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

Citation: *M. K. v. Minister of Employment and Social Development*, 2017 SSTADIS 739

Tribunal File Number: AD-17-260

BETWEEN:

M. K.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Jennifer Cleversey-Moffitt

Date of Decision: December 15, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant's application for a Canada Pension Plan (CPP) disability pension was date stamped by the Respondent on November 14, 2013. The Respondent denied the application initially and upon reconsideration. The Applicant appealed the reconsideration decision to the General Division of the Social Security Tribunal of Canada (Tribunal). On December 31, 2016, the Tribunal's General Division determined that a disability pension under the CPP was not payable. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division, which the Tribunal received on March 27, 2017.

ISSUE

[2] The Member must decide whether the appeal has a reasonable chance of success.

THE LAW

[3] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), "An appeal to the Appeal Division may only be brought if leave to appeal is granted" and "The Appeal Division must either grant or refuse leave to appeal."

[4] Subsection 58(2) of the DESDA provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[5] According to subsection 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 made in a perverse or capricious manner or without regard for the material before it.

[6] The process of assessing whether to grant leave to appeal is a preliminary one. The review requires an analysis of the information to determine whether there is an argument that would have a reasonable chance of success on appeal. This is a lower threshold to meet than the one that must be met on the hearing of the appeal on the merits. The Applicant does not have to prove the case at the leave to appeal stage: *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC). Leave will be granted only where the Applicant demonstrates that the appeal has a reasonable chance of success on one or more of the grounds identified in subsection 58(1) of the DESDA: *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100 (CanLII), at paras. 70-73. The Federal Court of Appeal, in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success.

SUBMISSIONS

[7] The Applicant alleges numerous errors. The submissions include the argument that the General Division erred in law by basing its decision on an adverse finding in paragraph 33 of the General Division decision. Although the submissions claim that it was an error in law, the error actually falls more appropriately under paragraph 58(1)(*c*) of the DESDA.

[8] The submissions argue that the General Division mentioned the medication "Topamax" in the wrong context and relied on the Applicant's use of that medication as a reason why her condition was not severe as defined in the legislation.

[9] The submissions argue that Topamax is used in the treatment of migraines; however, it appears that the General Division member thought it was used in treating back pain.

ANALYSIS

[10] Paragraph 33 of the General Division reads as follows:

> The evidence of the Appellant was that she is in pain daily due to her back. The Tribunal accepts that the Appellant has limitations imposed by ongoing back pain, however, finds that the evidence does not support that the condition would be "severe" as defined in the legislation. The evidence of the Appellant is that she requires no assistive devices and that her pain is well controlled with the

> change in medication to Topamax. Further, there is no evidence that the Appellant's condition has required any treatment other than pain medication or any consultation with any specialist. While the Appellant may not be able to return to her previous occupation as a nurse's assistant, the issue before the Tribunal is not whether the Appellant can return to her previous occupation, but rather, whether she is incapable regularly of pursuing any substantially gainful occupation. The measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether his or her disability prevents him or her from earning a living. The determination of the severity of the disability is not premised upon a person's inability to perform his or her regular job, but rather on his or her inability to perform any work (*Klabouch v. Canada (Social Development)*, 2008 FCA 33). The evidence of the Appellant regarding her physical capabilities and limitations would support that she would be unable to work in a physically demanding environment, but they would not preclude her from a more sedentary nature occupation. Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117).

[11] According to the Applicant's submissions, Topamax is used to treat migraines and not back pain. Additionally, the submissions point to Dr. Zaitlan's report following a December 4, 2014, consultation where Topamax is discussed. (GD3-5) Here, the report begins by noting that the referral was specifically for headaches.

[12] It appears in paragraph 33 of the General Division decision that the member believed Topamax was for back pain as there is no mention of the Applicant's headaches in that paragraph, but the member comments on the medication assisting the Applicant in pain management in what seems to be the context of back pain.

[13] Based on the above, I find that the Applicant has raised a ground upon which the proposed appeal might succeed. I am satisfied that the appeal has a reasonable chance of success.

[14] The Federal Court of Appeal in *Mette v. Canada (Attorney General)*, 2016 FCA 276 (CanLII), indicated that it is unnecessary for the Appeal Division to address all the grounds of appeal that an applicant has raised. At paragraph 15 of that decision, the Federal Court of Appeal explained that "[t]he provision [section 58(2) of the DESDA] does not require that

individual grounds of appeal be dismissed. […] [I]ndividual grounds may be so inter-related that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave."

[15] This application is one of the situations described in *Mette*. The alleged erroneous finding of fact and the analysis of whether the Applicant's medical condition was severe and prolonged may be interrelated. Therefore, it is unnecessary at this stage to deal with the other arguments raised by the Applicant.

CONCLUSION

[16] The Application is granted. This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[17] In accordance with subsection 58(5) of the DESDA, the Application hereby 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 (*Social Security Tribunal Regulations*, section 42).

Jennifer Cleversey-Moffitt
Member, Appeal Division