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

Citation: *A. H. v. Minister of Employment and Social Development*, 2017 SSTADIS 774

Tribunal File Number: AD-17-426

BETWEEN:

A. H.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: December 29, 2017

DECISION AND REASONS

DECISION

Leave to appeal is refused.

OVERVIEW

[1] The Applicant, A. H., who is now 37 years old, was born in Afghanistan and has the equivalent of a grade 10 education. After immigrating to Canada in 2005, she attended English as a Second Language classes and worked for four years in the kitchen and laundry of a nursing home. In early 2014, she sustained a work-related injury to her back. After treatment, she was unable to manage even modified duties and, in November 2014, her employment was terminated.

[2] In September 2016, the Respondent, the Minister of Employment and Social Development (Minister), refused Ms. A. H.'s application for a disability pension under the *Canada Pension Plan* (CPP). The Minister determined that her minimum qualifying period (MQP) will end on December 31, 2019. Although it acknowledged that she has limitations resulting from chronic back pain, it found insufficient evidence that they have prevented her from performing suitable work within her functional limitations.

[3] Ms. A. H. appealed the Minister's refusal to the General Division of the Social Security Tribunal of Canada (Tribunal). On May 1, 2017, the General Division convened a hearing by videoconference but ultimately found that Ms. A. H. had not demonstrated a severe disability, nor had she fulfilled her obligation to seek alternative employment that would be better suited to her physical limitations.

GROUNDS OF APPEAL

[4] The General Division issued its decision on May 15, 2017. On June 2, 2017, Ms. A. H. requested leave to appeal[1] from the Tribunal's Appeal Division, insisting that she could not

[1] Ms. A. H. requested leave to appeal using the incorrect form, although Tribunal staff never cited this as a reason to reject her application.

work because of back pain. In a letter dated June 7, 2017, Tribunal staff asked Ms. A. H. to provide additional reasons for her appeal, and she responded by again reiterating her pain. This cycle repeated itself five more times over the next three months, with Tribunal staff repeatedly sending out the same form letter informing Ms. A. H. that her reasons for appeal were deficient, and her responding with another assertion of her disability. The record also shows that Ms. A. H. made at least 10 telephone calls to the Tribunal seeking clarification and assistance in complying with what was demanded of her. Finally, on September 21, 2017, Ms. A. H., with the help of a legal clinic, filed the following written submissions:

(a) The General Division[2] failed to consider all of the medical evidence, selectively focusing on facts that supported the Minister's position while ignoring others that supported hers. In particular, the General Division based its decision on Ms. A. H.'s statement that she could drive 20-30 minutes, without referring to other evidence that qualified that fact.

(b) The General Division incorrectly stated that there was no mention in the file of her undertaking a home exercise program. In fact, she had been doing exercises as directed by her doctor.

(c) The General Division erred in stating that that there was "no indication on file that [she] attempted other appropriate work." In fact, she did return to her job at the laundry, but was unable to cope with modified duties.

[5] At this point, Tribunal staff declared Ms. A. H.'s application requesting leave to appeal complete. Although her application was deemed late, I am satisfied that, in fact, Ms. A. H. did meet the 90-day filing deadline specified in paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA). Upon receipt of her initial request for leave to appeal, Tribunal staff advised the Applicant that her stated reasons for appeal were deficient—and that may have been true for the purpose of determining whether to grant leave to appeal, but not for the purpose of merely registering the application for leave to appeal as

[2] Ms. A. H.'s letter refers repeatedly to errors in the "reconsideration decision," which is, in proper terms, a document prepared by the Minister that denied the Applicant's claim for a second time on September 6, 2016 (GD2-5). For the purpose of this decision, I will assume that the Applicant's grounds of appeal are directed toward the General Division's decision.

complete. The former, according to subsection 58(2) of the DESDA, requires an applicant to show that their grounds of appeal stand a "reasonable chance of success" and must be adjudicated by a member of the Appeal Division; the latter, according to paragraph 40(1)(*c*) of the *Social Security Tribunal Regulations* (SST Regulations), requires only "grounds for the application." It does not say anything about the quality of those grounds, nor does it require strict compliance with the requirements of subsection 58(2) of the DESDA. By that minimal standard, Ms. A. H.'s grounds of appeal, however terse or unsophisticated they may have been, fulfilled the filing requirements set out in the SST Regulations.

[6] That said, having reviewed the General Division's decision against the underlying record, I have concluded that Ms. A. H. has not advanced any grounds of appeal that would have a reasonable chance of success.

ISSUES

[7] According to section 58 of the DESDA, there are only three valid grounds of appeal to the Appeal Division: The General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material. An appeal may be brought only if the Appeal Division first grants leave to appeal,[3] but the Appeal Division must first be satisfied that the appeal has a reasonable chance of success.[4] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[5]

[8] My task is to determine whether any of the grounds that Ms. A. H. has put forward fall into the categories specified in subsection 58(1) of the DESDA and whether any of them would have a reasonable chance of success on appeal.

[3] DESDA at subsections 56(1) and 58(3).
[4] *Ibid*. at subsection 58(1).
[5] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

ANALYSIS

[9] It must be said that Ms. A. H.'s initial submissions were little more than a recapitulation of evidence and argument that had already been presented to the General Division. She did not identify how, in coming to its decision, the General Division failed to observe a principle of natural justice, committed an error of law or relied on an erroneous finding of fact. In the absence of detailed reasons, her grounds of appeal were so broad as to amount to a request to retry the entire claim—something that is beyond the Appeal Division's jurisdiction.

[10] As noted, Ms. A. H. has since submitted grounds of appeal that make specific allegations of error on the part of the General Division.

(a) Did the General Division consider evidence that qualified Ms. A. H.'s capacity to drive for up to 30 minutes?

[11] Ms. A. H. concedes that, in her disability questionnaire, she disclosed a capacity to drive for 20–30 minutes, but alleges that the General Division ignored other statements in which she qualified that capacity. She also presented evidence before the General Division that she was unable to get out of her car easily and that her back pain—and thus her ability to drive—varied day by day.

[12] I do not see an arguable case on this ground. An administrative tribunal charged with finding fact is presumed to have considered all of the evidence, even if it has not explicitly referred to each and every item of it in its reasons. While the General Division mentioned Ms. A. H.'s continued driving in paragraphs 7 and 23 of its decision, these references came in the sections that simply summarized documentary and oral evidence. However, in its analysis proper, the General Division made no reference to driving, suggesting to me that it played little, if any, role in its reasoning. Since it does not appear that the General Division based its decision on Ms. A. H.'s continuing ability to drive, its failure to address extenuating circumstances is similarly immaterial.

(b) Did the General Division disregard evidence that Ms. A. H. undertook an exercise program?

[13] Ms. A. H. alleges that the General Division drew an adverse inference from a finding that she had failed to follow her doctor's recommendation to exercise. Here, too, I see no arguable case. Paragraph 19 of its decision makes it clear that the General Division was cognizant of the Applicant's evidence that she tries to follow medical advice to stay physically active: "She also goes to the gym every second day to do exercises." In addition, her exercise, or lack of it, appears to have played no part in the General Division's reasoning.

(c) Did the General Division ignore Ms. A. H.'s attempts to perform modified duties?

[14] The Applicant alleges that the General Division ignored, or mischaracterized, her ultimately unsuccessful attempts to return to work.

[15] I see no arguable case on this ground. Jurisprudence[6] has imposed a duty on CPP disability claimants to make reasonable attempts to seek work within their limitations, provided that they have residual capacity. Accordingly, a trier of fact may be permitted to draw an adverse inference if there is evidence that the claimant has not investigated suitable alternative employment.

[16] In this case, Ms. A. H. alleges that the General Division overlooked her 2014 return to modified duties in the laundry room, but paragraph 17 of its decision makes explicit reference to this effort:

> She tried modified work just cleaning and shorter hours but could not do it. Her doctor finally told her she could only do an easy job, but there were no easy jobs at the nursing home and they sent her home.

[17] The law requires disability claimants to make a reasonable effort to seek out suitable work. The General Division went on to find that Ms. A. H. was not physically capable of returning to her former physically demanding job, although it noted that she had been found fit for sedentary or light work by both Dr. Kortbeck and Dr. Ahmed. It was aware that her former employer could not offer modified duties on a permanent basis and found that an abortive

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[6] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

attempt to clean a building during a week in August 2016 appeared “to be more physical than she could handle and more than sedentary […]” However, it concluded that, even with her limited education and lack of facility in English, she was not prevented from all forms of work and had not sufficiently investigated alternative vocational opportunities.

[18] In all, I fail to see any error in how the General Division applied the law to the facts in this situation.

CONCLUSION

[19] Since Ms. A. H. has not identified any grounds of appeal under subsection 58(1) of the DESDA that would have a reasonable chance of success on appeal, the application for leave to appeal is refused.

Member, Appeal Division