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

Citation: *L. R. v. Minister of Employment and Social Development*, 2018 SST 81

Tribunal File Number: AD-17-517

BETWEEN:

L. 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: January 29, 2018

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal is granted.

INTRODUCTION

[2] The Applicant's application for a disability pension under the *Canada Pension Plan* (CPP) is based on numerous health issues, including rheumatoid arthritis, chronic pain syndrome, fibromyalgia, irritable bowel syndrome, dyslipidemia, hepatic steatosis, hypertension, and endometriosis, along with related sensory and physical impairments (GD2-102 to 106). She last worked as a case subjects records and electronic file clerk until April 2013 and completed her application for a disability pension in July 2014, but says that she was unable to submit it until October 2014 (GD2-47 to 53).

[3] The Applicant's CPP disability application was denied by the Respondent, the Minister of Employment and Social Development, as was her request for reconsideration. She then appealed to the Tribunal's General Division, which scheduled a teleconference hearing for December 2016 (GD0). However, in an email to the Tribunal on the day of the hearing, the Applicant explained that she had encountered technical difficulties and was unable to join the teleconference (GD9). Based on this email from the Applicant, the General Division decided in February 2017 that it would dispense with an oral hearing and make a decision on the basis of the documents and submissions already filed (GD0A). Then, in April 2017, the General Division dismissed the appeal (AD1A).

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

ANALYSIS

The Relevant Legal Framework

[5] The Tribunal is 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.

[6] First, the General Division is required to consider and assess all of the evidence that has been submitted, where the Appeal Division is more focused on particular errors that the General Division might have made. More specifically, the Appeal Division can modify or overturn 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.

[7] A second important difference set out in 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

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[1] DESD Act, at subsection 58(2).

[2] *Osaj v. Canada (Attorney General)*, 2016 FC 115, at paragraph 12; *Ingram v. Canada (Attorney General)*, 2017 FC 259, at paragraph 16.

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.

[8] 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]

Is there an arguable ground on which the proposed appeal might succeed? Yes.

[9] In her application requesting leave to appeal, the Applicant submits that the General Division breached the principles of natural justice and made numerous errors of fact and law (AD1). Many of these alleged errors, including ones with respect to the Applicant's age, reasons why she stopped working, title of the last job that she held, and summary of the submissions in support of her application, are set out in an annotated version of the General Division's decision (AD1-13 to 20). For the purposes of this leave to appeal decision, however, I need only focus on a few of the alleged errors.

[10] At paragraphs 12 to 19 of its decision, the General Division summarized some of the medical evidence dated between October 2013 and September 2014. While the General Division did consider some of the medical evidence that was prepared after the expiration of the Applicant's minimum qualifying period (MQP), it then concluded as follows (at paragraph 20): "Additional information is contained in the file, but it is dated after the [Applicant's] MQP and was therefore not relevant to the matter at hand."

[11] In contrast, the Applicant argues that all of the medical evidence is relevant and that there is even medical evidence from before the MQP that was overlooked (see, for example, the X-ray report from May 2010 at page GD2-96). Specifically, the Applicant explained in some detail at pages GD2-103 to 108 (and in many handwritten letters) how most or all of the symptoms that prevent her from working have been present since before the expiration of her MQP. However, she also explained that she had been delayed in getting medical proof of some

[3] *Tracey v. Canada (Attorney General)*, 2015 FC 1300, at paragraph 31; *Griffin v. Canada (Attorney General)*, 2016 FC 874, at paragraph 20.

of these conditions due to her inability to access medical services, either because of the long waiting lists in New Brunswick or because she was unable to find a family doctor after moving from X to X. And since the trip from X to X is approximately 450 km in each direction, she was unable to see her family doctor on a regular basis. Nevertheless, she had several Emergency Department visits that corroborate the severity of her symptoms (e.g. GD1-60 to 64, GD2-86 to 87, and GD2-89).

[12] In the face of the Applicant's explanations, I find that there is an arguable case that the General Division might have erred by excluding certain medical documents simply because they were prepared after the Applicant's MQP. As a result, the appeal has a reasonable chance of success and leave to appeal is granted accordingly.

[13] Since I am granting leave on this ground, it is not necessary for me to consider any of the other issues that were raised by the Applicant, though all may be considered at the second step of the proceeding (i.e. the merits stage).[4]

[14] That said, to complement the grounds raised by the Applicant, I would also invite the parties to make submissions on whether the General Division might have erred in law or breached a principle of natural justice when it decided against holding an oral hearing in this case. In particular, I note

a) that the General Division seems not to have accepted the Applicant's evidence in its entirely, but repeatedly wrote that credibility was not a prevailing issue in the appeal (GD0, GD0A, and AD1A-2);

b) the General Division's seemingly contradictory findings on whether there were gaps in the information on file or a need to clarify that information (compare GD0 to GD0A and AD1A-2);

c) that the General Division might have misunderstood the Applicant's email of December 21, 2016 (GD9); and

[4] *Mette v. Canada (Attorney General)*, 2016 FCA 276, at paragraph 15.

d) assertions made by the Applicant in her letter dated November 7, 2016, that she had things she wanted to clarify and explain at the hearing (because she could not do so in writing) and that she also intended for her daughter to give evidence at the hearing (GD8-2 and 7).

[15] 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.

CONCLUSION

[16] The application for leave to appeal is granted. I invite the parties, as part of any further submissions, to also 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