Federal Court Cour fédérale

Date: 20191125

Docket: T-20-19

Citation: 2019 FC 1493

Ottawa, Ontario, November 25, 2019

PRESENT: Mr. Justice Boswell

BETWEEN:

PATRICIA GREELEY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Patricia Greeley, has applied for judicial review of a decision of the Appeal Division of the Social Security Tribunal of Canada [SST] dated December 3, 2018. The Appeal Division denied Ms. Greeley leave to appeal a decision of the General Division of the SST because the appeal had no reasonable chance of success.

[2] Ms. Greeley, who represents herself in this proceeding, now asks the Court for an order setting aside the decision of the Appeal Division member and granting leave to appeal the General Division's decision to the Appeal Division. In the alternative, she requests an order setting aside the decision of the Appeal Division member and returning the matter to the Appeal Division for redetermination by a different member, with such directions as the Court may permit. The question for the Court, therefore, is whether the Appeal Division's decision should be set aside.

I. Background

[3] Ms. Greeley applied for a disability pension under the *Canada Pension Plan*, R.S.C., 1985, c. C-8 [*CPP*] in April 2016 due to Parkinson's disease, anxiety, and depression. Service Canada denied her application; initially, in October 2016 and, again, upon reconsideration in December 2016, because she had insufficient earnings and contributions to qualify for the pension and did not fall within the late applicant provision in subparagraph 44(1) (b) (ii) of the *CPP*.

[4] The late applicant provision required Ms. Greeley to demonstrate that she had a severe, prolonged and continuous disability when she made enough contributions to qualify for disability benefits. Service Canada calculated Ms. Greeley's Minimum Qualifying Period [MQP] to end on the last day of October 2008, based on her contributions to the CPP as well as the applicable child rearing dropout years under paragraph 44(1)(b) and subsection 44(2.2) of the *CPP*.

[5] Ms. Greeley appealed Service Canada's reconsideration decision to the General Division of the SST. The General Division determined in a decision dated August 1, 2018, that she was not eligible for a CPP disability pension because she failed to prove, on a balance of probabilities, she became disabled on or before the end of her MQP. In the General Division's view, Ms. Greeley's medical evidence did not support a severe disability as of her MQP.

[6] Ms. Greeley sought leave to appeal the General Division's decision to the Appeal Division in mid-November 2018.

II. The Appeal Division's Decision

[7] The Appeal Division refused her application for leave to appeal in a decision dated December 3, 2018, because the appeal had no reasonable chance of success.

[8] The Appeal Division identified two issues at the outset of its reasons: (i) whether Ms. Greeley filed her application for leave to appeal late, and if so, whether the time for filing the application should be extended; and (ii) whether the appeal had a reasonable chance of success on at least one ground of appeal submitted by Ms. Greeley.

[9] On the first issue, the Appeal Division determined that, although the application for leave had been filed late under subsection 57(1) of the *Department of Employment and Social Development Act*, SC 2005, c 34 [*DESDA*], time to file the application should be extended. In reaching this determination, the Appeal Division found Ms. Greeley had a reasonable explanation for the delay; her actions demonstrated that she had a continuing intention to appeal;

and the Minister of Employment and Social Development would not be prejudiced if the matter were to proceed. Thus, the Appeal Division concluded it was in the interest of justice to extend time to file the application for leave to appeal.

[10] On the second issue, as to whether Ms. Greeley's application had a reasonable chance of success, the Appeal Division noted that subsection 58(1) of the *DESDA* sets out only three grounds of appeal. These grounds are that the General Division (i) failed to observe a principle of natural justice or made a jurisdictional error; (ii) made an error in law; or (iii) 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 also noted that, if the appeal has no reasonable chance of success, subsection 58(2) dictates that leave to appeal is refused.

[11] The Appeal Division then proceeded to consider Ms. Greeley's grounds of appeal.

[12] The Appeal Division rejected Ms. Greeley's argument that the General Division erred because it should have placed greater weight on her testimony and less weight on the medical evidence. The Appeal Division stated it was not to reweigh the evidence before the General Division to reach a different conclusion.

[13] The Appeal Division noted the submission by Ms. Greeley's representative that he would file additional medical evidence. In the Appeal Division's view, leave to appeal could not be granted based on a promise to present additional evidence.

[14] In response to Ms. Greeley's contention that the General Division should have taken steps to obtain further medical evidence, the Appeal Division observed that it was for the parties to the appeal to gather and present their evidence. Leave to appeal could not be granted, the Appeal Division found, on this ground of appeal.

[15] In response to Ms. Greeley's complaint that the General Division had failed to consider that her employers were benevolent employers, the Appeal Division explained that an employer is benevolent if it offers accommodations to a claimant beyond what is required in the commercial marketplace. The Appeal Division observed that, although the General Division had considered Ms. Greeley's earnings and the terms of her employment (including the fact that her husband was a manager at some of her jobs and that she required breaks to rest), the General Division had determined that her employers did not fit the definition of benevolent employers. The Appeal Division found Ms. Greeley's appeal had no reasonable chance of success on the basis that the General Division had failed to consider the principle of benevolent employers.

[16] The Appeal Division noted that the General Division had not failed to consider whether Ms. Greeley's work after her MQP consisted of failed work attempts. It further noted that the General Decision had delineated when she worked after her MQP, how much she earned each year, and the terms of her employment; and that these factors informed the General Division's conclusion that Ms. Greeley had engaged in gainful employment. The Appeal Division found no error with this conclusion, and that the appeal had no reasonable chance of success on this basis.

III. Analysis

[17] This application for judicial review raises one central issue: that is, was it reasonable for the Appeal Division to refuse Ms. Greeley's application for leave to appeal because it had no reasonable chance of success?

A. *Standard of Review*

[18] The applicable standard of review in respect of the Appeal Division's decision to deny leave to appeal is reasonableness (*Sjogren v Canada (Attorney General)*, 2019 FCA 157 at para 6; *Andrews v Canada (Attorney General)*, 2018 FC 606 at para 17; *Canada (Attorney General) v Bernier*, 2017 FC 120 at para 7).

[19] The reasonableness standard tasks the Court with reviewing an administrative decision for the existence of justification, transparency, and intelligibility within the decision-making process, and with determining whether the decision falls within a 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). Those criteria are met if the reasons allow the reviewing court to understand why the tribunal made its decision and permit the court to determine whether the conclusion is within the range of acceptable outcomes (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

[20] This Court's role is not to reweigh the evidence that was before the Appeal Division (*Sharma v Canada (Attorney General)*, 2018 FCA 48 at para 13 [*Sharma*]).

B. *The Parties' Submissions*

[21] Ms. Greeley claims she continues to suffer from various medical conditions and that her post-MQP employment consisted of failed work attempts offered by benevolent employers. In her view, there was no evidence before the General Division demonstrating an improvement in her medical condition.

[22] According to Ms. Greeley, Service Canada erred in finding she did not have a severe and prolonged disability that prevented her from working by October 31, 2008. In support of this argument, she references the medical reports before the General Division. She also relies on a letter from Dr. Murthy dated December 31, 2018, a copy of which is attached as an exhibit to her Affidavit.

[23] Dr. Murthy's letter states that, while Ms. Greeley receive an official diagnosis of Parkinson's disease in 2011, the initial symptoms of persistent left arm numbness and increased tone were present in 2008. This letter states that, although she attempted to work multiple times, she was unable to do so because of slowness, which Dr. Murthy identifies as a symptom of Parkinson's disease. In Dr. Murthy's view, Ms. Greeley was unable to work as of 2008. Dr. Murthy says, because of long wait times for neurology in Newfoundland and Labrador, Ms. Greeley's Parkinson's disease was diagnosed in 2011.

[24] Ms. Greeley alleges the Appeal Division erred in finding that the General Division relied on the relevant factors when making the determination that she does not have a severe disability.

She says the Appeal Division relied on her post-MQP earnings, her 2011 Parkinson's disease diagnosis, and her ability to complete her tasks at work, but it failed to weigh other evidence. She also says the Appeal Division erred in finding that the General Division applied the correct legal test to determine her eligibility for benefits.

[25] The Respondent notes Ms. Greeley's attempt to introduce Dr. Murthy's letter as new evidence. This letter was not, the Respondent points out, before either division of the SST and it does not fall within the recognized exceptions where new evidence may be adduced in judicial review proceedings. According to the Respondent, judicial review is meant to assess whether the decision under review was lawful based on the facts before the decision-maker; it is not a *de novo* hearing; nor is it an opportunity for Ms. Greeley to argue the merits of her claim for disability benefits.

[26] The Respondent contends that the Appeal Division reasonably refused Ms. Greeley's request for leave to appeal. In the Respondent's view, Ms. Greely's arguments -- that the General Division should have weighed the evidence differently; that it made errors in law concerning failed work attempts, benevolent employers, and gainful employment after her MQP -- had no reasonable chance of success.

C. *Analysis*

(a) *Preliminary Issue: Dr. Murthy's Letter*

[27] I agree with the Respondent that Dr. Murthy's letter is inadmissible evidence and, therefore, must be struck from the record because it does not fit within the recognized exceptions to the general rule against permitting new evidence in a judicial review proceeding.

[28] The Court may admit new evidence on judicial review in three recognized circumstances. First, where the new evidence provides general background in circumstances where that information might assist in understanding the issues relevant to the judicial review but does not add new evidence on the merits. Second, where the new evidence brings to the attention of the reviewing court procedural defects not found in the evidentiary record of the decision-maker. And third, where the new evidence highlights the complete absence of evidence before the decision-maker on a particular finding (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright),* 2012 FCA 22 at para 20 [*Access Copyright*]; *Sharma* at para 8).

[29] Though the list is not exhaustive, exceptions "exist only in situations where the receipt of evidence by the Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker" (*Access Copyright* at para 20). Parliament granted the SST jurisdiction to determine certain matters on the merits; specifically, facts relating to disability status. Conversely, Parliament granted the Court the authority to review the decision based on the facts before the decision-maker (*Sharma* at para 8). This Court's role is to review the Appeal

Division's decision based on the facts before it, and not to consider new evidence that should have been placed before the SST (*Sharma* at para 9).

[30] In my view, Dr. Murthy's letter does not provide general background information. Rather, it goes further and provides evidence that was relevant to the merits of the matter decided by the SST. In the letter, Dr. Murthy implies that Ms. Greeley's Parkinson's diagnosis was in 2008, rather than 2011, and that in 2008 she was unable to work. Admitting Dr. Murthy's letter would risk the Court invading the role of the SST in its fact-finding and merit-deciding role (*Access Copyright* at para 20). Thus, the first exception does not apply.

[31] With respect to the second exception, Ms. Greeley does not allege a procedural defect not found in the evidentiary record of the SST. She makes no procedural unfairness allegations and, thus, she has not asked the Court to fulfil its role of reviewing for procedural unfairness. The second exception does not apply.

[32] Lastly, Dr. Murthy's letter does not serve the purpose of highlighting a complete absence of evidence before the SST when it made its findings. The third exception is also inapplicable in the circumstances.

(b) *The Appeal Division's Decision was Reasonable*

[33] I agree with the Respondent that the Appeal Division's decision was reasonable. Ms. Greeley failed to demonstrate to the Appeal Division that her appeal had a reasonable chance of success (*Osaj v Canada (AG)*, 2016 FC 115 at para 12 [*Osaj*]). The Appeal Division reasonably

refused Ms. Greeley's request for leave to appeal because the grounds for her appeal had no reasonable chance of success.

[34] Subsection 58(2) of the *DESDA* requires the Appeal Division to grant leave to appeal a General Division decision if the appeal has a reasonable chance of success. A reasonable chance of success means having some arguable ground upon which the proposed appeal might succeed (*Osaj* at para 12). Subsection 58(1) of the *DESDA* prescribes only three grounds of appeal: (i) a breach of natural justice; (ii) an error of law; or (iii) an erroneous finding of fact made in a perverse and capricious manner or without regard for the material before it (*Cameron v Canada (AG)*, 2018 FCA 100 at para 2).

[35] There was no reasonable chance of success for Ms. Greeley's argument that the General Division erred in fact or disregarded evidence that she experienced symptoms from Parkinson's disease in 2008; she was diagnosed much later in March 2011. The Appeal Division cannot reweigh the evidence the General Division considered about Ms. Greeley's symptoms before October 31, 2008, absent a perverse and capricious finding of fact or disregard for a material fact in the record. The General Division found the symptoms were present in 2008, yet Ms. Greeley was able to work. While Ms. Greeley may disagree with the application of settled legal principles about eligibility for disability benefits, this does not mean that the factual findings are capricious or perverse.

[36] The General Division considered whether Ms. Greeley's employment after October 31, 2008 was benevolent employment or failed work attempts. The Appeal Division reasonably

denied leave to hear arguments on those grounds. The General Division set out the appropriate legal test concerning benevolent employers and applied it to the facts before it. With respect to the failed work attempts, the General Division appropriately considered Ms. Greeley's employment history, the pay she received, the number of hours worked, and the duration of each job. It noted that the reasons she left each of those jobs were unrelated to her medical limitations.

[37] The Appeal Division reviewed and considered the medical and employment evidence prior to reaching its decision. Ms. Greeley is effectively asking the Court to reweigh the evidence in a manner that is more favourable to her position. This Court's role is not to reweigh the evidence that was before the Appeal Division (*Sharma* at para 13).

[38] The Appeal Division did not err in finding that the General Division had applied the correct legal test to determine Ms. Greeley's eligibility for benefits. It was alive to the issue of benevolent employers or failed work attempts. It was reasonable for the Appeal Division to find there was no arguable case that the General Division made an error of law. It also was reasonable for the Appeal Division to decline leave to appeal on the basis that the General Division should have taken steps to obtain further medical evidence.

IV. Conclusion

[39] In short, the Appeal Division's reasons for refusing Ms. Greeley's application for leave to appeal the General Division's decision are intelligible, transparent, and justifiable; and its decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law. This application for judicial review is therefore, dismissed.

[40] The Respondent does not seek costs and, accordingly, there will be no order as to costs.

JUDGMENT in T-20-19

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and there is no order as to costs.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-20-19
STYLE OF CAUSE:	PATRICIA GREELEY v ATTORNEY GENERAL OF CANADA
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APPEARANCES:

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