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

Citation: *D. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 746

Tribunal File Number: AD-17-745

BETWEEN:

D. B.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Valerie Hazlett Parker

Date of Decision: December 18, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant applied for a Canada Pension Plan disability pension and claimed that she was disabled by chronic pain, fibromyalgia, and depression. The Respondent denied the application initially and on reconsideration. She appealed the reconsideration decision to the Social Security Tribunal of Canada (Tribunal). On July 20, 2017, the Tribunal's General Division decided, on the basis of the written record, that the Applicant was not disabled under the *Canada Pension Plan*. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on October 26, 2017. The Applicant had not set out grounds of appeal under the DESD Act in the Application, so the Tribunal wrote to her and requested that she provide this information. On November 27, 2017, she filed a letter that states that she cannot work.

ANALYSIS

[2] The *Department of Employment and Social Development Act* (DESD Act) governs the operation of this Tribunal. According to subsections 56(1) and 58(3) of the DESD Act, an appeal to the Appeal Division may be brought only if leave to appeal is granted, and the Appeal Division must either grant or refuse leave to appeal.

[3] The only grounds of appeal available under the DESD Act are set out in subsection 58(1), namely, that the General Division failed to observe a principle of natural justice, made an error of law, or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it. Subsection 58(2) states that leave to appeal is to be refused if the appeal has no reasonable chance of success.

[4] I must decide whether there are any grounds of appeal under the DESD Act that have a reasonable chance of success on appeal in this matter.

[5] Although the Applicant did not present any grounds of appeal based on an erroneous finding of fact, I am satisfied that the General Division decision may contain such an error. Paragraph 19 of the decision determines that the Applicant's income of $16,202 in 2005

demonstrates that she was gainfully employed at that time. This conclusion was reached without any evidence about the source of this income. In fact, the decision states that the Applicant did not provide any evidence about when she had started or stopped working. This finding of fact that she was gainfully employed may have been made erroneously because important evidence was overlooked or misconstrued. This is a ground of appeal that may have a reasonable chance of success on appeal.

[6] In addition, the decision does not provide reasons for finding that this income was "gainful". Although the term "substantially gainful occupation" is not defined in the *Canada Pension Plan*, the Federal Court of Appeal has considered its meaning and provided factors that are to be considered when deciding this issue (see *Atkinson v. Canada (Attorney General)*, 2014 FCA 187, for example). Also, the *Canada Pension Plan Regulations* define this term. Not providing reasons for reaching the conclusion that the income was gainful may be an error of law. This is also a ground of appeal that has a reasonable chance of success on appeal.

[7] Finally, the Applicant wrote in a letter to Service Canada in support of her disability claim that she did not tell her family or doctor about her symptoms because she was afraid of the consequences of doing so (GD2-14). This indicates that there may be other gaps in the Applicant's evidence that would have been addressed had the matter proceeded to an oral hearing instead of a decision based on only the written record. From the reasons given in the decision for choosing to decide the matter on the basis of the written record, it is not clear whether the General Division considered this. The General Division is entitled to deference regarding the choice of form of hearing. In this case, however, the Applicant may not have been able to fully present her case because she was not given an opportunity to speak to the Tribunal. This suggests that a principle of natural justice may not have been observed. This deserves further consideration on appeal.

CONCLUSION

[8] The Application is granted for these reasons.

[9] The *Social Security Tribunal Regulations* provide that parties have 45 days from the date that leave to appeal is granted to file written submissions. The parties are not limited to

addressing the legal issues considered in this decision in their submissions. They are also invited to file submissions about what form the hearing of the appeal should take.

[10] This decision to grant leave to appeal does not presume the result of the appeal on the merits of the case.

Valerie Hazlett Parker
Member, Appeal Division