicated that psychological features had already developed in addition to her physical injuries". I note that Dr. Alikhan is a general practitioner who completed an Insurer's Examination General Practitioner Report on June 16, 2011. Although the Applicant did not adduce Dr. Alikhan's entire report in evidence before the General Division, the report is summarized at GD2-40 and GD2-88 as part of a Multidisciplinary Psychological and Vocational Evaluation Report (MPVER) dated November 28, 2013, and at GD4-8 as part of a Catastrophic Impairment Report dated March 3, 2015. The summary at GD2-40 refers to the fact that Dr. Alikhan noted the Applicant was "'very nervous' at the time of the accident". He also stated, "Her appearance, mood and behaviour were noted to be appropriate". Dr. Alikhan concluded the Applicant's injuries "were consistent with minor injuries as defined by the Minor Injury Guideline".[2]

[10] The General Division member did not mention Dr. Alikhan's report in his reasons. It is settled law that an administrative tribunal need not refer to every piece of evidence in its reasons, but is presumed to have considered all the evidence before it: *Simpson* at para. 12. This presumption may be rebutted if the probative value of the evidence that is not expressly discussed is such that it should have been addressed: *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC), at paras. 14–17; *Dossa v. Canada (Pension Appeals Board)*, 2005 FCA 387 at para. 4.

[11] In my view, when Applicant's counsel says Dr. Alikhan "indicated psychological features had already developed", he overstates the import of Dr. Alikhan's report as summarized in the record. Dr. Alikhan noted the Applicant was "very nervous" after the accident, but he also stated the Applicant's appearance, mood and behaviour were appropriate. I do not believe this supports the conclusion that Dr. Alikhan "indicated psychological features had already developed". Moreover, there is no question that the General Division member

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[1] Referred to at GD2-40

[2] GD2-40.

accepted that the Applicant suffered from anxiety and depression, and Dr. Alikhan's report does not add anything on this point that was not already accepted by the General Division member from other medical evidence. Therefore, it cannot be said that the fact that the reasons do not refer to Dr. Alikhan's report gives rise to an error under s. 58(1)(*c*) of the DESDA.

[12] I find that the failure to mention Dr. Alikhan's report does not constitute a ground under s. 58(1) of the DESDA that has a reasonable chance of success on appeal.

Dr. Carano's November 28, 2011 report

[13] Counsel refers to the report of Dr. Carano which, he asserts, "indicated that [the Applicant] was disabled from working by a combination of physical and psychological problems". Applicant's counsel also relies on the report of Dr. Carano to assert that it leads "to the conclusion that [the Applicant] was incapable of work at that time (November 2011)".

[14] Dr. Carano, a chiropractor, completed a Disability Certificate dated November 28, 2011. The Applicant did not adduce into evidence Dr. Carano's entire report; however, his report is referred to in the MPVER at GD2-41 and GD2-86. The summary provided in the record states that Dr. Carano opined that the Applicant was "substantially unable to complete the essential tasks of her pre-accident employment and her pre-accident housekeeping/home maintenance".

[15] Although the General Division member did not mention Dr. Carano's report in his decision, there is a presumption that he considered all of the evidence. As noted above, this presumption may be rebutted if the probative value of the evidence that is not expressly discussed is such that it should have been addressed. However, the information contained in the summary of Dr. Carano's report as it appears in the record that was before the General Division is not probative of the issue of whether the Applicant suffered from a severe disability on or before the MQP date.

[16] As confirmed by the Federal Court of Appeal, the measure of whether a disability is "severe" is not whether the applicant suffers from severe impairments, but whether his disability "prevents him from earning a living" (see: *Granovsky v. Canada (Minister of Employment and Immigration)*, [2001] 1 S.C.R. 703, paras 28 and 29). In other words, it is an applicant's capacity to work and not the diagnosis of his or her disease that determines the

severity of the disability under the CPP: *Klabouch v. Canada (Social Development)*, 2008 FCA 33 at para.14. It is settled law that the determination of the severity of the disability is not premised on an applicant's ability to perform her regular or pre-accident job, but rather on her inability to perform *any* work, i.e. "any substantially gainful obligation" per s. 42(2) of the CPP: see *Canada (Minister of Human Resources Development) v. Scott*, 2003 FCA 34 at paras. 7-8 and *Klabouch* at para. 15.

[17] Dr. Carano's report speaks only to the issue of the Applicant not being able to perform her *pre-accident employment*, which is not relevant to or probative of the issue of whether the Applicant's disability was severe on or before the MQP. I conclude that the failure to refer to this report does not give rise to an error under s. 58(1)(*c*) of the DESDA and does not provide an arguable case on which the proposed appeal might succeed.

Dr. Efala's March 7, 2012 report

[18] Applicant's counsel relies on the report of Dr. Efala, an orthopedic surgeon. Dr. Efala provided an Independent Orthopedic Examination Report, dated March 7, 2012. The Applicant did not adduce into evidence Dr. Efala's entire report, but it is summarized in the MPVER at GD2-41, GD2-85 and GD2-92. Applicant's counsel states that Dr. Efala's report should be accepted for its conclusion that the Applicant had a "substantial inability to perform the essential tasks of employment". He also states, however, that Dr. Efala's opinion that the Applicant was fit for sedentary activities should be rejected because "this commentary is outside his expertise as an orthopaedic surgeon since he did not have a vocational assessment of her skills and abilities to look at".[3]

[19] I conclude that the fact that the General Division did not expressly mention Dr. Efala's report does not assist the Applicant in establishing that the proposed appeal has a reasonable chance of success.

[20] First, I note that Applicant's counsel appears to be taking out of context Dr. Efala's remark about the inability to perform the essential tasks of employment as this comment was made in relation to her *pre-accident employment*. Dr. Efala opined that the Applicant was unable to perform her "heavier pre-accident housekeeping and home maintenance," but he also made

[3] AD1-7.

various recommendations for active rehabilitation. For the reasons stated above, the ability to perform her regular job is not the measure of whether the Applicant's disability was severe as of the MQP.

[21] Second, the General Division member can be presumed to have considered all of the evidence. The summary of Dr. Efala's report as set out in the MPVER does not add to the other evidence summarized by the General Division member in his reasons. Dr. Efala's report noted that the Applicant herself reported trouble with memory and concentration, depression and anxiety; however, Dr. Efala did not express any opinion on the psychological aspects reported by the Applicant. In any event, the General Division member recognized the Applicant's psychological difficulties in his reasons.[4]

[22] With respect to the assertion that Dr. Efala did not have the expertise to form an opinion on whether the Applicant was capable of performing sedentary duties, the Applicant adduced no evidence on which to base such a finding. As a preliminary point, I note that the position of Applicant's counsel in relation to what he accepts from Dr. Efala's report appears to be inconsistent, in that he accepts Dr. Efala's opinion that the Applicant has a substantial inability to perform the essential tasks of her previous employment, whereas he rejects Dr. Efala's opinion that the Applicant is able to perform sedentary employment. In any event, the MPVER was placed into evidence by the Applicant, who provided it in support of her application for benefits. She did not object in the course of the hearing before the General Division that Dr. Efala's area of expertise as an orthopedic surgeon did not qualify him to opine on the Applicant's abilities to perform sedentary work.

[23] Moreover, as the General Division member did not rely on Dr. Efala's observation in this regard, there is no basis to conclude the General Division member made an erroneous finding of fact in relation to his report.

[24] I see no arguable case that 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 in relation to the matters addressed in Dr. Efala's report.

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[4] Reasons, para. 26,

Dr. Robertus' March 23, 2012 report

[25] Applicant's counsel relies on the report of Dr. Robertus who provided a Chronic Pain Assessment report, dated March 23, 2012.[5] Applicant's counsel relies on the report as it "noted the nature of [the Applicant's] continuing problems and that they were multifactorial in etiology including both psychological and physical. She was unable to perform normal daily activities."

[26] In order for s. 58(1)(*c*) to be engaged, the General Division must have based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it. In the present case, the General Division member accepted that the Applicant suffered from both psychological and physical problems. He stated that he had assessed and weighed the combination of both physical and psychological conditions but concluded that the Applicant was not disabled at the time of her MQP within the meaning of the CPP.[6]

[27] I note that Dr. Robertus opined that the Applicant's injuries substantially interfered with her ability to return to her *usual employment* and that she suffered a substantial inability to perform the essential tasks of her employment.[7] Nowhere in his report did Dr. Robertus give an opinion on whether the Applicant could perform *any work*.

[28] I see no arguable case that 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 in relation to Dr. Robertus' report.

MPVER dated November 28, 2013

[29] Applicant's counsel relies on the MPVER dated November 28, 2013[8] to assert that "the absence of vocational characteristics are outlined in great detail, the combination of her physical and psychological problems in combination with the absence of transferrable skills continued to render her unemployable". In fact, the MPVER concluded that it would appear that the Applicant was "most aptly suited to sedentary (or perhaps Light) employment moving

[5] GD1A-11 to GD1A-21.
[6] Reasons, para. 41.
[7] GD1A-20.
[8] GD2-36 to GD2-107.

forward that does not (as Drs. Efala, Robertus, Nguyen and DiMaria indicate) involve heavy lifting, pushing pulling repetitive bending, repeated twisting/turning repetitive reaching activities (especially overhead)."[9] Therefore, the MPVER did not conclude the Applicant was not able to work at any employment.

[30] The General Division member referred to the MPVER at para. 19 of his reasons, therefore it cannot be said that the member was not aware of the MPVER. However, this report was written almost two years after the MQP date and sheds no light on whether the Applicant's condition prevented her from earning a living as at the MQP date, which is the relevant date for the assessment of whether the Applicant met the severity requirement of s. 42(2) of the CPP. Therefore, as the report was not relevant to the issue of severity, I am not able to conclude the Applicant has raised an arguable case with respect to the MPVER that the General Division member based his decision on any erroneous findings in relation to the report.

Dr. Nguyen's March 26, 2013 report

[31] Applicant's counsel relies on the report of Dr. Nguyen dated March 26, 2013[10] to assert that it outlined "the continuum of the complaint and confirming particularly at GD2-137 to 138 that she could not work at that period of time".

[32] Dr. Nguyen carried out an Independent Psychiatric Examination, which was referred to by the General Division member at para. 17 of the reasons. Contrary to counsel's assertion, Dr. Nguyen does not say the Applicant could not work in March 2013. Rather, Dr. Nguyen stated the Applicant could not work at her previous employment but should be offered vocational counselling and testing for occupations identified as reasonable and appropriate for her hand function, accommodating variability in positioning and posture, and ergonomic modifications.[11] Also, the report was prepared more than one year after the MQP date and does not address the Applicant's condition as at the MQP date. It is therefore of limited relevance to the issue of whether the Applicant's disability was severe as of that time.

[9] GD2-94.
[10] GD1A-73 to GD1A-103.
[11] GD2-137.

[33] I find that the Applicant has not raised an arguable case with respect to Dr. Nguyen's report falling within the ambit of s. 58(1) of the DESDA.

Omega Catastrophic Impairment Report dated March 3, 2015

[34] Applicant's counsel relies on the Omega Catastrophic Report[12] to submit that it demonstrates "a continuum of factors both physical and psychological that prohibits her from returning back to any form of gainful employment". The General Division member made note of this report but gave it little weight because he concluded that it was rebutted by the opposing insurance company report.[13]

[35] The difficulty for the Applicant in relation to this report is that it was made more than three years after the December 31, 2011 MQP date. It does not speak to whether the Applicant was able to work on the MQP date. Therefore, the report has no relevance to the question of whether the Applicant was severely disabled on or before the MQP date. Moreover, the Federal Court of Appeal has recognized that deterioration after the MQP is not relevant to determination of severity at the MQP: *Gilroy v. Canada (Attorney General)*, 2008 FCA 116, at paras. 2-3; *Gilroy v. Canada (Attorney General)*, 2010 FCA 302 at paras. 11-12.

[36] I find that the Applicant has not raised an arguable case with respect to this report falling within the ambit of s. 58(1) of the DESDA.

Conclusion

[37] In the end, the Applicant is asking me to reassess the evidence that was before the General Division to reach a different conclusion regarding the "severe" part of the disability test. However, under the statutory framework, such an exercise is not open to me on the appeal: see *Marcia*.

[38] The Applicant has not persuaded me, in relation to any of the evidence she has cited in her pleadings, that she has an arguable case that the General Division misapprehended the

[12] GD4.
[13] Reasons, para. 21.

evidence or that it failed to consider relevant evidence in reaching its conclusion that her disability was not severe on or before the MQP date.

[39] I have borne in mind the Federal Court's decision in *Griffin v. Canada (Attorney General)*, 2016 FC 874, where Justice Boswell provided guidance on how the Appeal Division should approach 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 (CanLII) 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, <u>the Appeal Division should review the underlying record and determine whether the decision failed to properly account for any of the evidence</u>: *Karadeolian v. Canada (Attorney General)*, 2016 FC 615 (CanLII) at para 10, [2016] FCJ No 615. (Underlining added.)

[40] 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.

DISPOSITION

[41] 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. Therefore, in accordance with s. 58(2) of the DESDA, the application for leave to appeal is refused.

Nancy Brooks
Member, Appeal Division