Citation: *O. B. v. Minister of Employment and Social Development*, 2015 SSTAD 1464

Appeal No. AD-15-1191

BETWEEN:

O. B.

Applicant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: December 21, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated October 16, 2015. The General Division conducted a videoconference hearing on October 15, 2015 and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan,* as it found that his disability was not "severe" at his minimum qualifying period of December 31, 2011. The Applicant's counsel filed an application requesting leave to appeal on November 3, 2015. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

[2] Does the appeal have a reasonable chance of success?

SUBMISSIONS

[3] Counsel for the Applicant submits that paragraph 35 illustrates the problem with the decision of the General Division, though he does not specify how the paragraph relates to any errors which the General Division might have committed.

[4] Counsel submits that the Applicant was clearly relegated to the category of persons who have "some difficulty finding and keeping a job" and that the evidence clearly demonstrated "much more than that". Counsel notes that the Applicant had a severe left carpal tunnel syndrome that was surgically released in 2006. Counsel notes that in a report dated April 2006, an orthopaedic surgeon diagnosed the Applicant with persistent numbness, motor loss and pain on the basis of degradation, i.e. nerve damage. Counsel submits that subsequent medical reports demonstrate that the Applicant's medical condition has evolved into a chronic syndrome of "significant proportion requiring psychiatric care". Counsel submits that the Applicant has not recovered from his psychiatric condition either. Counsel submits that the there is significant organic damage to the Applicant's left upper extremity that involves damage to the nerves. Counsel submits that this requires significant pain medication, which is itself impairing.

Counsel submits that the Applicant's ongoing pain disability exists in the context of significant depression which complicates function even further and that as a result, the Applicant has become predominantly homebound.

[5] Counsel submits that the General Division erred in concluding that the Applicant's condition is not severe, as it has required surgery, extended psychiatric care and has resulted in unremitting pain. Counsel submits that the Applicant's condition has had a tremendous impact upon the Applicant and has "very severely" limited his functional capacity, even at home. Counsel submits that the condition is, by any reasonable measure, severe.

[6] Counsel submits that the General Division failed to consider the Applicant's inability to be successful in rehabilitative efforts, due to his problems with memory and concentration. Counsel submits that the Applicant has been unable to learn English as a second language beyond a very rudimentary level. He submits that this has been "significantly impacted by the psychiatric condition in the pain disorder". He submits that the very few jobs which might have been theoretically available to the Applicant disappear completely when language and the lack of transferrable skills are taken into account.

[7] Counsel submits that the General Division also erred as it failed to consider whether the Applicant's disability could be considered prolonged. The Applicant submits that he has been suffering from the same medical condition for nearly a decade and that his condition has been prolonged.

[8] The Respondent has not filed any written submissions in respect of this leave application.

ANALYSIS

[9] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

(a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(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.

[10] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted. The Federal Court of Canada recently affirmed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

(a) Paragraph 35 of the General Division decision

[11] Counsel submits that the problem with the decision can be found in paragraph 35, which reads:

> However, this does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a serious and prolonged disability that renders them incapable regularly of pursuing any substantially gainful occupation. Medical evidence will still be needed as will evidence of employment efforts and possibilities.

[12] The General Division indicated that it was looking to both medical evidence and employment efforts and possibilities. Although the General Division did not attribute the statement to any particular decision (as it has become a well-accepted proposition in law), it clearly traces its origins to *Villani v. Canada (Attorney General)*, 2001 FCA248 at para. 50. Counsel has not referred me to any authorities to support his submissions that there are any errors in law with the statement. I am not satisfied that the appeal has a reasonable chance of success on the grounds that there are legal or other errors in paragraph 35 of the decision of the General Division.

(b) Medical history

[13] Counsel has reviewed the Applicant's medical history and the impact his various conditions have had on his functionality and limitations. Counsel submits that the evidence is definitive that the Applicant's disability is severe. Essentially counsel seeks a reassessment of the facts and reweighing of the evidence. As the Federal Court recently held in *Tracey*, it is not the role of the Appeal Division to reassess the evidence or reweigh the factors considered by the General Division when determining whether leave should be granted or denied. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(c) Rehabilitative efforts

[14] Counsel submits that the General Division failed to consider the Applicant's inability to be successful in rehabilitative efforts, due to his problems with memory and concentration, and the lack of language and transferrable skills. In other words, he submits that the General Division failed to apply Villani and adopt a "real world" approach in assessing severity.

[15] The General Division identified the test set out in Villani at paragraph 34. The General Division recognized that it would need to consider the Applicant's personal characteristics, such as his age, education level, language proficiency, and past work and life experience, when assessing severity. This was the "real world" context to which it referred.

[16] Counsel submits that the General Division failed to consider the Applicant's language and lack of transferrable skills, as well as his problems with memory and concentration. However, the General Division addressed these very factors. The General Division indicated that the Applicant had been able to attend a Labour Market Re-entry program for three years and upgrade his employment skills through training as a cashier and security guard. The General Division acknowledged the Applicant's allegation that he could not successfully pursue these occupations because of his inability to learn English. The General Division rejected these allegations as the Applicant had failed to

produce any of the Labour Market Re-entry reports or other Workplace Safety and Insurance Board documents, which the General Division considered would have provided contemporaneous written evidence detailing the efforts made and why the Applicant did not pursue alternative employment.

[17] As for the Applicant's memory and concentration problems, the General Division noted that there was an insufficient documentary record to substantiate the extent these problems might have affected the Applicant in or around his minimum qualifying period. The General Division noted that apart from a medical report of October 2007, there were only two other medical reports in the hearing file before it: a second report dated May 15, 2013 (approximately 1.5 years after the minimum qualifying period) and a third report dated June 6, 2015 (approximately 9.5 years after the minimum qualifying period). It would be inappropriate for me at this leave stage to infer any findings of my own from the evidence regarding the Applicant's memory and concentration issues.

[18] The Federal Court of Appeal in *Villani* discouraged interference with the assessment of the Applicant's circumstances, as it involved a question of judgment and at this juncture, would also involve a measure of reassessment. Isaac J.A., writing on behalf of the Federal Court of Appeal wrote:

> [49] Bearing in mind that the hearing before the Board is in the nature of a hearing *de novo*, as long as the decision-maker applies the correct legal test for severity – that is, applies the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) he or she will be in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantially gainful occupation. The assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere.

[19] Given the analysis undertaken by the General Division, it cannot be said that it failed to consider the Applicant's personal characteristics, and it is an assessment with which I would be reluctant to interfere. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(d) Prolonged nature of disability

[20] Counsel submits that the General Division also erred as it failed to consider whether the Applicant's disability could be considered prolonged.

[21] At paragraph 32, the General Division identified the legal test which the Applicant was required to meet under paragraph 42(2)(a) of the Canada Pension Plan, in determining whether he was eligible for a disability pension. The General Division then undertook an analysis of the severe criterion. While it is true that the General Division did not consider the prolonged criterion, the test for disability is two-part and if an applicant does not meet one aspect of this two-part test, then he will not meet the disability requirements under the legislation. As the General Division correctly indicated, it was unnecessary under those circumstances to undertake an analysis on the prolonged criterion. In *Klabouch v. Canada (Minister of Social Development)*, 2008 FCA 33, the Federal Court of Appeal stated that:

> [10] The fact that the Board primarily concentrated on the "severe" part of the test and that it did not make any finding regarding the "prolonged" part of the test does not constitute an error. The two requirements of paragraph 42(2)(a) of the [Canada Pension Plan] are cumulative, so that if an applicant does not meet one or the other condition, his application for a disability pension under the [Canada Pension Plan] fails.

[22] I am not satisfied that the appeal has a reasonable chance of success on the ground that the General Division failed to consider the prolonged nature of the Applicant's disability.

CONCLUSION

[23] Given the considerations above, the application for leave to appeal is denied.

Janet Lew
Member, Appeal Division