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

Citation: *S. O. v. Minister of Employment and Social Development*, 2017 SSTADIS 741

Tribunal File Number: AD-17-850

BETWEEN:

S. O.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by : Meredith Porter

Date of Decision: December 15, 2017

REASONS AND DECISION

DECISION

[1] The application for leave to appeal (Application) is refused.

INTRODUCTION

[2] The Applicant is seeking to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal), which determined that the Applicant had failed to demonstrate that she suffers from a severe disability under the *Canada Pension Plan* (CPP). The General Division found that the Applicant retained capacity to work as she continues to work part-time hours as a cashier, despite her physical limitations, which resulted from a workplace injury. She suffers chronic pain from her jaw to her chest, shoulder and back. At the time of the General Division hearing, she was continuing to work approximately 20 hours per week and her performance at work was assessed to be reasonably good. The General Division found that the Applicant was employed in a substantially gainful occupation and that any accommodations that she received in order to perform work-related tasks were not such that her employer could be characterized as a benevolent employer.

[3] The Applicant disagrees with several of the General Division's findings of fact. According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), an appeal to the Appeal Division may be brought only if leave to appeal is granted and the Appeal Division must either grant or refuse leave to appeal. The Applicant filed an Application on October 30, 2017.

[4] Subsection 58(2) of the DESD Act provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success. There are three enumerated grounds of appeal pursuant to subsection 58(1) of the DESD Act, and these include a breach of natural justice; an error of law; and an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[5] I must decide whether the Applicant's argument that the General Division's decision is based on erroneous findings of fact has a reasonable chance of success.

ANALYSIS

[6] The Applicant cites three specific erroneous findings of fact made by the General Division:

- At paragraph 13, the date on which the General Division states the X-ray of the Applicant's lumbar spine took place is incorrect. The correct date should be January 5, 2012.

- At paragraph 13, the word "considerable" is used in reference to the degree of sclerosis of the Applicant's lumbar spine. However, the Applicant submits that the word "considerable" does not appear in any medical records relating to her lumbar spine.

- Finally, the Applicant states that at paragraph 24 of the decision, an imaging report is referenced which does not provide the complete results regarding the Applicant's lumbar spine. The report gives only the impression of the assigned physician, according to the Applicant.

[7] Paragraph 42(2)(*a*) of the CPP requires that a disability be "severe" and "prolonged" in order for an individual to qualify for a disability pension. A disability is considered severe if it renders a person "incapable regularly of pursuing any substantial gainful occupation." A disability is prolonged if it is "likely to be long continued and of indefinite duration or is likely to result in death."

[8] In this case, the General Division properly cited case law that exists to guide decision-makers in determining entitlement to a disability pension. In *Klabouch*,[1] the Federal Court of Appeal held that it is the applicant's capacity to work that determines the severity of the disability and not the applicant's diagnosed health condition. Applicants must demonstrate that they are incapable of performing any substantially gainful employment, and not simply that they cannot perform their regular job. Applicants must also provide objective medical evidence that supports their claim that they cannot work, along with evidence that they have made reasonable efforts to obtain work but that those efforts have failed as a result of their health

[1] *Klabouch v. Canada (Social Development)*, 2008 FCA 33.

condition. Finally, applicants must demonstrate efforts to mitigate their health condition with respect to the impact on their employability.

[9] The General Division applied *Klabouch* to the evidence in the record, which includes both medical records and work-related performance assessments, in addition to her oral testimony at the hearing. The General Division considered that the Applicant continued to work part-time as a cashier at the time of the hearing. Although the Applicant argued that she was only working because of financial pressures, the reasons for her continuing to work do not negate the fact that she is capable of working when she is scheduled to. She worked an average of 20 hours per week, and was paid at the same rate as other cashiers performing the same work. The accommodations provided to the Applicant were not onerous: she was provided a right-sided till to limit her reliance on her left arm. In determining an applicant's capacity to "regularly" pursue employment, the Federal Court of Appeal in *Atkinson*[2] stated that "predictability is the essence of regularity within the CPP definition of 'disability.'" I note that both her annual earnings and her work performance assessments indicated that she consistently and predictably showed up for the hours of work she was assigned and completed the tasks required to perform her work.

[10] The General Division did not find that the medical information in the record indicated that the Applicant's health condition met the criterion for "severe." While it was acknowledged that the Applicant had limited use of her left arm, a medical report from Dr. Martins, dated in May 2017, indicated that the Applicant was physically capable of performing work-related duties.

[11] The Applicant has cited several errors in the findings of fact on which she alleges the General Division based its decision. However, the cited errors relate to the date on which a test was done, a particular word used in medical reports, and whether a report reflects an impression or actual results. The cited errors of fact, even if substantiated, do not reflect "perverse" or "capricious" errors of fact. Nor do they reflect that the General Division disregarded the material in the record before it. If the alleged errors were proven on their merits, this would not change the fact that the Applicant continues to work part-time hours with noted ability. The

[2] *Atkinson v. Canada (Attorney General)*, 2014 FCA 187.

General Division based its decision, that her disability was not severe, on the finding of fact that she was working (as supported by the evidence in the record).

[12] It may be that the Applicant is asking me to reassess the evidence, but I am restricted to considering only those grounds of appeal that fall within subsection 58(1) of the DESD Act. The subsection does not permit me to reassess or reweigh the evidence, and I am not permitted to intervene in the General Division's findings simply because I may have decided an issue differently. Although the Applicant may not agree with the General Division's findings, this is not a ground for appeal enumerated in subsection 58(1) of the DESD Act. The Appeal Division does not have broad discretion in deciding leave pursuant to the DESD Act. It would be an improper exercise of the delegated authority granted to the Appeal Division to grant leave on grounds not included in subsection 58(1) of the DESD Act.[3]

[13] It is the Appeal Division's role to review the underlying record and to determine whether the General Division failed to account for any evidence, misconstrued evidence, or overlooked evidence that it ought to have considered in reaching its decision. Leave to appeal should normally be granted where this review of the underlying record demonstrates that the evidence was not appropriately considered.[4]

[14] Unfortunately, in this case I do not find that the Applicant has identified a ground of appeal that has a reasonable chance of success. Even if the alleged errors were proven on their merits, the outcome would be the same. The evidence reflects that the Applicant is capable regularly of pursuing gainful employment. As a result, leave is not granted on the ground that the General Division made an error of fact pursuant to paragraph 58(1)(*c*) of the DESD Act.

CONCLUSION

[15] The Application is refused.

Meredith Porter
Member, Appeal Division

[3] *Canada (Attorney General) v. O'keefe*, 2016 FC 503.
[4] *Joseph v. Canada (Attorney General)*, 2017 FC 391.