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

Citation: *M. B. v. Minister of Employment and Social Development*, 2018 SST 498

Tribunal File Number: AD-17-375

BETWEEN:

M. B.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Kate Sellar

Date of Decision: May 7, 2018

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] M. B. (Claimant), has a Grade 12 education. She worked as a waitress, a truck driver, and then a forklift driver in various factories. She said that she was no longer able to work as of May 1, 2012, due to a blocked artery in her leg, shortness of breath, irritable bowel syndrome, high blood pressure, anxiety, and depression. She worked on an assembly line in the automotive industry for four months in 2013, until she was laid off.

[3] The Claimant applied for a disability pension under the *Canada Pension Plan*, but the Minister denied her application both initially and upon reconsideration. She appealed to this Tribunal, and the General Division dismissed her appeal in February 2017. The General Division found that although the Claimant experiences some limitations, she did not prove on a balance of probabilities that she had a severe disability on or before the end of her minimum qualifying period (MQP).

[4] The Claimant requests leave to appeal the General Division decision. The Appeal Division must decide whether it is at least arguable that there are any errors in the General Division decision such that leave can be granted to the Claimant.

[5] There is no arguable case for error in the General Division decision, and the application for leave to appeal is refused.

PRELIMINARY ISSUE

[6] In support of her application for leave to appeal, the Claimant provided the Tribunal with additional evidence on three occasions. First, she provided evidence of an appointment for a medical test in the fall of 2017. She later provided a series of medical documents dated between 2008 and 2016. The Claimant argues that her evidence at the hearing before the General Division about the impact of her irritable bowel syndrome on her ability to work is better understood

through some of these documents. Finally, she provided a series of medical documents from the summer of 2017 (after the General Division decision). The Appeal Division cannot grant leave to appeal on the basis of new evidence.[1] With regard to granting leave to appeal, the Appeal Division is limited to the three grounds of appeal.[2] The Appeal Division can admit new evidence to support a ground of appeal in some instances,[3] but that is not the case here.

[7] The Claimant states that there may have been evidence that was not before the General Division at the time of her hearing due to delays on the part of her specialist. The Appeal Division's role is not to provide the Claimant with a new hearing on all of the issues using new evidence that she has gathered after the hearing. The Appeal Division considers whether the General Division has made any errors[4] that require review. The Claimant's challenge in terms of getting medical evidence before the General Division in time for the hearing (as a result of delays on the part of her specialist) is not connected to any possible error by the General Division in this case, so it cannot form the basis for an appeal to the Appeal Division.

ISSUES

1. Is there an arguable case that the General Division made an error of fact in failing to consider any evidence in the record before it?

2. Is there an arguable case that the General Division ignored or misconstrued any evidence in this case?

ANALYSIS

[8] The *Department of Employment and Social Development Act* (DESDA) sets out the only grounds that allow for an appeal of a General Division decision. Subsection 58(1) lists the following three 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;

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[1] *Mette v. Canada (Attorney General)*, 2016 FCA 276
[2] DESDA, s. 58(1); *Canada (Attorney General) v. O'Keefe*, 2016 FC 503; *Marcia v. Canada (Attorney General)*; 2016 FC 1367)
[3] i.e. affidavit support for an alleged error of natural justice that occurred at the General Division level
[4] DESDA, s. 58(1)

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.

[9] At the leave to appeal stage, an applicant has to show that the appeal has a reasonable chance of success. To meet this requirement, the Claimant needs to show only that there is some arguable ground on which the appeal might succeed.[5]

Issue 1: Is there an arguable case that the General Division made an error of fact in failing to consider any evidence in the record before it?

[10] The Claimant has not identified any specific evidence that the General Division had before it—but did not take into account—in reaching its decision. The Appeal Division cannot grant leave to appeal on the basis of the possibility of an error of fact.

[11] The Appeal Division cannot grant leave to appeal on a hypothetical. The Federal Court has found that the Appeal Division made an error when it failed to "articulate in any way what evidence [it] relied upon in deciding that the Respondent had a reasonable chance of success on appeal."[6] The decision to grant leave must point to the evidence that supports that the appeal has a reasonable chance of success.[7]

[12] The Claimant states in her submissions: "I believe there may have been documents not reviewed or not in my file at the time I was doing my hearing over the phone." The Appeal Division provided the Claimant with an opportunity to explain, in writing, which documents she believes the General Division failed to review or consider in making its decision. The Claimant responded by requesting a full copy of her file from the Tribunal. The Tribunal provided the file to the Claimant three months ago. The Claimant has not identified any documents that she thinks the General Division failed to consider in its decision. The time for providing this information has passed.

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[5] *Fancy v. Canada (Attorney General)*, 2010 FCA 63
[6] *Canada (Attorney General) v. Hoffman*, 2015 FC 1348
[7] *Canada (Attorney General) v. Hoffman*, 2015 FC 1348, at para. 44, *Canada (Attorney General) v. Hines*, 2016 FC 112, at para. 48; *Canada (Attorney General) v. O'Keefe*, 2016 FC 503, at para. 40; *Cvetkovski v. Canada (Attorney General)*, 2017 FC 193, at para. 48

[13] The Claimant has not pointed to the documents she says the General Division failed to consider in reaching its decision. She has not provided any argument that supports the idea that the appeal has a reasonable chance of success on this ground, and so the Appeal Division cannot grant leave to appeal on this issue.

Issue 2: Is there an arguable case that the General Division ignored or misconstrued any evidence in this case?

[14] An applicant must provide all the evidence and arguments required under s. 58(1) of the DESDA.[8] However, the Appeal Division should go beyond a mechanistic review of the grounds of appeal.[9] The Appeal Division reviewed the record and is satisfied that the General Division did not overlook or misconstrue the evidence.

[15] In determining that the Claimant had capacity for work, the General Division considered both the medical evidence before it (mostly documents from her family physician and reports from cardiovascular surgeon Dr. Pearce) and the Claimant's own testimony about her conditions and treatment. The Claimant's evidence was that she was able to complete her job in 2013 but she was laid off, and that her family physician told her she could return to work in August 2014 after her left leg angioplasty (para. 36). The General Division concluded, based on multiple sources of evidence, that she had capacity for work on or before her MQP, which ended December 31, 2015.

[16] The Claimant's evidence was that she did not look for work after the layoff in 2013, and therefore the Claimant was not able to show that efforts at obtaining and maintaining employment had been unsuccessful by reason of her health condition.[10]

CONCLUSION

[17] The application for leave to appeal is refused.

Kate Sellar
Member, Appeal Division

[8] *Tracey v. Canada (Attorney General)*, 2015 FC 1300
[9] *Karadeolian v. Canada (Attorney General)*, 2016 FC 615
[10] *Inclima v. Canada (Attorney General)*, 2003 FCA 117

REPRESENTATIVES:	M. B., self-represented