Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *D. C. v. Minister of Employment and Social Development*, 2016 SSTADIS 81

Tribunal File Number: AD-15-1328

BETWEEN:

D. C.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: February 22, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division rendered on September 16, 2015. The General Division determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that her disability was not "severe" on or before her minimum qualifying period of December 31, 2008. Counsel for the Applicant filed an application requesting leave to appeal on December 8, 2015. The leave application was filed in two parts, and included various records, including labour market re-entry progress reports and medical opinions. 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 on any of the grounds cited by the Applicant?

SUBMISSIONS

[3] Counsel for the Applicant submits that the General Division based its decision on erroneous findings of fact without regard for the material before it, and also erred in law. Counsel submits that the General Division erred as follows:

(a) erred in law when it determined that the Applicant's attendance at a labour market re-entry program indicated that she was capable of working after her minimum qualifying period;

(b) made an erroneous finding of fact that the Applicant could no longer work as of August 15, 2012;

(c) made various erroneous findings of fact regarding the Applicant's depression:

(i) erred in finding that a psychologist had diagnosed the Applicant with moderate depression in 2008 (at paragraph 49 of the General Division decision), when in fact the psychologist had diagnosed the Applicant with "major depressive episode – moderate" (GD2-271);

(ii) erred in finding that the psychologist had recommended that the Applicant be retrained if she could not return to her prior position in the automotive parts industry, when the psychologist actually wrote:

> Should Ms. C. be unable to return to her previous employment due to ongoing physical limitations, it would appear to be potentially beneficial to work with this claimant towards developing retraining activities. If additional sessions appear necessary during this time of transition, please re-refer her accordingly.

(iii) in failing to consider that despite undergoing 12 sessions of pain management, the Applicant showed no improvement and continued to score "severe" in the McGill Melzack Pain Questionnaire (GD2-270); and

(iv) in failing to consider that the Applicant's score on the Pain Impact Inventory Program was significant, in terms of the impact of pain on her overall quality of life (GD2-270);

(d) made an erroneous finding of fact that there were no medical reports prepared contemporaneous with the Applicant's minimum qualifying period; and

(e) erred in law in failing to mention *Villani v. Canada (Attorney General)*, 2001 FCA 248, and in failing to conduct its analysis in accordance with *Villani* principles.

[4] The Social Security Tribunal copied the Respondent with the leave materials, but the Respondent did not file any written submissions.

ANALYSIS

[5] 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.

[6] 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 approved this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

(a) Labour market re-entry program

[7] Counsel for the Applicant submits that the General Division erred in law when it determined that the Applicant's attendance at a labour market re-entry program indicated that she was capable of working after her minimum qualifying period.

[8] Counsel for the Applicant submits that the records before the General Division showed that the Applicant completed the program with significant accommodation and flexibility from the WSIB. Counsel submits, for instance, that the WSIB provided assistive devices and was also flexible with respect to the Applicant's attendance. Counsel submits that the attendance records show that the Applicant's weekly hours of attendance fluctuated. For instance, for May 2010, her weekly hours varied from 10 hours

and 43 minutes to 17 hours and 16 minutes, and sometimes she started the program at 9:10 a.m. and other times, as late as 1:29 p.m. Counsel submits that the Applicant's attendance at the labour market re-entry program cannot be equated with capacity to work, and that predictability is the essence of regularity: *MHRD v. Bennett* (July 10, 1997), CP 04757 (PAB).

[9] In fact, the General Division did not find that the Applicant's attendance in a retraining program indicated that she was capable of working after her minimum qualifying period. At paragraph 55, the General Division wrote:

> The Tribunal determined the successful completion of a three year retraining program subsequent to the end of the [Applicant's minimum qualifying period] … led to the conclusion the [Applicant] did not have a severe disability on or before her [minimum qualifying period] of December 31, 2008.

[10] The General Division determined that, after considering a number of factors, including the Applicant's successful completion of a three-year retraining program, that she did not have a severe disability on or before December 31, 2008. There is a significant difference between finding an applicant severely disabled on or before his or her minimum qualifying period, and finding him or her capable of working after his or her minimum qualifying period. After all, the test for a severe disability is whether an applicant is incapable regularly of pursuing any substantially gainful occupation.

[11] Counsel for the Applicant suggests that the General Division did not consider the evidence before it. However, there is a general presumption that the trier of fact considers all of the evidence before it. It would have been helpful had the General Division indicated that the Applicant had received accommodations and assistive devices during the re-training program, but there was extensive documentation before the General Division and it would have been wholly unrealistic to expect the General Division to have referred to all of the evidence.

[12] In effect, counsel for the Applicant is requesting that we reassess and re-weigh the evidence and come to a different conclusion from the General Division. Subsection 58(1) of the DESDA sets out very limited grounds of appeal and does not allow for a

reassessment. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(b) Work in 2011 and 2012

[13] Counsel for the Applicant submits that the General Division based its decision on an erroneous finding of fact that the Applicant could no longer work as of August 15, 2012. Counsel submits that the General Division misstated the Applicant's evidence that her medical condition prevented her from working as at August 15, 2012. Counsel submits that in fact the Applicant had testified that she could no longer work as of 2006, although he did not refer to any portion of the audio-recording of the hearing to substantiate this allegation.

[14] Counsel for the Applicant submits that the Applicant had also testified that she had attempted a return to work from March 13, 2011 to April 1, 2012 for Scentsy Consultant and from August 5, 2012 to August 29, 2012 for Metro, but that these attempts to return to work in 2011 and 2012 failed and should have been considered a failed return to work. Counsel submits that, indeed, the Applicant had produced her T4 slip at the hearing before the General Division, to show that she had earned only $1,000 over one year of work at Scentsy.

[15] I note that the T4 at GD2-25 / AD1-14 is in fact a T4A slip, which shows the Applicant's self-employed commissions of just over $1,100 for 2011. It is unclear whether the General Division explored what hours or duties the Applicant may have worked to generate these commissions.

[16] I do not know whether, in the proceedings before the General Division, the Applicant's counsel submitted that the General Division should find that the 2011 and 2012 employment represented a failed attempt at work, but there is no suggestion that this submission had been made at that time. The General Division did not direct itself to determining whether these brief work periods in 2011 or 2012 might have qualified as failed attempts at a return to work. It is not appropriate to now make that determination, as it would involve assessing the evidence and making my own findings. In any event, the

fact that the Applicant might have had these two failed attempts to return to work alone would not have been determinative of whether she was incapable regularly of pursuing any substantially gainful occupation.

[17] The Questionnaire accompanying the Applicant's application for a Canada Pension Plan disability pension, which the Applicant filed on August 30, 2012, confirms that the Applicant had been employed from August 5 to 29, 2012 and that she considered herself unable to work as of August 15, 2012, because of her medical condition (GD3-80 to GD3-83). The Questionnaire provided an evidentiary basis for the General Division to have come to this determination that the Applicant's medical condition prevented her from working as of August 15, 2012, so it cannot be said that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it.

[18] The decision of the General Division indicates that it explored this issue with the Applicant and that it questioned why she chose August 15, 2012 as the date when she could no longer work. The General Division set out the Applicant's evidence at paragraph 10. The General Division noted that the Applicant testified that she was unable to work as a cashier any longer because of wrist and back pain, which prevented her from lifting/packing groceries, and prolonged standing. There is no reference to 2006, and counsel for the Applicant did not direct me to any portion of the audio- recording of the hearing to substantiate the submissions that his client testified that she could no longer work as of 2006. If I should assume that the Applicant testified that she could no longer work as of 2006, the General Division could have nonetheless rejected this evidence and preferred the evidence that she could no longer work as of August 15, 2012. Ideally, the General Division would have explained why it preferred this evidence.

[19] Even so, the Applicant's testimony on this point alone clearly would not have been determinative of the issue of whether and when she might have become incapable regularly of pursuing any substantially gainful occupation. After all, hypothetically if her evidence had been that she had been unable to work for say, the past 20 years, the General Division would still have had to examine the medical evidence at the minimum qualifying period.

[20] I am not satisfied that the appeal has a reasonable chance of success on this ground.

(c) Depression

[21] Counsel for the Applicant submits that the General Division made a number of erroneous findings of fact relating to the Applicant's depression.

(i) Diagnosis

[22] At paragraph 49, the General Division wrote that a psychologist diagnosed the Applicant as suffering from "moderate depression". Counsel submits that the General Division erred in making this finding, as the psychologist in fact diagnosed the Applicant with "major depressive episode – moderate".

[23] It does not appear that the General Division accurately set out the diagnosis that the Applicant had a "major depressive episode - moderate. Indeed, as counsel for the Applicant points out, Dr. King's report of September 28, 2007 (GD2-279) indicated that the Applicant had scored positive for major depression on the clinic's screening test, and his report of January 4, 2008 (GD2-276) referred to the diagnosis of "major depressive disorder". (On the other hand, a subsequent medical report of April 13, 2009 of a neurologist, at GD3-128, indicates "no history of depression".)

[24] Although the General Division seems to have inaccurately set out the diagnosis, it nonetheless proceeded to determine whether the Applicant's depression could be found to be severe. In other words, the General Division did not base its decision on the diagnosis of the Applicant's medical condition alone. Rather, it used the diagnosis as a starting point from which it assessed whether her depression could be found severe. The General Division noted that there was no evidence of any subsequent treatment for depression, save for an anti-depressant taken subsequent to completion of the cognitive behavioural therapy program. In other words, had the Applicant's depression been considered severe, the General Division would have expected subsequent treatment, other than the anti-depressants after she had finished the cognitive behavioural therapy program.

[25] I am not satisfied that the appeal has a reasonable chance of success on the ground that the General Division appears to have misstated one of the Applicant's diagnoses.

(ii) Retraining

[26] Counsel for the Applicant submits that the General Division erred in finding that the psychologist had recommended that the Applicant be retrained if she could not return to her prior position in the automotive parts industry, when the psychologist actually wrote:

> Should Ms. C. be unable to return to her previous employment due to ongoing physical limitations, it would appear to be potentially beneficial to work with this claimant towards developing retraining activities. If additional sessions appear necessary during this time of transition, please re-refer her accordingly.

[27] The report was prepared in 2008 and the Applicant in fact participated in a retraining program from November 2008 to July 2012. The General Division clearly interpreted the recommendation to mean that the Applicant be retrained, and indeed, the Applicant participated in a retraining program from November 2008 to July 2012, shortly after the recommendation had been made. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(iii) McGill Melzack Pain Questionnaire

[28] Counsel for the Applicant submits that the General Division failed to consider that the Applicant showed no improvement in her condition, despite undergoing 12 sessions in a pain management program, and that she continued to score "severe" in the McGill Melzack Pain Questionnaire.

[29] The fact that the General Division may not have fully referred to all of the evidence does not mean that it ignored that evidence or that it failed to consider it. Indeed, the Supreme Court of Canada has determined that it is unnecessary for a decision-maker to write exhaustive reasons addressing all the issues before it. In

Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62 (CanLII), the Supreme Court of Canada remarked that:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, 1973 CanLII 191 (SCC), [1975] 1 S.C.R. 382, at p. 391).

[30] Stratas J.A. in *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 (CanLII), also addressed this issue. He wrote:

> … trial judges are not trying to draft an encyclopedia memorializing every last morsel of factual minutiae, nor can they. They distill and synthesize masses of information, separating the wheat from the chaff and, in the end, expressing only the most important factual findings and justifications for them.

[31] I am not satisfied that the appeal has a reasonable chance of success on this ground.

(iv) Pain Impact Inventory Program

[32] Counsel for the Applicant submits that the General Division failed to consider that the Applicant's score on the Pain Impact Inventory Program suggested that the impact of pain on her overall quality of life was significant. These submissions are similar to those in (iii) above, and for the same reasons I have expressed above, I am not satisfied that the appeal has a reasonable chance of success on this ground.

(d) Contemporaneous medical reports

[33] The General Division wrote at paragraph 53 that, "There are no medical reports contemporaneous to the [Applicant's minimum qualifying period] of December 31, 2008,

which suggest the [Applicant] was at that time incapable regularly of pursuing any substantially gainful occupation".

[34] Counsel for the Applicant submits that the General Division erred in finding that there were no medical reports prepared contemporaneous with the Applicant's minimum qualifying period of December 31, 2008, despite the fact that there were reports dated September 28, 2007, January 4, 2008 and May 15, 2008 from Dr. King of the Upper Limb Clinic.

[35] In fact, the General Division did not suggest that there were no medical reports prepared around the time of the minimum qualifying period. Rather, it qualified its remarks by stating that there were no reports which suggested the Applicant was incapable regularly of pursuing any substantially gainful occupation. (The presence of a comma after the word "2008" probably was unnecessary, but, in this case, did not alter the meaning of the sentence.) The General Division clarified the meaning of this in paragraph 55, when it wrote that there was an "absence of any investigative reports indicating any severe pathology contemporaneous to [the Applicant's minimum qualifying period]". In other words, the General Division found that there were no medical reports that indicated a severe disability. From this perspective, it cannot be said that the General Division necessarily might have erred.

[36] However, while there is no obligation on a decision-maker to exhaustively address all of the evidence before it, particularly here where the hearing file consisted of over 1,000 pages, it is curious at best that the General Division did not mention or focus on the medical documentation for late 2008 or early 2009, although it did discuss the pain management report dated May 30, 2008, authored by a psychologist and three registered nurses (GD2-268 to GD2-272). The General Division had to determine whether the Applicant could be found severely disabled by her minimum qualifying period of December 31, 2008, yet it does not appear to have undertaken any analysis of the medical documentation that was produced at that time, other than to the one report. The General Division referred to a number of medical reports throughout its decision, but the only references to any medical records for 2008 and early to mid-2009 were to the pain

management report dated May 30, 2008 and an x-ray report dated July 13, 2009. Given that the central issue before it was whether the Applicant could be found severely disabled at her minimum qualifying period of December 31, 2008, it may be significant that the General Division largely did not analyze the medical evidence around this timeframe, including those that addressed her physical complaints, to the same extent to which it analyzed the medical evidence prior to and well after the minimum qualifying period, other than for the pain management report. This might be sufficient to rebut the general presumption that a decision-maker considered all of the evidence before it.

[37] While the General Division cited a number of reasons in concluding that the Applicant did not have a severe disability on or before her minimum qualifying period of December 31, 2008, it is not altogether evident that the General Division considered or analyzed the medical evidence in or around December 31, 2008, other than the May 2008 report. Had the General Division not undertaken a relatively detailed analysis of the pre- and post-minimum qualifying period medical records, I might have arrived at a different conclusion. It is unclear to what extent an analysis of the medical evidence in or around December 31, 2008 could have impacted upon the General Division's ultimate determination. For that reason, I am satisfied that the appeal has a reasonable chance of success on this ground.

(e) *Villani*

[38] Counsel for the Applicant submits that the General Division erred as it did not mention *Villani* and may not have conducted its analysis in accordance with the *Villani* principles. Assuming that the General Division did not conduct this analysis, counsel has not indicated how the Applicant's personal characteristics might have impacted the General Division's consideration of the severity of her disability. The General Division may have considered the Applicant's personal characteristics and determined that they were not relevant, but that would be entirely speculative to do so.

[39] *Villani* indicates that the statutory test for severity be applied with some degree of reference to the "real world" and that a decision-maker must take into account the particular circumstances of the applicant, such as age, education level, language

proficiency and past work and life experience. *Bungay v. Canada (Attorney General)*, 2011 FCA 47, confirmed that a decision-maker must consider these details, when it wrote:

> [11] . . . Further, aside from brief mention of the applicant's work history, there is no mention of her age, education level, language proficiency and past life experience at all or in any detail as required by *Villani*, *supra*.
>
> . . .
>
> [14] The dissenting member charged herself properly as to the law as set out in *Villani* (at paragraph 14):
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> > The *Villani* (2001 FCA 248 (CanLII), [2002] 1 F.C. 130) test and the case law requires the Tribunal and this Board to examine an individual's entire physical condition, age, level of education, employability and so on.

[40] The Federal Court of Appeal in *Bungay* allowed the application for judicial review and quashed the decision of the Pension Appeals Board, ordering that a new panel of the Pension Appeals Board "reconsider [the] matter applying the *Villani* test".

[41] Following these authorities, I am satisfied that the appeal has a reasonable chance of success on the ground that the General Division may not have applied the *Villani* test in examining the Applicant's personal circumstances.

CONCLUSION

[42] The application for leave to appeal is granted.

[43] This decision granting leave in no way presumes the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division