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

Citation: *S. E. v. Minister of Employment and Social Development*, 2016 SSTADIS 107

Appeal No. AD-15-1267

BETWEEN:

S. E.

Applicant

and

Minister of Employment and Social Development
(formerly the 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: March 9, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated August 24, 2015. The General Division initially scheduled a videoconference hearing on February 16, 2015, but the proceedings were adjourned, as an issue with the interpretation services arose, and the matter was heard by questions and answers on March 25, 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" by her minimum qualifying period of December 31, 2013. The Applicant's representative, a paralegal, filed an application requesting leave to appeal on November 25, 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] The Applicant's representative submits that the General Division made a number of errors, that it:

(a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction. In particular, the representative submits that the Applicant should have been entitled to a "live hearing" where she would have been provided with the opportunity to clarify her evidence, as the questions and answers placed her at a "huge disadvantage with respect to properly and effectively present[ing] her claim";

(b) erred in law in making its decision, whether or not the error appears on the face of the record. In particular, the representative suggests that the General Division did not properly apply *Villani v. Canada (A.G.)*, 2001 FCA 248, as it

failed to appropriately consider the Applicant's level of education, lack of proficiency in any language or life experience; and

(c) 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.

[4] The Applicant's representative submits that the evidence overwhelmingly supports a conclusion that the Applicant is disabled as defined by the *Canada Pension Plan*. The representative notes that the Applicant has both physical and psychological disabilities and that she has numerous limitations and restrictions. The representative notes that the Applicant's family physician is of the opinion that the Applicant suffers from extensive disabilities, is unable to stand, cannot walk more than 50 meters without rest, has poor sleep and is fatigued all the time and is unable to do any housekeeping or maintenance. The representative notes that there is a medical opinion that the Applicant might have fibromyalgia and that despite treatment, she has not seen any appreciable improvement in her overall medical condition. The representative states that the Applicant is unable to pursue certain treatment recommendations, such as a pain clinic, due to financial constraints. The Applicant also has sensitivities to pharmacological medications, and is therefore unable to take anti-depressants. Instead, the Applicant has psychotherapy sessions. The Applicant is not regarded as a surgical candidate and apparently has been advised that her lumbar vertical disease is likely to deteriorate without surgery. The representative also notes that the Applicant has qualified for the federal disability tax credit, retroactive to 2010. Finally, the representative notes that the Applicant is illiterate, which, along with the Applicant's depression, poor concentration and other issues, makes retraining nearly impossible. The Applicant's representative submits that the totality of the evidence confirms a prolonged and severe disability.

[5] The Respondent did not file any written submissions in respect of this leave application.

ANALYSIS

[6] 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;
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> (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.

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

(a) Natural justice

[8] As my colleague Pierre Lafontaine described in *D.P. v. Canada Employment Insurance Commission and D.R.A. Holdings Ltd, 2015 SSTAD 1161*, the principles of natural justice exist to ensure that everyone who falls under the jurisdiction of a judicial or quasi-judicial forum is given adequate notice to appear and is allowed every reasonable opportunity to present his case and the decision given is free of bias or the reasonable apprehension or appearance of bias.

[9] Here, the Applicant's representative alleges that the Applicant was denied the opportunity to fairly and effectively present her case, resulting in gaps and ambiguities in the evidence.

[10] However, the decision of the General Division indicates that the Applicant and her representative agreed that the hearing should proceed by way of questions and answers, once

it became apparent that the interpretation at the videoconference was incompatible with the Applicant's needs. The General Division issued a number of questions, by letter dated February 26, 2015, and invited the parties to provide any responses, along with any additional documents or submissions, by March 28, 2015. The Applicant's representative filed a response with the Social Security Tribunal on March 25, 2015.

[11] Neither the Applicant nor her legal representative dispute paragraph 2 of the decision of the General Division, that they had agreed that the hearing would proceed by way of questions and answers. Given that they had accepted this type of hearing, they cannot now say that they had been denied a fair hearing and raise any objections at this juncture. This effectively would amount to "forum shopping". Had they any concerns about the type of hearing, they should have voiced those objections at the earliest opportunity, even if this were to have resulted in an adjournment of the proceedings altogether.

[12] The Applicant's representative alleges that the Applicant was not provided with any opportunity to properly and effectively present her claim, such that there were gaps and areas of her evidence which required clarification. The representative suggests that had there been a "live hearing", the Applicant could have provided clarification then. This presupposes that the General Division would have necessarily sought clarification, and that the Applicant would have been able to immediately provide comprehensive responses, during the hearing. On the other hand, a hearing by way of questions andanswers enabled the Applicant and her representative to collect information and to provide more reasoned, deliberate and comprehensive responses. The Applicant and her representative had fully one month within which to prepare and provide responses. There were no limitations placed upon them as to how they could present the Applicant's claim. There was ample opportunity for the parties to present their claim.

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

(b) Error of law

[14] The Applicant's representative submits that the General Division erred in law as it did not properly apply *Villani*, as it failed to appropriately consider the Applicant's level of education, lack of proficiency in any language or life experience.

[15] The General Division referred to *Villani* at paragraphs 35 and 36 of its decision, where it wrote:

> [35] Furthermore, an applicant must adduce before the Tribunal not only medical evidence in support of his claim that his disability is "severe" and "prolonged", but also evidence of his efforts to obtain work and to manage his medical condition. In *Villani v. Canada (Attorney General)*, 2001 FCA 248, at paragraph 50, stated that this restatement of the approach to the definition of disability 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.
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> [36] According to *Villani*, the severe criterion must be assessed in a real world context. This means that when deciding whether a person's disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.

[16] The General Division then proceeded to consider the Applicant's personal circumstances, at paragraph 37:

> [37] The Appellant was 45 years old when she stopped work in June 2011 due to back pain. She has an elementary education and worked as a labourer prior to stopping work. She has been diagnosed with lumbar disc disease and inflammatory arthritis of the knees, hips and ankles. She has functional limitations with standing (half hour) sitting (one hour) and driving 5-15 minutes. She has sensitivity towards narcotic medications and is only treated with Celebrex for her pain. Her treatment modalities have included massage therapy and physiotherapy but these reportedly did not help.

[17] The General Division made no mention whatsoever of the Applicant's language proficiency. The Applicant's language proficiency is a significant feature of her personal circumstances. The representative submits that this should have been taken into account when assessing the severity of her disability. When the hearing of the appeal had been scheduled for a videoconference, an interpreter had been arranged. The hearing was unable

to proceed, as the Applicant apparently has a distinct dialect. The fact that the General Division does not appear to have considered the Applicant's language proficiency would seem to raise questions as to whether the *Villani* assessment had been appropriately undertaken.

[18] However, the Federal Court of Appeal stated at paragraph 49 of the *Villani* decision that:

> . . . 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 ofseverity 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 substantial gainful occupation. The Assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere. (My emphasis)

[19] If the General Division considers an applicant's personal circumstances, one generally ought not to interfere with that assessment, even if on the face of it, it might not appear to be comprehensive. In this particular case, the General Division appeared to have undertaken the *Villani* analysis required of it, when it considered the Applicant's age, education and prior work experience. As the trier of fact, the General Division was in the best position to "judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantial gainful occupation". It is unclear however whether there was any evidence before the General Division regarding how widespread or extensive the Applicant's dialect is spoken or written within her general community or setting for the General Division to judge whether, taking her language into account, she was incapable regularly of pursuing any substantial gainful occupation. Although I am mindful that generally one ought not to interfere with the General Division's assessment of an applicant's circumstances, where there is no reference at all to one of the defining characteristics of an applicant, there may be an arguable case as to whether the assessment undertaken by the General Division met the level of judgment with which a court or appellate body might otherwise interfere. Given this consideration, I am satisfied that the appeal in this case has a reasonable chance of success.

(c) Erroneous findings of fact

[20] The Applicant's representative submits that the General Division based its decision on erroneous findings of fact made in a perverse or capricious manner, or without regard for the evidence before it. To qualify as an erroneous finding of fact under subsection 58(1) of the DESDA, the General Division had to have based its decision on that erroneous finding of fact, and the erroneous finding of fact had to have been made in either a perverse or capricious manner or without regard for the material before it.

[21] The representative however did not identify any specific erroneous findings of fact upon which the General Division might have based its decision.

[22] For the most part, it seems that the Applicant is seeking a reassessment of the facts and reweighing of the evidence. Many of the submissions and facts presented in the leave application mirror those submissions and facts which had been before the General Division. Some of those submissions, such as the fact that the Applicant has been approved for a federal disability tax credit, are irrelevant to the issue of the severity of the Applicant's disability under the *Canada Pension Plan.* The General Division addressed these submissions previously. As the Federal Court 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. Neither the leave nor the appeal provides opportunities to re-litigate or re-prosecute the claim. I am not satisfied that the appeal has a reasonable chance of success on the ground that the General Division failed to consider the Applicant's multiple medical conditions and diagnoses set out in the medical reports filed with the leave application.

CONCLUSION

[23] I invite the parties to provide submissions addressing the issue as to whether the *Villani* analysis undertaken by the General Division is sufficient and whether this issue is one which requires some deference to the General Division.

[24] I invite the parties also to make submissions in respect of the form of hearing (i.e. whether it should be done by teleconference, videoconference, other means of

telecommunication, in-person or by written questions and answers). If a party requests a hearing other than by written questions and answers, I invite that party to provide time estimates for oral submissions.

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

Janet Lew
Member, Appeal Division