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

Citation: *P. M. v. Minister of Employment and Social Development*, 2016 SSTADIS 139

Date: April 15, 2016

File number: AD-15-1500

APPEAL DIVISION

Between:

P. M.

Applicant

and

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

Respondent

Decision by: Hazelyn Ross. Member, Appeal Division

DECISION

[1] The Application for Leave to Appeal is refused.

BACKGROUND

[2] The Applicant seeks leave to appeal, (the Application), from the decision of the General Division of the Social Security Tribunal, (the Tribunal), issued on September 30, 2015. In its decision, the General Division dismissed the Applicant's application for a disability pension pursuant to paragraph 42(2)(a)(i) of the *Canada Pension Plan,* (CPP).

[3] The General Division decision was rendered relative to a minimum qualifying period, (MQP), that ended on December 31, 2009. This date reflects the fact that, at the time she applied for the disability pension, the Applicant did not have 4 years of earning and contributions in the last 6 years prior to the application. However, using the late application provision allowed her to quality for a disability pension; this also meant that her MQP ended several years before she made the application for a CPP disability pension.

GROUNDS OF THE APPLICATION

[4] Counsel for the Appellant submitted that the General Division decision contains several errors of law and errors of fact which provide grounds of appeal that would have a reasonable chance of success on appeal.

THE LAW

What must the Applicant establish on an Application for Leave to Appeal?

[5] The *Department of Employment and Social Development,* (DESD) *Act*, provides the circumstances when the Appeal Division would either grant or refuse leave to appeal. Ss. 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success".

[6] Case law has established that on an Application for Leave to Appeal the hurdle that an Applicant must meet is a first, and lower, one than that which must be met on the hearing of the

appeal on the merits. To grant leave the Appeal Division must be satisfied that the appeal would have a reasonable chance of success. A reasonable chance of success has been equated with an arguable case[1]; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[7] Ss. 58(1) of the DESD Act states that the only grounds of appeal are 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.

[8] Counsel for the Applicant has submitted that the General Division breached paragraphs b and c of ss. 58(1). In order to grant the Application, the Tribunal must determine whether any of the Applicant's reasons for appeal fall within any of the grounds of appeal set out above.

ISSUE

[9] The issue is: does the appeal have a reasonable chance of success?

ANALYSIS

Did the General Division err in law?

[10] Counsel for the Appellant submitted that the General Division erred in law by:-

a) failing to apply the principles in *Villani*[2]
b) misapplying the principles in *Inclima.*[3]
c) requiring the Applicant to provide objective evidence of pain;
d) failing to consider the cumulative effect of the Applicant's medical conditions, contrary to *Bungay v. Canada (Attorney /General)*, 2011 FCA 47

[11] For the following reasons, the Appeal Division finds that the General Division did not err in law as submitted by Counsel for the Applicant.

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[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).
[2] *Villani v. Canada (Attorney General)* 2001 FCA 248.
[3] *Inclima v. Canada (Attorney General)* 2003 FCA 117.

[12] The decision of the General Division was informed by the following findings and facts:-

- The Applicant was a credible witness.
- During her consultation with Dr. Campbell at the KOPI clinic in 2010, the Applicant described her level of pain on a scale of 1-10 as being within the range of 1-3.
- That the Applicant was treated with relatively low levels of pain killers; and that her dosage of Celebrex had remained unchanged over more than two years.
- While Dr. Campbell did state that the Applicant was unable to work, he made this determination more than two years after the end of her MQP
- In his report of July 6, 2012 Dr. Moxon, the Applicant's family physician, did not rule out the possibility that she could be retrained. .
- The Applicant testified that she was reluctant to undertake retraining.

[13] In the view of the Appeal Division these circumstances do not point to errors of law in the application of the case law as submitted by Counsel for the Applicant. In as much as the General Division is required to properly apply *Villani;* applicants for a CPP disability pension are required by *Inclima* to show that they made reasonable efforts to obtain and maintain work. The Applicant's testimony on this point, which the Appeal Division finds the General Division did not ignore, showed that she made no such effort. Thus no error of law arises in relation to the General Division's application of either *Inclima* or *Villani,* which latter case according to *Giannaros*[4] need not be applied where an applicant has failed to establish that he had a severe condition.

[14] Nor is the Appeal Division persuaded that the General Division erred by failing to consider whether the Applicant was capable of sedentary work. The Appeal Division reaches this conclusion despite the submission of Counsel for the Applicant that the Applicant was "expressly found incapable of physical work" Drs. Moxon and Campbell made this finding after the MQP, which impacts its relevance for a pre-MQP finding. Further, this was not the finding of the General Division. At paragraph 57 of the decision the General Division found that the Applicant could not be employed in either her old employment or certain categories of work given her personal circumstances, however, it did not rule out that at the MQP she could have been retrained and, therefore, she had retained work capacity. As well, in the view of the

[4] *Giannaros v Canada (Minister of Social Development)* 2005 FCA 187 at 14-15; it was not necessary for the Review Tribunal to undergo a "real world approach" analysis where the Appellant's subjective evidence did not present a severe condition.

Appeal Division, the Applicant's testimony that she did not seek alternative work renders moot any discussion of her capacity, as opposed to her obligation, to seek alternative employment.

[15] The Appeal Division also finds that the General Division did not disregard the totality of the Applicant's medical conditions as submitted by Counsel for the Applicant, rather it noted the conditions and focused on the condition that had been identified as disabling one. At paragraph 55, the General Division notes,

> [55] Although there is evidence that the Appellant has for quite some time taken blood pressure medication and, more recently, experienced shoulder pain caused by arthritis, the Appellant's medical condition with respect to her claim for the CPP disability benefit concerns her damaged left knee.

The Appeal Division finds that in the context of the decision, the General Division did not disregard the totality of the Applicant's medical conditions and did commit an error of law.

[16] With respect to the submission by Counsel for the Applicant that the General Division required the Applicant to provide objective evidence of pain despite numerous Tribunal decisions that indicate that objective evidence is not required to prove disability particularly in cases of chronic pain the Appeal Division is not persuaded that the General Division erred as alleged. This submission is borne out neither by the decision itself nor the case law. Furthermore, while in Martin, the FCA did speak to subjective pain and linked it with the credibility of an applicant, *Klabouch*[5] and the line of cases that follow it, make it clear that in cases of chronic pain or chronic pain syndrome an applicant is still required to establish that the pain prevented him from pursuing regularly any substantially gainful occupation.

Did the General Division make erroneous findings of fact?

[17] Counsel for the Appellant submitted that the General Division erred in fact by:-

a. finding that her age was the reason why the Applicant did not return to school.
b. finding that the Applicant had retained work capacity based on reports from doctors who said she had no capacity to work
c. disregarding the Applicant's testimony concerning her medical conditions and her subjective level of pain and the accommodations she made in her personal life to deal with her pain.

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[5] *Klabouch v. Canada (Minister of Social Development),* 2008 FCA 33.

[18] On examining the decision of the General Division and the Tribunal record the Appeal Division finds no support for the submissions of Counsel for the Applicant. In the view of the Appeal Division the statement "I am sympathetic to the fact that the Appellant in her early 50s would feel incapable of returning to a classroom setting" is not equivalent to a finding that her age was the only reason why the Applicant she did not retrain.

[19] With respect to the two other points described by Counsel for the Applicant as erroneous findings of fact, the Appeal Division notes that these were also raised as errors of law and have been dealt with as such. The Appeal Division finds that the medical reports on which Counsel for the Applicant relies were both created well after the Applicant's MQP of December 31, 2009. Thus, they have limited applicability to a determination of whether or not she had a condition that was "severe and prolonged" on or before the MQP.

[20] The Appeal Division finds that the General Division did not disregard the Applicant's testimony about her medical conditions as it specifically found her credible on these points and concluded that she now perhaps unable to work. Thus, this is not a ground that would have a reasonable chance of success on appeal.

CONCLUSION

[21] On the basis of the foregoing, the Appeal Division finds that the Applicant has not raised grounds of appeal that would have a reasonable chance of success on appeal.

[22] The Application for Leave to Appeal is refused.

Hazelyn Ross
Member, Appeal Division