Federal Court  Cour fédérale

Date: 20170306

Docket: T-1157-16

Citation: 2017 FC 259

Ottawa, Ontario, March 6, 2017

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

CAROL INGRAM

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Carol Ingram has brought an application for judicial review under s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of a decision of the Appeal Division of the Social Security Tribunal dated June 13, 2016. The Appeal Division denied her application for leave to appeal a decision of the Tribunal's General Division. The General Division denied Ms. Ingram's application for a disability pension under the Canada Pension Plan [CPP].

[2] For the reasons that follow, I have concluded that the Appeal's Division's dismissal of Ms. Ingram's application for leave to appeal was unreasonable. The application for judicial review is therefore allowed.

II. Background

[1] Ms. Ingram applied for a disability pension in January 2012. The application was denied on July 19, 2012. Her application for reconsideration was denied on December 6, 2012. She appealed to the General Division of the Social Security Tribunal. Her appeal was heard by the General Division on September 8, 2015, and dismissed on October 29, 2015.

[2] The General Division found that the date for Ms. Ingram's minimum qualifying period [MQP] was December 31, 2011. After the hearing, the General Division asked Ms. Ingram to provide an updated Record of Earnings, together with any submissions she wished to make. The information she provided confirmed that Ms. Ingram had earnings and CPP contributions for the years 2013 and 2014, but no earnings in the years 2010, 2011 or 2012. The General Division maintained the initial MQP, but noted that two years of valid earnings would now have to be taken into account.

[3] The General Division found that, if Ms. Ingram had been assessed as of the date of her MQP, there would be "little doubt" that she had a severe disability in 2008, and that she met the requirements for contributory eligibility. However, the General Division continued:

> Her return to work was a result of determined perseverance, medical treatment and mitigation strategies, under painful conditions. She "needed the money" and was prepared to ignore

> and “work through” her pain and the advice of her family doctor who advised her to not work, steel herself up and punish herself with the pain she had described as the recovery reward for her persistence. The Tribunal therefore must decide if this unusually long period of a “back-to-work attempt” was successful and whether or not the earnings of 2012 through 2014 were gainful.

[4] The General Division concluded:

> [53] It is the Tribunal's view that the Appellant's personal characteristics actually work to her advantage in terms of her being employable in the real world which has been demonstrated. She has transferable skills. As a result, the scope of substantially gainful occupations is much broader for the Appellant than would be the case for a much older, less educated Appellant, with limited English or French language skills.
>
> [54] To establish severe disability, Appellants must not only show a serious health problem, but where there is evidence of work capacity after the MQP, (which the Tribunal finds in this case), must also show an effort at obtaining and maintaining employment has been unsuccessful by reason of the health condition. (as per *Inclima v. The Attorney General of Canada*, [2003 FCA 117]). Her gainful work from 2013 into 2015 has demonstrated this capacity. Accordingly, the Tribunal cannot find that her medical conditions amount to a level of severity that meet the CPP disability test.

[5] The General Division found that the test for severity had not been met, and it was therefore unnecessary to consider whether the disability was also prolonged. The General Division dismissed the appeal, and Ms. Ingram sought leave from the Appeal Division to appeal that decision.

III. Decision under Review

[6] The Appeal Division denied Ms. Ingram's application for leave to appeal on June 13, 2016, concluding that her appeal had no reasonable chance of success. The Appeal Division acknowledged that the General Division had placed significant emphasis on Ms. Ingram's earnings in 2013 to 2015 in determining whether she was capable of pursuing substantially gainful employment. Nevertheless, the Appeal Division was satisfied that the General Division had turned its mind to other factors. The Appeal Division concluded as follows:

> Given that the General Division did not focus exclusively on the Applicant's earnings and considered other factors in assessing the severity of her disability, I am not satisfied that the appeal has a reasonable chance of success.

IV. Issue

[7] The sole issued raised by this application for judicial review is whether the Appeal Division's decision to refuse leave to appeal was reasonable.

V. Analysis

[8] Decisions of the Appeal Division of the Social Security Tribunal on applications for leave to appeal involve questions of mixed fact and law, and are subject to review by this Court against the standard of reasonableness (*Tracey v Canada (Attorney General)*, 2015 FC 1300 at para 17 [*Tracey*]; *Jama v Canada (Attorney General)*, 2016 FC 1290 at paras 12-15). The Court will intervene only if the decision falls outside the "range of possible, acceptable outcomes

which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[9] Pursuant to s 44(1)(b) of the *Canada Pension Plan*, RSC 1985, c C-8, a disability pension is paid to a disabled person who (i) is under sixty-five years of age; (ii) does not receive a retirement pension; and (iii) has made valid contributions to the CPP for at least the MQP. A person is considered to be disabled if the person is determined to have a severe and prolonged mental or physical disability (CPP, s 42(2)). A disability is severe if a person is incapable of regularly pursuing any substantially gainful occupation (CPP, s 42(2)(a)(i)). Prior to reforms that were introduced in 2014, the test consistently applied was whether an applicant had "any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation" in a "real world" context (*Villani v Canada (Attorney General)*, 2001 FCA 248 at para 38).

[10] Appeals from the General Division of the Social Security Tribunal to the Appeal Division are governed by the *Department of Employment and Social Development Act*, SC 2005, c 34 [DESDA]. An appeal to the Appeal Division may be made only where the General Division: (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; (b) erred in law in making its decision, whether or not the error appears on the face of the record; or (c) 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 (DESDA, s 58(1); *Canada (Attorney General) v O'keefe*, 2016 FC 503 at para 29). Leave to appeal will be refused where

the Appeal Division is satisfied the appeal has "no reasonable chance of success" (DESDA, s 58(2)).

[11] Ms. Ingram argues that the Appeal Division unreasonably concluded that the General Division applied the correct legal test in finding that she was not disabled. She says the General Division failed to weigh all of the evidence in assessing the severity of her disability. In particular, she says that the General Division focused unduly on her post-MQP earnings and her ability to complete tasks at work, and gave insufficient consideration to the evidence of her medical condition.

[12] The Respondent defends the Appeal Division's decision as reasonable, and says that it properly applied the test to determine the existence of a "reasonable chance of success" (citing *Tracey*; *Canada (Human Resources Development) v Hogervorst*, 2007 FCA 41; *Fancy v Canada (Attorney General)*, 2010 FCA 63 [*Fancy*]). The Respondent maintains that the Appeal Division considered the legal and factual issues presented by Ms. Ingram, and provided a reasonable explanation for its conclusion that the General Division did not rely exclusively on Ms. Ingram's earnings for the years 2013, 2014 and 2015, but also considered the "constellation" of medical issues bearing on her application.

[13] The General Division accepted that Ms. Ingram met the test of severe disability in 2008, that she had no earnings in the years 2010, 2011 or 2012, and only modest earnings in the years 2013 and 2014. The General Division also accepted that she achieved these modest earnings despite "punishing" herself by working through considerable pain, and against the advice of her

family doctor. The General Division also appears to have accepted that Ms. Ingram's medical condition would not improve. It is difficult to reconcile these findings with the General Division's ultimate conclusion that Ms. Ingram's application should be denied because her disability was not sufficiently severe.

[14] The threshold for granting leave to appeal a decision of the General Division is low: "no reasonable chance of success". This has been interpreted to mean that an appellant must demonstrate an "arguable case" (*Fancy* at para 4). In light of the internal inconsistencies of the General Division's decision, and its apparent assumption that Ms. Ingram should continue to ignore the advice of her physician and maintain her employment despite debilitating pain, I find that the Appeal's Division's conclusion that she did not have an arguable appeal was unreasonable.

[15] The application for judicial review is therefore allowed, and the matter is remitted to a differently-constituted panel of the Appeal Division for reconsideration.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, and the matter is remitted to a differently constituted panel of the Appeal Division of the Social Security Tribunal for reconsideration.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1157-16
STYLE OF CAUSE:	CAROL INGRAM v THE ATTORNEY GENERAL OF CANADA
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