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

Citation: *J. R. v. Minister of Employment and Social Development*, 2017 SSTADIS 717

Tribunal File Number: AD-16-1241

BETWEEN:

J. R.

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 8, 2017

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, J. R., worked as a labourer until May 2005, when she stopped working due to an injury. She complained of pain in her left shoulder radiating down her arm, leading to discolouration and swelling. She also complained of pain in her neck leading to the back of her head, resulting in headaches, nausea and eye pain. She worked again after May 2005, but claims that any employment after this date represents a failed return to work effort.

[3] The Applicant applied for a Canada Pension Plan disability pension in August 2010, but the Respondent denied her application. 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, 2007. (The minimum qualifying period is the date by which an applicant is required to be disabled, to qualify for a Canada Pension Plan disability pension.)

[4] The Applicant now seeks leave to appeal the General Division's decision[1]. She submits that the General Division both erred in law and 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.

[1] The General Division initially rendered a decision in 2015. The Applicant appealed that decision to the Appeal Division, which returned the matter to the General Division for a rehearing. The General Division conducted an in-person hearing and rendered a decision on July 18, 2016.

ISSUE

[5] The issue before me is whether the appeal has a reasonable chance of success on any of the grounds or issues that the Applicant has raised.

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.*[2]

ANALYSIS

[8] The Applicant raises several arguments. One of them concerns whether the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it, when it found that the Applicant had unreasonably failed to comply with treatment recommendations.

[9] The General Division found that a physiatrist had indicated in December 2012 that the Applicant had requested trigger point injections for her neck, back and shoulder,

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

finding that they had been very helpful in the past (GT1-201[3]). In my own review of the medical records, I note that the Applicant had also previously requested trigger point injections from the physiatrist in February 2012 (GT1-206[4]). Indeed, she had had trigger point injections for her back, dating back to at least as early as August 2009.

[10] At paragraph 45, the General Division wrote that there was no medical evidence or testimony from the Applicant as to why "helpful injections (relief lasting up to three months) have not been regularly used as a mitigating strategy for a long time…"

[11] The Applicant argues that the General Division erred in finding that she had unreasonably failed to comply with treatment recommendations because she had refused injections, without recognizing that injections cannot be used on a regular basis.

[12] The Applicant has not referred me to any evidence (before the General Division) to suggest that injections cannot be regularly used, the frequency at which they can be taken, or any evidence to suggest that the Applicant had exhausted injections as a treatment recommendation.

[13] Despite the General Division's findings, however, I do not readily see any references in the medical records that any of the Applicant's physicians had necessarily recommended ongoing or additional injections after December 2012 or that the Applicant had refused to have any further injections.

[14] It is also unclear whether, having found that the Applicant had refused injections, that the General Division then examined whether the Applicant's refusal to comply with treatment recommendations was unreasonable and what impact that refusal might have on her disability status. The Federal Court of Appeal has determined that a disability assessment generally requires considering whether an applicant's refusal to seek treatment recommendations is unreasonable and what impact that has on his or her disability status[5]. The General Division indicated (at paragraph 15) that "there was no

[3] Also at GT1-201 / 341 / 3 47 / 372 / 396 / 427 / 443.
[4] Also at GT1-337 / 352 / 377/401 / 423 / 439.
[5] *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211.

explanation as to why not" i.e. why the Applicant did not have injections; however, it is unclear whether this question was put to her.

[15] The Applicant has raised several other arguments in support of her application seeking leave to appeal, but as the Federal Court of Appeal in *Mette*[6] indicated, it is unnecessary for the Appeal Division to address all of the grounds of appeal as it is generally sufficient to grant leave on the basis of one argument alone. It is unnecessary for me to address any other issues or grounds at this juncture.

CONCLUSION

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

[17] 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

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