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

Citation: *P. K. v. Minister of Employment and Social Development*, 2017 SSTADIS 727

Tribunal File Number: AD-17-569

BETWEEN:

P. K.

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: December 12, 2017

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, P. K., worked as a personal support worker until October 2013, when she stopped working because of chronic lower back pain radiating down her left lower extremity, which left her unable to sit or stand for prolonged periods.

[3] The Applicant applied for a Canada Pension Plan disability pension in September 2014, but the Respondent, the Minister of Employment and Social Development, denied her claim. She appealed the Respondent's decision, but the General Division also determined that she was ineligible for a Canada Pension Plan disability pension, as it found that her disability was not "severe" by the end of her minimum qualifying period on December 31, 2015. (The end of an appellant's minimum qualifying period is the date by which he or she is required to be found disabled, to qualify for a Canada Pension Plan disability pension.)

[4] The Applicant now seeks leave to appeal the General Division's decision. She submits that the General Division erred in law because it failed to assess the merits of her claim on the balance of probabilities. She claims that, instead, the General Division determined whether there was a possibility that her psychiatric condition might improve. I must now decide whether the General Division required her to meet a higher standard of proof.

ISSUE

[5] The issue before me is whether the appeal has a reasonable chance of success on the ground that the General Division failed to assess the Applicant's claim on the balance of probabilities.

GROUNDS OF APPEAL

[6] 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.

[7] 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

[8] The General Division indicated at paragraph 40 that the Applicant was required to prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2015.

[9] The Applicant notes that, at paragraph 45, the General Division found that it was possible that her depression and psychological condition were likely to improve once treatment was initiated and undertaken. Dr. Pillai, a psychologist, had recommended cognitive behavioural therapy, multi-disciplinary pain management intervention, as well as an in-vehicle/pedestrian assessment, but the Applicant had yet to undergo or pursue these treatment options. At paragraph 49, the General Division again noted that it was possible that the Applicant's condition might improve with the various treatment modalities.

---

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

[10] The General Division also noted that the psychologist was "hopeful" that incorporating his recommended treatment would alleviate the Applicant's pain and enable her to increase her activities and, overall, improve the quality of her life and rehabilitation.

[11] The Applicant argues that the General Division erroneously concluded that she would have significantly improved, had she followed through with the recommendations of a single medical practitioner, given that her depression and psychological condition were allegedly "outstanding for many years." The Applicant argues that the prospect for any improvement was "extremely small" given that there had been no appreciable improvement since her initial motor vehicle accident in 2007. In this regard, the Applicant relies on her family physician's recent medical report of July 27, 2017 (AD1A- 7).

[12] The General Division did not have a copy of Dr. Joshi's medical report before it. New evidence generally is not permitted on an appeal under subsection 58(1) of the DESDA, unless it falls within any of the exceptions. There is no indication that Dr. Joshi's report falls within any of the exceptions to the general rule that would enable me to consider it.

[13] I am, however, prepared to grant leave to appeal as I am satisfied that there is an arguable case that the General Division may have required a higher standard of proof, rather than proof on a balance of probabilities. If the General Division had indeed found that there was a "possibility" of improvement, did that amount to requiring a higher standard of proof of the Applicant than one on a balance of probabilities, given the Applicant's medical history? Did this require the General Division to examine the prospects or likelihood for improvement? What evidence was before the General Division that addressed the expected prognosis if the Applicant had pursued the various treatment recommendations?

[14] Although I am prepared to grant leave to appeal in these circumstances, the Applicant should be prepared to address whether, in light of the General Division's findings that she had yet to pursue these treatment recommendations, she met the requirements set out in *Lalonde.*[2] There, the Federal Court of Appeal held that "[t]he real world" context also means that the [Pension Appeals Board] must consider whether Ms. Lalonde's refusal to undergo physiotherapy treatment is unreasonable and what impact that refusal might have on

[2] *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211, at para. 19.

Ms. Lalonde's disability status should the refusal be considered unreasonable." The Applicant should be prepared to refer to any evidence before the General Division that explains her alleged non-compliance with treatment recommendations and any evidence of what impact any refusal might have had on her disability status.

CONCLUSION

[15] I am satisfied that the appeal has a reasonable chance of success. Accordingly, the application for leave to appeal is granted.

[16] In accordance with subsection 58(5) of the DESDA, the application for leave to appeal hereby becomes the notice of appeal. Within 45 days after the date of this decision, the parties may file either submissions or 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