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

Citation: *D. P. v. Minister of Employment and Social Development,* 2018 SST 73

Tribunal File Number: AD-17-453

BETWEEN:

D. P.

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 25, 2018

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

INTRODUCTION

[2] It is not disputed that the Applicant suffers from a serious bipolar disorder that is largely resistant to pharmacological treatment. She stopped working in March 2013 and applied for a disability pension under the *Canada Pension Plan* (CPP) in March 2016, but her application was denied by the Respondent, the Minister of Employment and Social Development (Minister).

[3] In a nutshell, the Minister did not assess the Applicant's state of health or impairment. Rather, the Minister noted that the Applicant had been receiving a CPP retirement pension since October 2014 and that the CPP does not allow a person to receive both a retirement pension and a disability pension at the same time.[1] In addition, since the Applicant's application for a disability pension was received more than 15 months after the start of her retirement pension, there was no way of converting her retirement pension into a disability pension.[2]

[4] The Applicant then appealed the Minister's decision to the Tribunal's General Division, which found evidence in the record suggesting that the Applicant might have been incapacitated for at least part of the time between the start of her retirement pension and the date of application for her disability pension. The General Division correctly recognized that the CPP's so-called "incapacity provisions" might have been of assistance to the Applicant, since they sometimes allow it to deem that an application for a disability pension has been made from an earlier date.[3]

[5] As a result, the General Division held a teleconference hearing, the focus of which was to assess whether the Applicant might have been incapacitated during the relevant time.[4] Both the Applicant and her psychiatrist, Dr. Siddhartha, gave evidence at the hearing.

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[1] CPP at paragraph 44(1)(*b*) and subsection 70(3).
[2] CPP at paragraph 42(2)(*b*) and subsections 66.1(1) to (1.1); *Canada Pension Plan Regulations* at subsection 46.2(2). See also the Minister's submissions to the General Division at GD5.
[3] CPP at subsections 60(8) to (10).
[4] General Division decision at paragraph 2.

[6] In the end, however, the General Division concluded that the legal test relating to incapacity is a very high one and that the Applicant was able to show that she met that test only for the period from January 6 to 19, 2015. The appeal was dismissed, since this period could not be used to deem that the Applicant's application for a disability pension had been received before March 2016.

[7] In June 2017, the Applicant filed this application requesting leave to appeal to the Tribunal's Appeal Division. For the reasons described below, I have decided that leave to appeal must be refused.

ANALYSIS

The Legal Framework

[8] 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.

[9] 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.

[10] 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.[5] 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?[6]

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.

[11] 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.[7]

Are there any arguable grounds on which the proposed appeal might succeed? No.

[12] The Applicant does not have a legal representative and suffers from depression, confusion, and difficulty concentrating, all of which can make it difficult to tease out the arguments that she is trying to advance, including in her application requesting leave to appeal (AD1). As a result, the Tribunal sent letters to the Applicant on June 16 and October 24, 2017, asking her for more information on her grounds of appeal. She responded to those letters on July 14 and December 1, 2017 (AD1A and AD1B).

[13] In several places, the Applicant refers to a credit split that she had applied for, cancelled, and then applied for again. This issue was not considered by the General Division

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[5] DESD Act at subsection 58(2).

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

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

and I too have trouble understanding how it relates to the issue at hand. The main points that the Applicant seems to be making are that

a) at the time of applying for her CPP retirement pension, she was unaware of the need to apply for her CPP disability pension within 15 months; and

b) there is additional evidence that the General Division did not consider, since she had forgotten that she had been previously seen by mental health professionals in Alberta.

[14] Though I do not agree with the precise manner in which the General Division expressed itself, it dealt with the Applicant's lack of knowledge regarding the availability of CPP disability benefits at paragraph 41 of its decision. The Applicant has not raised an arguable ground on which this part of the appeal might succeed. Indeed, the Federal Court of Appeal has made clear that not knowing about the CPP disability pension is not the same as having an incapacity (i.e. being incapable of forming or expressing an intention to make an application, as required by subsection 60(9) of the CPP).[8]

[15] In support of her second argument, the Applicant has filed clinical notes from Drs. Berhe and Low (psychiatrists), Dr. Miller (family physician), and Ms. Page (registered psychiatric nurse), all of which cover the period from April to October 2014 (AD1-7 to 18). The Applicant has also provided a letter dated June 5, 2017, from her current psychiatrist, Dr. Siddhartha, in which he writes (at AD1-19): "I understand that [the Applicant] could not apply for her Canada Disability Pension between 2014 and 2016."

[16] The Appeal Division's role, as set out in subsection 58(1) of the DESD Act, is sufficiently narrow that new evidence is normally irrelevant to the assessment that the Appeal Division must undertake. While there are some exceptions to the rule against considering new evidence, none of those exceptions apply to the facts of this case, and I have not taken these additional documents into account.[9]

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[8] *McDonald v. Canada (Attorney General)*, 2013 FCA 37.
[9] *Marcia v. Canada (Attorney General)*, 2016 FC 1367; *Paradis v. Canada (Attorney General)*, 2016 FC 1282.

[17] Furthermore, the Federal Court has confirmed that new evidence is not, in and of itself, a reason for granting leave to appeal.[10]

CONCLUSION

[18] Although I have great sympathy for the Applicant and have little doubt that she has a serious psychiatric disorder, I have concluded that none of the arguments that she has raised amount to an arguable ground upon which the proposed appeal might succeed.

[19] Nevertheless, I am mindful of Federal Court decisions in which the Appeal Division has been told that it should go beyond the four corners of the written materials and consider whether the General Division might have misconstrued or failed to properly account for any of the evidence.[11]

[20] After reviewing the underlying record, listening to the recording of the hearing, and examining the decision under appeal, I am satisfied that the General Division neither overlooked nor misconstrued relevant evidence. In my view, the General Division accurately summarized the key aspects of the evidence and explained why the Applicant did not meet the legal test for showing that she was incapacitated, except for during a brief period. That said, I do have some concerns about the General Division's decision to embark on an assessment of the Applicant's incapacity without a prior decision by, or proper notice to, the Minister on this issue. Those concerns, however, are of no assistance to the Applicant.

[21] As a result, the application for leave to appeal is refused.

Jude Samson
Member, Appeal Division

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[10] *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100, at paragraph 73. See also *Tracey*, *supra*, at paragraphs 28–29; *Canada (Attorney General) v. O'Keefe*, 2016 FC 503, at paragraph 28.

[11] *Karadeolian v. Canada (Attorney General)*, 2016 FC 615, at paragraph 10; *Griffin*, *supra*, at paragraph 20.