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

Citation: *Minister of Employment and Social Development v. J. R.,* 2017 SSTADIS 729

Tribunal File Number: AD-17-418

BETWEEN:

Minister of Employment and Social Development

Applicant

and

J. R.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: December 13, 2017

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, the Minister of Employment and Social Development, seeks leave to appeal the General Division's decision dated February 28, 2017, which determined that the Respondent, J. R., had the onset of a severe and prolonged disability in August 2013, and that, because she had a deemed date of disability of October 2013, payment of a Canada Pension Plan disability pension would commence in February 2014.

[3] The Applicant submits that the General Division erred in law and based its decision on several erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it. The Applicant asserts that the General Division also gave imprecise reasons. I must decide whether the appeal has a reasonable chance of success on the basis of any of these grounds.

ISSUE

[4] Does the appeal have a reasonable chance of success on the issue of whether the General Division erred in law, based its decision on several erroneous findings of fact that it made in a perverse or capricious manner, or gave imprecise reasons?

ANALYSIS

[5] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the grounds of appeal enumerated under subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) and that the appeal has a reasonable chance of success. The Federal Court has endorsed this approach[1].

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

Alleged errors of law

[6] The Applicant has identified several alleged errors of law. One of these includes the General Division's failure to consider whether any non-compliance with treatment recommendations was unreasonable, and what impact that could have had on the Respondent's health condition. The Applicant contends that the General Division failed to follow *Lalonde*[2] and *Kaminski*[3].

[7] In *Lalonde*, the Federal Court of Appeal determined that a "real world" assessment requires a decision-maker to consider whether a claimant's refusal to undergo treatment is unreasonable and what impact that might have on his or her disability status should the refusal be considered unreasonable.

[8] The Applicant notes that several medical practitioners had recommended pain relief medication, but that the Respondent reportedly was not taking any pain relief medication. For instance, Dr. S. Macaluso, a physiatrist, recommended in August 2013 that the Respondent try nortriptyline for both pain and sleep restoration. When seen in follow-up a month later, she was taking the nortriptyline (GD2-86, GD2-90 to 92). However, when seen in August 2014, the Respondent reported that she was not taking any medications, despite having been started on Pregabalin in June 2014 (GD2-69 and 70). When she completed the questionnaire accompanying her application for a disability pension, she suggested that she was not taking any medications at that time (GD2-116). In July 2015, Dr. Mula, a chronic pain specialist, saw the Respondent for a medical-legal assessment. Dr. Mula made several recommendations for future care, including pharmacological options and nerve block injections/trigger point injections (GD1-43).

[9] At paragraph 17, the General Division wrote that the Respondent had tried all recommended treatments, but it is unclear whether it was repeating the Respondent's testimony or whether it had made such a finding. (Given that the statement was made in the General Division's summary of the evidence, the member was likely restating the Respondent's testimony.)

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[2] *Lalonde v. Canada (Minister of Human Resources Development*), 2002 FCA 211, at para. 19.
[3] *Kaminski v. Canada (Social Development)*, 2008 FCA 225, at paras. 14 to 16.

[10] Although the General Division discounted the opinion of the chronic pain specialist, the General Division does not appear to have addressed whether other treatment options had been available to the Respondent and if so, whether she had been compliant with them and if not, whether any non-compliance was reasonable, and what impact that might have had on her disability status. For these reasons, I am satisfied that the Applicant has made out an arguable case and that the appeal has a reasonable chance of success.

[11] As I have noted above, the Applicant has also raised other arguments in support of its application requesting leave to appeal, but it is unnecessary for me to address each of them, since I am granting leave to appeal on at least one of them[4].

CONCLUSION

[12] The application for leave to appeal is granted.

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

[4] *Mette v. Canada (Attorney General)*, 2016 FCA 276.