Federal Court  Cour fédérale

Date: 20161110

Docket: T-664-16

Citation: 2016 FC 1254

Ottawa, Ontario, November 10, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

KARA JOHNSON

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision dated December 15, 2015 of a member of the Appeal Division of the Social Security Tribunal of Canada [Appeal Division], refusing an application requesting leave to appeal a decision dated August 10, 2015 by the General Division – Income Security Section of the Social Security Tribunal [General Division] to deny the Applicant disability benefits under the *Canada Pension Plan*, RSC 1985, c C-8

[CPP]. The Applicant seeks an order granting the request for leave to appeal to the Appeal Division.

[2] As explained in greater detail below, this application is dismissed because the Appeal Division's decision, refusing leave to appeal on the basis that the Applicant's appeal would not have a reasonable chance of success, is reasonable, falling within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

II. Background

[3] The Applicant, Kara Johnson, last worked as a waitress in a restaurant, from March 1998 until February 7, 2006, and has not worked since. She previously worked as a waitress and marina attendant in a family-owned business from 1985 until 1995.

[4] Ms. Johnson stopped working after she was involved in a motor vehicle accident on February 8, 2006, in which she rear-ended a pick-up truck at 80-90 kilometers per hour. As a result of the accident, Ms. Johnson sustained injuries to her skull, face, jaw, and foot, which required several surgeries. Her evidence is that her symptoms from the accident include headaches, pain and numbness in her back and legs, left foot pain, short term memory loss, confusion and disorientation at times, and depression. She takes pain medication to get through her days and to help with sleep.

[5] Ms. Johnson's position is that she is disabled and incapable of regularly pursuing any substantially gainful occupation on a full-time, part-time, or seasonal basis. She claims her

disability continues and is of indefinite duration. Ms. Johnson applied for CPP disability benefits on February 27, 2012. Her application was denied initially and following a request for reconsideration. She then appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals, and the appeal was transferred to the General Division of the Social Security Tribunal pursuant to section 257 of the *Jobs, Growth and Long-Term Prosperity Act*, SC 2012, c 19.

[6] On August 10, 2015, the General Division issued its decision, dismissing the appeal. The General Division noted that, to receive disability benefits under the CPP, Ms. Johnson was required to establish a severe and prolonged disability on or before the end of the minimum qualifying period [the MQP Date] for which she had made CPP contributions. The parties agreed, and the General Division found, that the MQP Date for Ms. Johnson was December 31, 2007. Having noted that a person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation, the General Division concluded that Ms. Johnson failed to establish such incapability before her MQP Date, December 31, 2007, and continuously thereafter.

[7] Ms. Johnson sought leave to appeal the General Division's decision to the Appeal Division on the ground of appeal prescribed by section 58(1)(c) of the *Department of Employment and Social Development Act*, SC 2005, c 34 [the Act], that the General Division erred by basing 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.

[8] On December 15, 2015, the Appeal Division issued its decision refusing Ms. Johnson's application for leave to appeal, as it found that the General Division did not err as alleged by Ms. Johnson and was therefore not satisfied that the appeal would have a reasonable chance of success.

III. Issues and Standard of Review

[9] Ms. Johnson describes the issue in this application as whether she should be granted leave to appeal the General Division's decision. The Respondent refers to two issues:

A. Should portions of the Applicant's affidavit filed in this judicial review application be struck?

B. Was the Appeal Division's decision refusing the Applicant's application for leave to appeal reasonable?

[10] The Respondent's articulation of the second issue relies on its position that, in reviewing a decision regarding leave to appeal from the General Division of the Social Security Tribunal, the standard of review is reasonableness (see *Tracey v. Canada (Attorney General)*, 2015 FC 1300, at paras 17-23; *Canada (Attorney General) v Hoffman*, 2015 FC 1348, at paras 26 -27). Ms. Johnson has made no submissions on the standard of review. I agree that the authorities cited by the Respondent support the conclusion that the applicable standard of review is reasonableness, and I so find. The Court's role is to consider whether the Appeal Division's decision falls within a range of possible, acceptable outcomes, defensible in respect of the facts and the law (see *Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 47-49).

[11] I therefore adopt the Respondent's articulation of the issues to be decided by the Court in this application.

IV. Analysis

A. *Should portions of the Applicant's affidavit filed in this judicial review application be struck?*

[12] The Respondent submits that portions of Ms. Johnson's affidavit, specifically paragraphs 7, 11-12, and 16-18, should be struck as they contain opinions and arguments. The Respondent relies on the reasoning of the Federal Court of Appeal in *Canada (Attorney General) v Quadrini*, 2010 FCA 47, at para 18, for the position that an affidavit is to be confined to facts and should not include opinion or argument.

[13] Ms. Johnson concurs that paragraphs 7 and 11 of her affidavit represent opinions, but her position is that paragraphs 12 and 16 to 18 of her affidavit represent a combination of facts and opinions, and she leaves it to the Court to address the affidavit appropriately.

[14] As noted by the Respondent, the impugned paragraphs of the affidavit, or at least the substance thereof, are reproduced in Ms. Johnson's Memorandum of Fact and Law filed in this judicial review. Therefore, while the impugned paragraphs contain some material that is not appropriate for an affidavit, the arguments contained therein are properly before the Court through Ms. Johnson's written submissions. In reliance on *Zurita Vallejos v. Canada (Citizenship and Immigration)*, 2009 FC 289, at paras 16 to 17, I give no weight to paragraphs 7,

11, and 12, and the last sentence of each of paragraphs 16 and 18 (all of which I find to represent argument or expressions of opinion). However, given the reproduction of these arguments in Ms. Johnson's written submissions, my decision on this issue does not adversely affect Ms. Johnson's ability to advance her arguments in full in this judicial review.

B. *Was the Appeal Division's decision refusing the Applicant's application for leave to appeal reasonable?*

[15] Ms. Johnson explained that her main argument in challenging the Appeal Division's decision is that the General Division and Appeal Division both erred in determining that her back injury was not a result of the motor vehicle accident. She submits that she did not have back issues prior to the accident and that it was not until her participation in a work hardening program following the accident that she began experiencing back pain. The work hardening program began in July 2008, and she began to notice back pain in September 2008, approximately 8 months after her MQP Date. She also notes that the record includes CT scan results from September 3, 2010 which indicate a prominent bulging/herniated disc at L4 – L5. Ms. Johnson submits that that her back injury must have been caused by the accident and that, if she had started the work hardening program earlier, she would have discovered the injury prior to the MQP Date.

[16] The Appeal Division's decision demonstrates that it considered this argument. However, it noted that, based on Ms. Johnson's own testimony, she did not suffer from back pain on or before the MQP Date. The Appeal Division also considered the CT scan results and found that the General Division did not dispute these findings. Rather, the General Division concluded that

the findings came too far after the MQP Date to establish that Ms. Johnson had a disability that was severe and prolonged on or before the MQP Date. The Appeal Division therefore found that the General Division did not err in this aspect of its decision.

[17] As noted above, the Court's role is to consider whether the Appeal Division's decision was reasonable, in considering whether Ms. Johnson had a reasonable chance of success in arguing under section 58(1)(c) of the Act that the General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it. The Appeal Division's decision demonstrates that it considered Ms. Johnson's argument but found no such error by the General Division. I agree with the Respondent's position that Ms. Johnson was asking the Appeal Division to reweigh the evidence related to her back injury and is again asking the Court to reweigh this evidence in this judicial review. This is not the role of either the Appeal Division or the Court. I find that the Appeal Division's analysis falls within a range of possible, acceptable outcomes, defensible in respect of the facts and the law, and is therefore reasonable.

[18] While referring to this next argument as a more minor point, Ms. Johnson also submits that the Appeal Division should have recognized an error by the General Division in concluding that there were inconsistencies in her answers in a questionnaire she submitted in support of her application and her answers at the hearing before the General Division. This argument is based on the following portion of paragraph 10 of the General Division's decision:

> [10] … She indicated in the Questionnaire for Disability Benefits (Questionnaire) dated February 22, 2012, the impairments that prevent her from working were degenerative disc disease, facet joint disease, chronic back pain, headaches, and jaw pain. She

> testified the main reason she has been unable to work since February 8, 2006, is low back pain and cognitive difficulties.

[19] Ms. Johnson submits that her answers, in the questionnaire and at the hearing, were not inconsistent. She refers to her evidence that she suffered from "multiple head injuries" and argues that the Appeal Division erred in finding that the General Division's omission of this item from the above paragraph was not material. Ms. Johnson's argument is that the omission is material, because credibility is essential in cases involving disability benefits, and inconsistencies in an applicant's evidence raise credibility concerns.

[20] In considering this argument by Ms. Johnson in her application for leave to appeal, the Appeal Division noted that the General Division referred to headaches in paragraph 10 of its decision and was not persuaded that the omission of a specific reference to "multiple head injuries" was an omission material enough to invoke the application of section 58(1)(c) of the Act. The Appeal Division also expressed the view that paragraph 10 was no more than a recitation of the conditions that Ms. Johnson either stated or testified prevented her from working. It found that there was no inconsistency.

[21] I note that paragraph 10 of the General Division's decision does not describe Ms. Johnson's questionnaire and testimony as being inconsistent. Nor does it make an adverse credibility finding. I consider the Appeal Division to have reached a reasonable conclusion in interpreting that paragraph as merely reciting the list of conditions identified by Ms. Johnson in her questionnaire and testimony. I also find that the Appeal Division reasonably concluded that the omission of "multiple head injuries" from the list in paragraph 10 is immaterial, given the

General Division's reference to headaches. Based on the record, I see no support for Ms. Johnson's argument that that the Appeal Division overlooked an erroneous negative credibility determination by the General Division.

[22] Finally, Ms. Johnson notes that the General Division's decision was based in part on a conclusion as to the conservative nature of her treatment. She argues that the treatment she undertook was prescribed by her insurance company and her physicians and other advisors identified by the insurer. Her position is that this treatment was extensive, that she followed it, and that it was therefore an error to conclude on this basis that she did not have a severe disability.

[23] I must again agree with the Respondent's position that, in advancing this argument, Ms. Johnson is asking that the evidence before the General Division be re-weighed. In her Memorandum of Fact and Law, her submissions on this argument focus in particular upon the General Division's reference to the absence of treatment such as cognitive behavioural therapy. She argues that she received treatment for her cognitive issues from the case manager appointed by her insurer and that the General Division erred in failing to recognize such treatment.

[24] The Appeal Division considered this argument and noted in particular a psychiatric assessment performed upon Ms. Johnson and the reports of her occupational therapist. The Appeal Division was not persuaded that the General Division had erred when it concluded that Ms. Johnson had not participated in cognitive behavioural therapy sessions, and therefore was not satisfied that this ground of appeal would have a reasonable chance of success.

[25] The Respondent argues that cognitive behavioural therapy is a specific form of treatment and that, notwithstanding references in the record to discussion of cognitive strategies between Ms. Johnson and her occupational therapist, it was reasonable for the Appeal Division to conclude that the General Division did not err in stating that Ms. Johnson had not undergone cognitive behavioural therapy. Ms. Johnson has not adduced evidence as to what cognitive behavioural therapy entails. The record before the Court does not support a conclusion that the Appeal Division reached an unreasonable decision, outside the range of possible acceptable outcomes, when it found that this ground of appeal would not have a reasonable chance of success.

[26] Having round no reviewable error by the Appeal Division, this application for judicial review must be dismissed. Neither party has claimed costs, and none are awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, with no order as to costs.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-664-16
STYLE OF CAUSE:	KARA JOHNSON v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	WINDSOR, ONTARIO
DATE OF HEARING:	OCTOBER 31, 2016
JUDGMENT AND REASONS:	SOUTHCOTT, J.
DATED:	NOVEMBER 10, 2016

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