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

Citation: *T. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 757

Tribunal File Number: AD-17-457

BETWEEN:

T. M.

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 20, 2017

DECISION AND REASONS

INTRODUCTION

[1] On March 16, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable.

[2] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on June 16, 2017.

ISSUE

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

THE LAW

Leave to Appeal

[4] 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.

[5] 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

[6] 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

[7] The Applicant relies on all three grounds of appeal under s. 58(1) of the DESDA.

[8] The Applicant argues that the General Division made erroneous findings of fact in a perverse and capricious manner contrary to s. 58(1)(*c*) of the DESDA. The Applicant indicates that the General Division relied on a finding of fact regarding appropriate treatment for fibromyalgia for the Applicant that was not based on evidence provided at the hearing through either the medical reports or testimony. The Applicant argues there was no expert evidence regarding fibromyalgia in the documentary record.

[9] The Applicant argues that the General Division identified further treatment options available to the Applicant that the General Division indicated would improve her functionality without evidence that any of these treatment options would in fact improve the management of her condition.

[10] The Applicant argues that the General Division made an error of law in reaching its decision contrary to s. 58(1)(*b*) of the DESDA. The Applicant indicates that the General Division relied on the fact that the Applicant was working part time to find that she has capacity to work. The General Division failed to properly consider whether she had capacity to regularly pursue any substantially gainful employment.

[11] The Applicant argues that the General Division failed to observe a principle of natural justice pursuant to s. 58(1)(*a*) of the DESDA, because the phone connection for the teleconference hearing was poor, and that made it difficult for the Applicant to adequately present her case.

ANALYSIS

[12] It is at least arguable that the General Division decision contains errors under s. 58(1) of the DESDA.

[13] The General Division noted that it is the capacity to work and not the diagnosis or disease description that determines the severity of a disability under the CPP (para. 34). The General Division acknowledged that the Applicant has fibromyalgia and then indicated that "the fibromyalgia is however manageable with medication and physical activity" (para. 37). The decision goes on to indicate the following (para. 40):

> The Appellant's fibromyalgia diagnosis dates back to 2002 and her symptoms for rheumatoid arthritis and irritable bowel syndrome have been ongoing for a long time. She has been referred and been under the care of consultants and specialist (*sic*) for a long time. However, as noted by the Respondent, fibromyalgia in itself is not a disabling condition and there is a plethora of treatments, therapies, referrals and programmes which successfully help with management of the condition. Education and physical activity is generally encouraged as has been the case with the Appellant.

[14] The Applicant argues that there was no expert evidence on the record about fibromyalgia, and no evidence that education and physical activity were encouraged for the Applicant specifically. It is at least arguable that the General Division committed an error here under s. 58(1)(*b*) and/or (*c*) by relying on information that was "noted" by the Respondent about the Applicant's condition generally, rather than relying on evidence about whether the Applicant was incapable regularly of pursuing any substantially gainful occupation.

[15] The General Division decision also states that the Applicant found some treatments helpful but that she could not afford some of them (para. 44). The General Division decision then stated, "The Tribunal is aware that financial hardship is not relevant to a finding of disability. Furthermore, there are treatment options that the Applicant is yet to access which could further help her in managing her conditions." Where the General Division finds that an Applicant has not been compliant with treatment, it must analyze whether that lack of compliance impacted the disability status and, if it did, whether that non-compliance was reasonable [see *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA

211]. That analysis is not at all clear from a review of the General Division's decision, which may be an error of law under s. 58(1)(*b*) of the DESDA. It is not clear what authority the General Division relied on in determining that the Applicant's financial circumstances were not relevant to the reasonableness of any lack of treatment compliance.

[16] It is at least arguable that the General Division committed an error of law under s. 58(1)(*b*) of the DESDA in its reliance on the Applicant's part-time employment as evidence that the Applicant's disability is not severe. The General Division noted that capacity "to perform part-time work, modified activities or sedentary occupations may preclude a finding of disability as it is an indication of capacity to work" (para 42). There is no analysis as to whether or why the incapacity could not still be considered "regular" despite the work, and whether the work was "substantially gainful" for the purpose of the CPP [as is required by the decision in *D'Errico v. Canada (Attorney General)*, 2014 FCA 95]. Missing these steps in the legal analysis may constitute an error under s. 58(1)(*b*) of the DESDA.

[17] Given that there are several possible errors here under s. 58(1) of the DESDA, the Appeal Division does not need to consider all the 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 any of the grounds raised in her Application.

[18] If the Applicant continues to rely on arguments that the General Division breached a principle of natural justice, any future submission should address whether an objection to the breach was made at the hearing, and if the Applicant did not object to the breach at the hearing, whether there was an implied waiver of any perceived breach of natural justice [see *Hennessey v. Canada*, 2016 FCA 180, para. 21; *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 461, paras. 204-220; and *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 FCR 371, para. 25].

CONCLUSION

[19] 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