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

Citation: *P. M. v. Minister of Employment and Social Development,* 2017 SSTADIS 688

Tribunal File Number: AD-16-603

BETWEEN:

P. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: November 29, 2017

REASONS AND DECISION

DECISION

Leave to appeal is granted.

OVERVIEW

[1] The Applicant, P. M., who is now 48 years old, applied for disability benefits under the *Canada Pension Plan* (CPP) in January 2013. The Respondent, the Minister of Employment and Social Development Canada (Minister), refused her application, finding that her condition did not amount to a "severe and prolonged" disability during her minimum qualifying period (MQP), which ended on December 31, 2003.

[2] Ms. P. M. appealed the Minister's refusal to the General Division of the Social Security Tribunal. After conducting a hearing by way of written questions and answers, the General Division found insufficient evidence that Ms. P. M.'s medical problems as of the MQP prevented her from performing substantially gainful employment.

[3] Ms. P. M. now seeks leave to appeal to the Appeal Division, alleging various errors on the part of the General Division. Having reviewed its decision against the record, I have concluded that this appeal stands a reasonable chance of success.

ISSUES

[4] Ms. P. M.'s submissions dated November 21, 2017,[1] raise the following questions. Is there an arguable case that the General Division

(a) failed to observe a principle of natural justice by electing not to hear her oral testimony, proceeding instead solely on the basis of written questions and answers?

[1] Amended by way of a letter dated November 28, 2017.

(b) erred in law by failing to assess the severity of her impairments in a "real world context" as required by *Villani v. Canada*?[2]

(c) based its decision on an erroneous finding that she had continued working into 2004, the year her doctor began treating her for joint pain, while ignoring her unsuccessful attempt to maintain employment the previous year?

ANALYSIS

[5] At this juncture, I will address only the argument that, in my view, offers Ms. P. M. her best chance of success on appeal.

[6] According to section 58 of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: The General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact. An appeal may be brought to the Appeal Division only if it first grants leave to appeal,[3] but the Appeal Division must first be satisfied that at least one of the grounds advanced has a reasonable chance of success.[4] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[5]

[7] I am ordinarily reluctant to interfere with the General Division's discretion to decide on an appropriate form of hearing, but there may be cause to make an exception in this case. Section 21 of the *Social Security Tribunal Regulations* permits the General Division to choose among several hearing formats, but this authority cannot be exercised without regard for the principles of natural justice.

[8] I have not yet determined whether Ms. P. M.'s right to procedural fairness was violated, but a case can be made that the General Division's reasons for choosing a hearing by written Q&A[6] did not correspond to any of Ms. P. M.'s known circumstances. For instance, contrary to the General Division, the selected form of hearing did not provide for accommodations that

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[2] *Villani v. Canada (Attorney General)*, [2002] 1 FCR 130, 2001 FCA 248.
[3] DESDA at subsections 56(1) and 58(3).
Ibid. at subsection 58(1).[4]
[5] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.
[6] As set out in the notice of hearing dated July 15, 2015 (GD0-1).

Ms. P. M. required or requested. The issues, which, among other things, involved subjective pain symptoms arising from a 2003 motor vehicle accident, were “complex” on their face.

[9] Above all, there did indeed appear to be “gaps” in the information on file, given the dearth of evidence about Ms. P. M.’s condition leading up to December 31, 2003. Were those gaps not reason to ask Ms. P. M. more than just two questions about her condition during this most relevant period? Moreover, having decided that it needed more information from Ms. P. M., was it not incumbent on the General Division, in the interests of fairness and efficiency, to hear from her directly?

[10] I see an arguable case that the General Division failed to observe a principle of natural justice by forgoing an oral hearing for Ms. P. M. in favour of written questions and answers.

CONCLUSION

[11] I am granting leave to appeal on all grounds claimed. Should the parties choose to make further submissions, they are free to offer their views on whether a further hearing is required and, if so, what format is appropriate.

[12] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Member, Appeal Division