Federal Court  Cour fédérale

Date: 20160602

Docket: T-1230-15

Citation: 2016 FC 615

Ottawa, Ontario, June 2, 2016

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

NORITSSA KARADEOLIAN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This application challenges a decision of the Appeal Division of the Social Security Tribunal [Tribunal] which refused the Applicant's leave to appeal from a denial of Canada Pension Plan [CPP] disability benefits made by the General Division under section 58 of the *Department of Employment and Social Development Act*, SC 2005, c 34, [the Act].

I. Background

[2] Ms. Karadeolian was injured in a motor vehicle accident in 1996. According to her submissions, her injuries prevented an immediate return to work but, by the year 2000, she was employed as a seamstress. Between 2005 and 2010, she ironed and hung garments, apparently on a full-time basis. In April 2010, she stopped working due to chronic pain, headaches, and numbness.

[3] Ms. Karadeolian applied for CPP disability benefits in April 2011. Her claim was administratively diminished on October 7, 2011 on the following basis:

> We reviewed all the information and documents in your file including the following reports:
>
> - your application and your questionnaire
> - your family doctor's report dated May 11, 2011, and all accompanying documentation
>
> We recognize that you have identified limitations resulting from neck and arm pain, anxiety and depression. However, the following factors were also considered:
>
> - The information on file indicates you, have a long history of upper back and arm pain. You have been able to work gainfully with this in the past.
> - There is no evidence on file of any severe orthopaedic or neurological problem.
> - We recognize you have ongoing complaints of pain. Comprehensive pain management program was recommended. There is no evidence on file that this has been done.
>
> While you may not be able to do your usual work, we have concluded that you should still be able to do some type of work. Therefore you do not meet the criteria of severe and prolonged.

[4] Ms. Karadeolian unsuccessfully sought a reconsideration of the denial of benefits decision and she then brought an appeal to the General Division. Once again, her claim was denied on the basis that, notwithstanding her medical limitations, she was capable of being retrained for "suitable sedentary work". Her disability was therefore not "severe" and the denial of benefits was upheld.

[5] Ms. Karadeolian then sought leave to appeal to the Tribunal. She asserted that she was incapable of sedentary work. She also maintained that the General Division acted unfairly and, with only one member, was not lawfully constituted.

[6] The Tribunal dismissed the application because Ms. Karadeolian failed to identify a ground of appeal that had a "reasonable chance of success". It is from this decision that this application for relief is brought.

II. Analysis

[7] in *Tracey v Canada*, 2015 FC 1300, 261 ACWS (3d) 505, Justice Sylvie Roussel discussed the standard of review applicable to a leave to appeal decision by the Tribunal. For purposes of this application, I adopt Justice Roussel's analysis as set out below:

> [19] When the SST-AD is determining whether leave to appeal should be granted or denied, it is interpreting its home statute. In contrast with the former scheme which was grounded in common law through jurisprudence, the test to be applied by the SST-AD when determining leave to appeal is now set out in subsection 58(2) of the DESDA. Leave to appeal is refused if the SST-AD is satisfied that the appeal has no reasonable chance of success.
>
> [20] Subsection 58(1) of the DESDA also enumerates the only grounds upon which an appeal can be brought: 1) the General

Division of the Social Security Tribunal [SST-GD] (previously the RT) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; 2) the SST-GD erred in law, whether or not it appears on the face of the record; and 3) the SST-GD based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[21] In my view, the determination of whether an application for leave to appeal has a reasonable chance of success clearly falls within the expertise of the SST-AD, whose ultimate responsibility, if leave is granted, will be to decide the merits of the appeal, which will be reviewable on a standard of reasonableness. As stated in *Atkinson v Canada (Attorney General)* 2014 FCA 187 at para 31 of the decision:

> [31] In my view, the differences between the SST and the PAB's structure, membership and mandate do not diminish the need to apply a deferential standard in reviewing the SST's decisions. One of the SST's mandates is to interpret and apply the CPP and it will encounter this legislation regularly in the course of exercising its functions. Moreover, subsection 64(2) of the DESDA also restricts the type of questions of law or fact that the Tribunal may decide with respect to the CPP, presumably in order to better ensure that the SST is only addressing issues that fall within its expertise. These factors suggest that Parliament intended for the SST to be afforded deference by our Court, as it has greater expertise in interpreting and applying the CPP.

[22] Given that the ultimate decision on appeal is reviewable on a standard of reasonableness, the determination of whether leave to appeal should be granted or denied should also be subject to the same standard of review. Furthermore, I note that in subsection 58(2) of DESDA, Parliament left it to the SST-AD to be "satisfied" that the appeal has a reasonable chance of success. This wording, in my view, further supports the argument that deference should be afforded to the SST-AD's determination of whether leave should be granted.

[23] Finally, I find that the presumption that the standard of review is reasonableness has not been rebutted. The legal questions raised when the SST-AD is applying its home statute in determining whether an appeal has a reasonable chance of success,

> do not fall within the categories of questions to which the correctness standard of review applies, as set out in *Alberta Teachers*, cited above.

[8] It is apparent that the Tribunal applied the correct standard of a "reasonable chance of success" to the question before it. It also reasonably disposed of the grounds advanced in Ms. Karadeolian's application for leave. In particular, it found nothing to support the argument that the dismissal of her claim was made unfairly or that the panel was unlawfully constituted. The Tribunal's assessment of the medical and disability record was then described in the following way:

> [8] Finally, the Applicant set out some of her physical limitations. The General Division decision described the Applicant's limitations and considered them in reaching its decision. The repetition of this information is not a ground of appeal under section 58 of the *Department of Employment and Social Development Act*. If the particular limitations set out in the Application Requesting Leave to Appeal to the Appeal Division were not specifically presented at the General Division hearing, their presentation at this time is not a ground of appeal that has a reasonable chance of success on appeal. Section 58 of the Act sets out the only grounds of appeal that can be considered. The presentation of new evidence is not a ground of appeal that is listed.

[9] In oral argument Ms. Karadeolian's counsel argued that the Tribunal erred by failing to look more deeply into the medical records to identify potential evidentiary errors which might be successfully exploited on appeal. Some allowance was necessary to account for Ms. Karadeolian's limited education and lack of legal sophistication. The difficulty with this argument is that nothing in the nature of a potential evidentiary error was brought forward to the Tribunal by Ms. Karadeolian or to the Court by her counsel.

[10] I do agree that the Tribunal must be wary of mechanistically applying the language of section 58 of the Act when it performs its gatekeeping function. It should not be trapped by the precise grounds for appeal advanced by a self-represented party like Ms. Karadeolian. In cases like this, the Tribunal should examine the medical evidence and compare it to the decision under consideration. If important evidence has been arguably overlooked or possibly misconstrued, leave to appeal should ordinarily be granted notwithstanding the presence of technical deficiencies in the application for leave.

[11] In this case, the General Division thoroughly reviewed Ms. Karadeolian's medical records and found very little support for the assertion she was wholly incapable of working. Indeed, the medical reports appear to have largely ignored the issue of Ms. Karadeolian's employability. In the context of the record presented to the Tribunal, there was nothing to support an argument that the General Division had ignored or misconstrued material evidence or otherwise erred in its evidentiary assessment. To put it bluntly, Ms. Karadeolian's case for a severe and prolonged disability was weak and unconvincing and both the General Division and Tribunal decisions were reasonable.

[12] For the foregoing reasons, this application is dismissed. Appropriately, the Respondent is not seeking costs and none are awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed.

"R.L. Barnes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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