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

Citation: *M. H. v. Minister of Employment and Social Development*, 2017 SSTADIS 762

Tribunal File Number: AD-17-445

BETWEEN:

M. H.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Kate Sellar

Date of Decision: December 21, 2017

REASONS AND DECISION

INTRODUCTION

[1] On March 10, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* was not payable. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on June 12, 2017.

ISSUE

[2] The Appeal Division must decide whether the appeal has a reasonable chance of success.

THE LAW

Leave to Appeal

[3] According to ss. 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an applicant may bring an appeal to the Appeal Division only if the Appeal Division grants leave to appeal. The Appeal Division must either grant or refuse leave to appeal.

[4] Subsection 58(2) of the DESDA provides that the Appeal Division refuses leave to appeal if it is satisfied that the appeal has no reasonable chance of success. An arguable case at law is a case with a reasonable chance of success [see *Fancy v. Canada (Attorney General)*, 2010 FCA 63].

Grounds of Appeal

[5] According to s. 58(1) of the DESDA, the following are the only grounds of appeal:

(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.

SUBMISSIONS

[6] The Applicant submits that the General Division erred in multiple ways. The Applicant argues that the General Division made the following errors of law contrary to s. 58(1)(*b*) of the DESDA:

- The General Division required a stricter standard of proof than balance of probabilities on the question of whether the Applicant has obsessive compulsive disorder (OCD);
- The General Division failed to consider evidence of the Applicant's anxiety caused by electronic devices at GD 2–122 and GD 2–123 in its application of the "real world" factors in *Villani v. Canada (Attorney General)*, 2001 FCA 248; and
- The General Division requested irrelevant and personal information about whether the Applicant had applied to the Ontario Disability Support Program for benefits.

[7] The Applicant argues that the General Division made the following errors of fact contrary to s. 58(1)(*c*) of the DESDA:

- The General Division relied on the Applicant's testimony that her fibromyalgia was the main condition when there was evidence of another main condition on the record, namely OCD.
- The General Division misconstrued a 2012 report from Dr. Harth by stating that the report contained no physical findings (GD 2–116). A report in 2015 by the same physician (GD 2–56) also notes deterioration and bases the decision that the Applicant is "work disabled" on those physical findings.

- The General Division ignored a significant part of Dr. Crabbe's report (GD 2–144) in which he stated that the Applicant "had been unable to work on medical grounds due to chronic pain from fibromyalgia. She has been unable to work since July 28, 2014, and is unable to work for the foreseeable future."

- The General Division relied only on Dr. Chande's report about the Applicant's Crohn's disease being in remission, and ignored the Applicant's own evidence in that regard, in which she described the side effects she experienced as a result of Methotrexate, which included vomiting, bloody diarrhea, pain, headaches, dizziness and nausea.

- The General Division noted that the Applicant's anxiety was characterized as "severe" in November 2014 but that she was not prescribed anti-anxiety medication. The General Division ignored subsequent reports that detailed the fact that Paxil had failed and that there was a corresponding increase in dosage to a medication that the Applicant found effective.

- The General Division ignored evidence from the Applicant and from her physicians about her unwillingness to take a prescribed medication, and ignored the reasons the Applicant gave for why she did not complete prescribed counselling.

ANALYSIS

[8] It is arguable that the General Division made errors in its decision under s. 58(1) of the DESDA.

[9] Although the General Division indicates that a claimant's condition should be assessed in its totality, and that all of the possible impairments are to be considered, not just the biggest impairments or the main impairment (para. 42), it is possible the General Division did not actually follow this approach in its analysis: "With the exception of fibromyalgia and her psychiatric and mood disorders, none of the appellant's other issues would interfere with her returning to work" (para. 42). It is not clear from the General Division's decision that the fibromyalgia and psychiatric disorders were considered cumulatively in reaching a decision about the Applicant's capacity for work. The Applicant argues that the impact of her OCD was

not considered a main condition, and the role that the OCD plays in the Applicant's capacity is not expressly covered in the General Division's analysis. This may amount to an error of law under s. 58(1)(*b*) of the DESDA.

[10] The General Division relied heavily on Dr. Chande's report, which concluded that the Applicant's Crohn's disease was in remission in January 2016 (just after the expiry of the MQP) and therefore "her Crohn's disease would not be a factor in preventing the appellant from pursuing suitable gainful employment" (para. 35). However, in reaching that conclusion, the General Division may have ignored the Applicant's evidence about the significant side effects she experienced as a result of the medication she took for Crohn's disease (the side effects included vomiting, bloody diarrhea, pain, headaches, dizziness and nausea). The General Division decision does not mention or examine these side effects in its analysis. The General Division is presumed to have considered all the evidence before it, but that presumption will be set aside when the probative value of the evidence that is not expressly discussed is such that it should have been [see *Lee Villeneuve v. Canada (Attorney General)*, 2013 FC 498; *Kellar v. Canada (Minister of Human Resources Development)*, 2002 FCA 204; and *Litke v. Canada (Human Resources and Social Development)*, 2008 FCA 366]. The failure to expressly consider the Applicant's evidence about the serious impact of her medication for Crohn's disease in this instance may be an error under s. 58(1)(*c*) of the DESDA.

[11] Given that this decision has identified possible errors under s. 58(1) of the DESDA, the Appeal Division does not need to consider any other specific arguments raised by the Applicant at this time. Subsection 58(2) of the DESDA does not require that individual grounds of appeal be considered and accepted or rejected [see *Mette v. Canada (Attorney General)*, 2016 FCA 276]. The Applicant is not restricted in her ability to pursue the grounds raised in her Application.

[12] The Appeal Division welcomes further submissions from the parties regarding the General Division's analysis of the Applicant's treatment compliance in light of the approach required by *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211. It would also be of assistance to have further submissions from the parties on the General

Division's observation (at para. 38) that "in general, with fibromyalgia, activity is encouraged and work is not contraindicated" in light of the analysis required by *Lalonde*.

CONCLUSION

[13] The Application is granted. This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Kate Sellar
Member, Appeal Division