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

Citation: *K. R. v. Minister of Employment and Social Development*, 2017 SSTADIS 758

Tribunal File Number: AD-17-475

BETWEEN:

K. R.

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 20, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant was involved in a workplace accident in October 2011 that resulted in back and hip pain. She went on short-term disability for a few months, until her claim was accepted by Ontario's Workplace Safety and Insurance Board (WSIB). She then returned to work, but her evidence was that she was put in a corner and had nothing to do. The company that she worked for closed its doors in February 2013 and she has not worked since, though WSIB provided her with six months of training on computers and in office administration.

[2] The Applicant applied for a disability pension under the *Canada Pension Plan* in December 2014. Her application was refused by the Respondent, the Minister of Employment and Social Development (Minister), as was her request for reconsideration. She then appealed to the General Division of the Social Security Tribunal of Canada (Tribunal), which held a teleconference hearing in February 2017, but later dismissed her appeal.

[3] In June 2017, the Applicant filed this application requesting leave to appeal with the Tribunal's Appeal Division. For the reasons described below, I have decided to grant leave to appeal.

THE LEGAL FRAMEWORK

[4] The Tribunal is created and governed by the *Department of Employment and Social Development Act* (DESD Act). The DESD Act establishes a number of important differences between the Tribunal's General Division and its Appeal Division.

[5] First, the General Division is required to consider and assess all of the evidence that has been submitted, including new evidence that was not considered by the Minister at the time of its earlier decisions. In contrast, the Appeal Division is generally prohibited from considering any new evidence and is more focused on particular errors that the General Division might have made. More specifically, the Appeal Division can interfere with a General Division decision only if one of the following errors set out in subsection 58(1) of the DESD Act is established (also known as 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.

[6] A second important difference created by the DESD Act is that most appeals before the Appeal Division must follow a two-step process:

a) The first step is known as the application for leave to appeal stage. This is a preliminary step that is intended to filter out those cases that have no reasonable chance of success.[1] The legal test that applicants need to meet at this stage is a low one: Is there any arguable ground upon which the proposed appeal might succeed?[2]

b) If leave to appeal is granted, the file moves on to the second step, which is known as the merits stage. It is at the merits stage that appellants must show that it is more likely than not that the General Division committed at least one of the three possible errors described in subsection 58(1) of the DESD Act. The expression "more likely than not" means that appellants have a higher legal test to meet at the second stage as compared to the first.

[7] This appeal is now at the leave to appeal stage, meaning that the question I have asked myself is whether there is any arguable ground on which the proposed appeal might succeed. It is the Applicant who has the responsibility of showing that this legal test has been met.[3]

ANALYSIS

[8] In her application requesting leave to appeal (AD1), the Applicant submits that the General Division made errors of law and fact. Broadly speaking, the Applicant alleges that the General Division committed errors by

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

a) focusing too much on the period when she stopped working as opposed to the expiration of her minimum qualifying period;

b) failing to recognize a deterioration in the Applicant's condition, as shown by changes to her medications, including the use of opioid-based analgesics;

c) failing to acknowledge the Applicant's functional limitations (such as the inability to do household chores and activities of daily living);

d) misapprehending the Applicant's capacity to work based on the "modified work" that she did and subsequent course that she took;

e) misinterpreting and placing too much emphasis on certain aspects of the medical evidence; and

f) failing to conduct a proper assessment, as required by the Federal Court of Appeal in *Villani v. Canada (Attorney General)*.[4]

[9] By choosing to conduct the hearing by teleconference, the Applicant also submits that the General Division limited her ability to fully present her case (AD1-8).

[10] The Minister has not filed any submissions on the question of whether leave to appeal should be granted.

New Documents

[11] As part of the leave to appeal materials, the Applicant's representative has submitted new documents, including

a) modified work program forms (AD1-14, 15 and 22);

b) a letter dated June 7, 2017, from the Applicant's former union representative (AD1-16);

c) a medical certificate completed by Dr. Csandi in June 2017 (AD1-18);

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[4] 2001 FCA 248.

d) a notice of tax assessment (AD1-19);

e) receipts for prescription medications dating from 2015 and 2017 (AD1-20 and 21); and

f) a job search record (AD1-23).

[12] As already mentioned, the Appeal Division does not normally consider new evidence. While there are some exceptions to this rule, none of those exceptions apply to the facts of this case, and I have not taken any of these new documents into account.[5]

[13] In addition, the Federal Court confirmed in *Belo-Alves v. Canada (Attorney General)*[6] that new evidence is not, in and of itself, a reason for granting leave to appeal.[7]

Alleged Errors of Fact

[14] Based on my review of the General Division decision and of the underlying record, I am satisfied that the possible errors of fact raised by the Applicant are sufficiently made out that an arguable case has been shown under paragraph 58(1)(*c*) of the DESD Act. Leave to appeal is granted accordingly.

[15] In particular, I noted the following examples that give rise to a concern that the General Division might have based its decision on an erroneous finding of fact:

a) On seven occasions the General Division mentioned that the Applicant took Tylenol or Tylenol No. 3 to manage her back pain. At paragraphs 27 and 37, the General Division concluded that Tylenol or Tylenol No. 3 is an effective form of pain relief. Yet in both her oral and documentary evidence (GD2-12 to 14), the Applicant indicated that she had started taking opioid-based analgesics to help manage her pain.

b) At paragraph 29 of its decision, the General Division relied on the Applicant's ability to return to work on modified duties as evidence of her capacity to work. Yet the decision does not mention the Applicant's oral testimony to the effect that these modified duties involved sitting in a corner and doing nothing.

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[5] *Marcia v. Canada (Attorney General)*, 2016 FC 1367; *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[6] 2014 FC 1100.
[7] See also *Tracey*, *supra*; *Canada (Attorney General) v. O'keefe*, 2016 FC 503.

[16] It is well established that the General Division need not refer to every piece of evidence that it has in front of it. Rather, it is presumed to have reviewed all of the evidence.[8] However, the General Division may fall into error if it fails to assess evidence that is sufficiently relevant or ignores important contradictions in the evidence.[9] In my view, leave to appeal should be granted in this case since there is a sufficient concern that the General Division might have overlooked significant evidence or ignored important contradictions in the evidence.

[17] Since I am granting leave on one ground, it is not necessary for me to consider any of the other issues that were raised by the Applicant.[10] Nevertheless, the additional issues raised by the Applicant may be considered at the second step of the proceeding (i.e. the merits stage), as long as they are connected to one of the potential errors under subsection 58(1) of the DESD Act.

[18] It is worth stressing at this point that nothing in this decision prejudges the result of the appeal on its merits. It is at the merits stage that the Applicant will have to show that it is more likely than not that the General Division committed at least one of the errors set out in subsection 58(1) of the DESD Act.

[19] Moving forward, it is noted that the Applicant's application requesting leave to appeal makes some reference to her testimony before the General Division. To the extent that it might be necessary, the recording of the hearing can be requested from the Tribunal. Should any party rely on the recording of the hearing, their submissions must include timestamp references, so that all parties can quickly locate the relevant portions of the recording.

CONCLUSION

[20] The application for leave to appeal is granted. I invite the parties, as part of any further submissions they might file, to consider whether an oral hearing is required and, if so, the appropriate form of hearing (i.e. teleconference, videoconference, or in-person).

Jude Samson
Member, Appeal Division

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[8] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.
[9] *Lee Villeneuve v. Canada (Attorney General)*, 2013 FC 498; *Canada (Minister of Human Resources Development) v. Quesnelle*, 2003 FCA 92; *Canada (Attorney General) v. Ryall*, 2008 FCA 164.
[10] *Mette v. Canada (Attorney General)*, 2016 FCA 276, at paragraph 15.