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

[TRANSLATION]

Citation: *L. L. v. Minister of Employment and Social Development*, 2017 SSTADIS 718

Tribunal File Number: AD-16-1263

BETWEEN:

L. L.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Jude Samson

Date of Decision: December 8, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant experienced a fall in November 2011, the effects of which were compounded by a motor vehicle accident in December 2012 (GD2-55). She stopped working as a cashier in April 2012 and applied for a Canada Pension Plan disability pension (GD2-5). In her application, she described the main disabling condition as left-side rib and spinal pain (GD2-48).

[2] The Applicant's disability pension application was refused by the Respondent, the Minister of Employment and Social Development (Minister), initially and upon reconsideration. The Applicant appealed the reconsideration decision to the General Division of the Social Security Tribunal of Canada (Tribunal), but the appeal was dismissed in July 2016, following a teleconference hearing.

[3] In November 2016, the Applicant filed an application requesting leave to appeal to the Appeal Division. Leave to appeal was granted for the reasons below.

THE LAW

[4] The Tribunal was created by the *Department of Employment and Social Development Act* (DESD Act), which governs its operations. For example, the DESD Act provides that the Appeal Division must focus on particular errors that the General Division may have made. More specifically, the Appeal Division cannot amend a General Division decision unless one of the following errors (grounds of appeal), enumerated in subsection 58(1) of the DESD Act, has been established:

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.

[5] Given the limited role of the Appeal Division, new evidence is generally not admitted before the Appeal Division.[1] Therefore, in making this decision, I did not consider the new report from Dr. Massé that the Applicant enclosed with her application for leave to appeal (AD1-5).

[6] Furthermore, the DESD Act provides for a two-step process for most appeals before the Appeal Division.

a) Step 1: Leave to appeal. This means that you must obtain permission to appeal from a member of the Appeal Division. This preliminary step seeks to filter out appeals that have no reasonable chance of success.[2] This initial hurdle to meet is lower than the one that must be met at the second stage of the process. At the leave to appeal stage, the Applicant does not have to prove her case. Rather, the relevant question is whether there is an arguable ground upon which the proposed appeal might succeed?[3]

b) Step 2: If leave to appeal is granted, a member of the Appeal Division will decide on the merits of the appeal, which means that the member has to decide whether it is more likely than not that the General Division made at least one of the errors listed in the grounds of appeal below.

[7] Since this file is at the first stage, I must determine whether there is at least one arguable ground of appeal that might justify setting aside the decision under review. It is for the Applicant to show that the legal threshold has been reached.[4]

---

[1] *Marcia v. Canada (Attorney General)*, 2016 FC 1367.
[2] DESD Act, at subsection 58(2).
[3] *Osaj v. Canada (Attorney General)*, 2016 FC 115; *Ingram v. Canada (Attorney General)*, 2017 FC 259.
[4] *Tracey v. Canada (Attorney General)*, 2015 FC 1300, at paragraph 31; *Griffin v. Canada (Attorney General)*, 2016 FC 874, at paragraph 20.

ANALYSIS

[8] In support of her application, the Applicant argues that the General Division did not adequately consider the report of her family doctor, Dr. Massé. Instead, the General Division seemed to prefer the opinion of specialists that she had seen only once or twice. I find that the Applicant's arguments may invoke paragraphs 58(1)(*b*) and (*c*) of the DESD Act.

[9] The General Division is authorized to give precedence to certain evidence over other evidence. It is not the Appeal Division's role to assess or weigh evidence again to arrive at a different conclusion.[5] However, the General Division may fall into error if it does not fulfill its obligation to perform a meaningful analysis of the evidence or to explain how it chose between the two items of contradictory evidence.[6]

[10] In this case, Dr. Massé found that the Applicant's condition was chronic and permanent and precluded her from all work activity, for the following reasons (GD2-58):

a) the two injuries following her accidents, which severely aggravated the Applicant's pain and limited her in all her activities;

b) an adjustment disorder with anxiety and depression;

c) post-traumatic stress disorder, which affects all spheres of life as well as concentration at work;

d) the time elapsed since her first accident.

[11] Furthermore, Dr. Massé notes that all attempts at treatment (medication, physiotherapy, massage therapy, assessment by a pain clinic and psychological follow-up) produced little results.

---

[5] *Tracey*, *supra*.

[6] *Dossa v. Canada (Pension Appeal Board)*, 2005 FCA 387; *Canada (Minister of Human Resources Development) v. Quesnelle*, 2003 FCA 92; *Canada (Attorney General) v. Ryall*, 2008 FCA 164.

[12] The General Division's analysis can be found at paragraph 24 of its decision and reads as follows (AD1A-7):

> [translation] [24] The Tribunal recognizes that the Appellant has limits and the support of her family doctor. However, the evidence clearly shows that the Appellant has work capacity. Without any evidence to show that she tried unsuccessfully to return to work, the Tribunal must assume that she would have been able to maintain some sort of employment. She has the experience and education to be able to work in another position, and the medical evidence does not show any severe pathology. Therefore, the Tribunal does not find that the Appellant had a severe disability that rendered her incapable regularly of pursuing any substantially gainful occupation on or before December 31, 2015, and that continues to this day.

[13] Dr. Massé's opinion, on the one hand, and the General Division's finding that "the evidence clearly shows that the Appellant has work capacity," on the other, raises concern that the General Division may not have fulfilled its obligation to perform a meaningful analysis of the evidence or to explain how it chose between contradictory items of evidence.

[14] Therefore, I find that the Applicant's arguments have a reasonable chance of success under paragraphs 58(1)(*b*) and (*c*) of the DESD Act.

[15] I would also invite the parties to make submissions on the following questions, which supplement the grounds of appeal raised by the Applicant:

a) According to subsection 58(2) of the DESD Act, did the General Division fulfill its obligation to provide adequate reasons for its decision?

b) Did the General Division err in its application of binding decisions (ex. *Villani v. Canada (Attorney General)*,[7] *Bungay v. Canada (Attorney General)*,[8] and Nova Scotia (Workers' Compensation Board) v. Martin[9])?

---

[7] 2001 FCA 248.
[8] 2011 FCA 47.
[9] 2003 SCC 54.

CONCLUSION

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

[17] This decision does not presume the result of the appeal on the merits of the case.

Jude Samson
Member, Appeal Division