Federal Court  Cour fédérale

Date: 20190227

Docket: T-105-18

Citation: 2019 FC 237

Ottawa, Ontario, February 27, 2019

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ANDREA JAN THOMSON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] On August 21, 2017, the General Division of the Social Security Tribunal (the "General Division") awarded Andrea Jan Thomson (the "Applicant") disability pension benefits. In rendering this decision, the General Division decided that, as of January 2017, the Applicant's fibromyalgia was a severe and prolonged disability. The Applicant believed that the General Division should have found she was disabled at a date prior to January 2017 and appealed the decision. The Applicant's appeal to the Appeal Division of the Social Security Tribunal (the

"Appeal Division") was dismissed. On January 18, 2018 the Applicant applied to this Court for judicial review of this decision. For the reasons that follow, I am dismissing this application.

II. **Facts**

[2] The Applicant is a self-represented litigant who lives in Fillmore, Saskatchewan. She is a single mother (the children's father is deceased) of four daughters. Until recently, she supported her family by running a small daycare, but the Applicant no longer runs the daycare because she suffers from painful fibromyalgia symptoms. She believes that her fibromyalgia was triggered on December 23, 2008, when she came upon the scene of the car crash that killed her father. She says that since September 2009 she has experienced a stabbing pain that spreads throughout her entire body. In addition, she experiences sensitivity to touch, muscle and joint stiffness, balance problems, environmental sensitivity (weather, sounds, and smells can all leave her nauseous or in pain), and feels fatigued while doing simple tasks such as holding a phone. The Applicant says that sometimes her pain is so severe that she attends the hospital emergency room for morphine.

[3] The Applicant applied twice for a disability pension under the *Canada Pension Plan*, RSC, 1985, c C-8 ("CPP"). The Applicant made her first application on April 7, 2014, and it was denied by a Service Canada Medical Adjudicator on June 24, 2014. The Applicant asked for reconsideration of that decision, but on September 11, 2014 this reconsideration request was rejected.

[4] The Applicant made her second CPP benefits application on November 16, 2015. When this application was denied on February 3, 2016 the Applicant asked for reconsideration of the decision. On May 3, 2016, a Medical Adjudicator rejected this reconsideration request. The Applicant then appealed that decision to the General Division.

[5] The General Division heard the appeal on August 15, 2017. To be successful on appeal, the Applicant needed to prove on a balance of probabilities that she was disabled before or on August 15, 2017 (the date of the hearing) and that she satisfied the definition of "disability" in section 42(2) of the CPP which is set out below:

When person deemed disabled	Personne déclarée invalide
(2) For the purposes of this Act,	(2) Pour l'application de la présente loi :
a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,	a) une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa :
(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and	(i) une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice,
(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and	(ii) une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès;
(b) a person is deemed to have become or to have ceased to be disabled at the time that is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person — including a contributor referred to in subparagraph 44(1)(b)(ii) — be deemed to have become	b) une personne est réputée être devenue ou avoir cessé d'être invalide à la date qui est déterminée, de la manière prescrite, être celle où elle est devenue ou a cessé d'être, selon le cas, invalide, mais en aucun cas une personne — notamment le cotisant visé au

disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.	sous-alinéa 44(1)b)(ii) — n'est réputée être devenue invalide à une date antérieure de plus de quinze mois à la date de la présentation d'une demande à l'égard de laquelle la détermination a été faite.

[6] The General Division reviewed the evidence before it. The Applicant's evidence of her work history was that in 2011 and 2012 her daycare cared for 6 families, in 2013 she cared for 7 families, and in 2014 she cared for 3 families. The General Division also reviewed the evidence of her earnings which showed that the Applicant earned $10,086 in 2011; $9,992 in 2012; $12,086 in 2013; $10,543 in 2014; and $10,593 in 2015.

[7] The Applicant explained that whether she worked full-time or part-time depended on the families' needs. The Applicant stated that other types of work for her are unrealistic because she gets tired easily. In fact, the Applicant said that by January 5, 2017 she could only work 1-2 hours per day due to the pain she was experiencing. As a result, her expected earnings were approximately $6000.00 that year. She noted that she also receives financial assistance to help with her twins' developmental delays, and government grants related to her unlicensed childcare centre.

[8] The Applicant's further evidence included medical reports from doctors. She said that she had attempted all recommended treatments: walking, physiotherapy, chiropractic, occupational therapy, clean eating, acupuncture, and massage. The Applicant also says that she was prescribed Tramadol, but it was ineffective at relieving her pain. Nevertheless, she said that she tried to increase her physical activity by taking aqua aerobics, and attends water therapy once per

year. She also took a cognitive behavioral therapy course where she learned to keep a pain journal.

[9] On August 21, 2017 the General Division allowed the appeal, finding that the Applicant had a severe and prolonged disability in January 2017. The General Division noted that the Applicant fatigues easily, could only work part time, can only care for one child, and will earn $6000.00 (below what it considered substantially gainful work under section 68.1 of the *Canada Pension Plan Regulations*, CRC, c 385). Accordingly, the General Division decided that the Applicant's condition was severe. In addition, the General Division accepted the Applicant's evidence that she has attempted every recommended treatment, and noted that her condition is worsening over time. The General Division determined that the condition was prolonged because there was no evidence to suggest any improvements that would allow the Applicant to regularly pursue a substantially gainful occupation.

[10] The Applicant, dissatisfied with the General Division's decision that she was only disabled as of January 2017 and not earlier, appealed the decision to the Appeal Division. But as the Applicant did not argue any reviewable grounds in her appeal, on November 30, 2017 Service Canada wrote to the Applicant and explained that her appeal was incomplete. The letter also explained she would need to first obtain leave to appeal, and that the Appeal Division's jurisdiction is limited to the three grounds of review in section 58 of the *Department of Employment and Social Development Act*, SC 2005, c 34 (the "DESDA"):

Grounds of appeal	Moyens d'appel
58 (1) The only grounds of appeal are that	58 (1) Les seuls moyens d'appel sont les suivants :
(a) the General Division failed to observe a principle of natural justice or otherwise	a) la division générale n'a pas observé un principe de justice naturelle ou a autrement

acted beyond or refused to exercise its jurisdiction;	excédé ou refusé d'exercer sa compétence;
(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or	b) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;
(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.	c) elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.
Criteria	Critère
(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.	(2) La division d'appel rejette la demande de permission d'en appeler si elle est convaincue que l'appel n'a aucune chance raisonnable de succès.

[11] The Applicant responded in a brief, undated letter that was received by the Appeal Division on December 18, 2017. In this letter she states that she is appealing the General Division's decision under section 58(1)(c) of the DESDA and that she wished her benefits to go back as far as possible, specifically mentioning 2008 or 2009 as retroactive dates.

[12] In its decision dated January 2, 2018, the Appeal Division dismissed the application for leave to appeal, finding that the Applicant did not make any arguments under the grounds for review in section 58 of the DESDA. The Appeal Division went on to review the file, and noted that no medical evidence was on file that addressed the Applicant's disability prior to December 2013. The Appeal Division also noted Dr. Amanda Kleisinger's opinion (dated November 2 , 2015) that the Applicant could work part time if she engaged in certain strength and aerobic activities and would not benefit by going on disability. The Appeal Division also noted Dr.

Wunder's similar opinion (dated April 20, 2016) that the Applicant was not permanently disabled.

[13] The Appeal Division determined that the General Division's finding that the Applicant was capable of regularly pursuing substantially gainful occupation until January 2017 was supported by the evidence. The Appeal Division also noted that under the CPP there is a 15 month statutory limit on deeming disability retroactively. Consequently, the Appeal Division found that the earliest the Applicant could have been deemed disabled was August 2014. Although there is an exception to this limit if it is established that an applicant was continuously incapacitated, the Appeal Division determined the Applicant did not satisfy this exception.

III. **Preliminary Issue**

[14] On judicial review, the record before this Court cannot be supplemented with evidence that was not before the decision maker (*Ochapowace First Nation v Canada (Attorney General)*, 2007 FC 920). The Respondent has rightly argued that the Applicant's affidavit contains evidence that was not before the decision maker, and I will disregard those portions of the affidavit.

IV. **Issue and Standard of Review**

[15] The three grounds of appeal that the Appeal Division may consider in section 58(1) of the DESDA are set out above at paragraph 11, above. According to section 58(2) of the DESDA, the Appeal Division cannot grant leave to appeal when there is no reasonable chance of success. A reasonable chance of success means that there is "some arguable ground upon which the proposed appeal might succeed" (*Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12). Considering that the Appeal Division's decision to deny leave to appeal is reviewed for

reasonableness (*Andrews v Canada (Attorney General)*, 2018 FC 606 at para 17), the issue before me is, therefore, whether the Appeal Division reasonably decided that the Applicant did not have an arguable ground on which she might succeed on appeal.

V. **Analysis**

[16] The Applicant, who is a self-represented litigant, attended Court despite her painful fibromyalgia condition in order to provide her side of the story. I am sympathetic to the Applicant's condition, especially in the circumstances. Her submissions describe her painful experience with fibromyalgia in detail, as well as the difficulty she faces as a single mother (whose father and husband are both deceased) trying to support her family when she is unable to run her daycare. As I will explain, however, there is no legal basis upon which I can interfere with the decision of the Appeal Division.

[17] I recognize that judicial review is often difficult to understand, and so at the hearing I explained to the Applicant that she must point the Court to a reviewable error in the Appeal Division's decision. In response, the Applicant expressed her dissatisfaction with the date the General Division considered her disability to begin at, but she was unable to point this Court to any errors.

[18] The Respondent argued that the Appeal Division decision is reasonable. For example, the Respondent submits that the Appeal Division reasonably found that the General Division's decision was supported by the evidence, did not overlook any evidence, and did not misconstrue any evidence.

[19] The Respondent also pointed out that the Applicant's request to have her benefits retroactively applied to 2008 is impossible due to the 15 month statutory limitation. Although there is an exception to this limitation, this exception only applies when there is evidence that the applicant was incapable of expressing an intention to apply for benefits during the relevant time. On these facts, the Respondent argued that the Applicant's evidence does not establish she was unable to express intention. For example, the evidence is that during the relevant time she ran a daycare and drove a car, thus demonstrating that she was capable of expressing intent as described by the Federal Court of Appeal in *Sedrak v Canada (Social Development)*, 2008 FCA 86 at paras 3-4.

[20] I agree that the Appeal Division reasonably decided that the Applicant's argument would have no reasonable chance of success on appeal, and therefore reasonably refused to grant leave to appeal. There is nothing in the reasons to indicate any error occurred. To the contrary, the reasons are justified, intelligible, transparent and well-supported by the evidence. Again, I appreciate the difficult position that the Applicant is in, but the role of this Court on judicial review is to review the tribunal decision and ensure that the decision is reasonably made. As described above, the Appeal Division reasons are within a range of acceptable outcomes defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). Accordingly, I will dismiss this application for judicial review. Costs were not sought by the Respondent, and none shall be awarded.

VI. **Conclusion**

[21] The application for judicial review is dismissed. There shall be no costs.

JUDGMENT in T-105-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There shall be no costs.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-105-18
STYLE OF CAUSE:	ANDREA JAN THOMSON v ATTORNEY GENERAL OF CANADA
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