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

Citation: *B. K. v. Minister of Employment and Social Development*, 2016 SSTADIS 128

Tribunal File Number: AD-16-163

BETWEEN:

B. K.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

DECISION BY: Neil Nawaz

DATE OF DECISION: April 30, 2016

REASONS AND DECISION

DECISION

[1] The Appeal Division (AD) of the Social Security Tribunal grants leave to appeal.

INTRODUCTION

[2] In a decision dated October 15, 2015, the General Division (GD) of the Social Security Tribunal determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*.

[3] On January 14, 2016, the Applicant filed an Application for Leave to Appeal. The AD received the Application within the specified time limit.

THE LAW

[4] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), an appeal to the AD may only be brought if leave to appeal is granted and the AD must either grant or refuse leave to appeal.

[5] Subsection 58(2) of the DESD Act provides that leave to appeal is refused if the AD is satisfied that the appeal has no reasonable chance of success.

[6] According to subsection 58(1) of the DESD Act the only grounds of appeal are the following:

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

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

(c) The GD 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] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the Applicant does not have to prove the case.

ISSUE

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

SUBMISSIONS

Erroneous Findings of Fact

[9] The Applicant submits that the GD based its decision on erroneous findings of fact made in a perverse or capricious manner or without regard for the material before it, specifically:

(a) It incorrectly described the Applicant's prescription medications and dosages;

(b) It mischaracterized information about the Applicant's medications as general, generic and non-specific;

(c) It ignored the fact that the side effects of narcotics are real for everyone who takes them;

(d) It ignored evidence that the Applicant is incapable of work or retraining;

(e) It ignored evidence that the side effects from the Applicant's narcotic and depression and anxiety medications are cumulative and preclude him from engaging in any substantially gainful employment;

(f) It incorrectly found that the Applicant had "completed all necessary eye surgeries";

(g) It inappropriately discounted the Applicant's statement that he could not sit for more than 15 minutes at a time.

Errors of Law

[10] The Applicant submits that in making its decision, the GD erred in law by failing to apply legal principles set out in *Leduc* and *Villani* and asses the Applicant's disability in a real world context.

Failure to Observe Principles of Natural Justice

[11] The Applicant submits that in making its decision, the GD did not observe principles of natural justice or acted beyond or refused to exercise its jurisdiction, specifically:

(a) In finding no corroborating evidence that the Applicant was incapable of work or retraining, it failed to recognize that no employer would hire a person impaired by the effects of narcotic painkillers;

(b) It recognized the Applicant suffered from nerve damage yet failed to find he was disabled from work, likely because it refused to admit documentary evidence about pain caused by diabetic neuropathy.

ANALYSIS

[12] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC). The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada (Attorney General),* 2010 FCA 63.

[13] Before leave can be granted, 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.

Erroneous Findings of Fact

Dosage

[14] In his Application for Leave to Appeal, the Applicant stated that in paragraph 13 of its decision the GD described his dosage of pain medications as "Endocet 5 mg oxycodone/325 mg

acetaminophen 2 tablets 4 times a day." He alleges that this was incorrect as of the MQP as he was actually was prescribed "Endocet 5 mg oxycodone/325 mg acetaminophen 2 tablets 3 times a day and 12 mg Hydromorph Cotin [sic] once per night," which he alleges is the equivalent of 100 mg of morphine or 12 Percocet per day.

[15] In paragraph 13, the GD noted that the Applicant "testified today he takes a considerable amount of prescribed medication to treat his medical issues" and followed this with a long list of drugs and dosages. It is true, as alleged, that the GD's list does not correspond with the Applicant-prepared list at GD1A-8 (which was prepared shortly after the MQP on January 2, 2014), but it is possible that the GD's list merely reflected changes in the Applicant's medication regime in the intervening 20 months. However, a cursory review of the hearing recording indicates (at around the 1:04 mark) that the Applicant testified (in response to a question from the GD member) that the list at GD1A-8 remained accurate and there had been no changes in his prescriptions.

[16] I therefore find that there is at least an arguable case the GD made an erroneous finding of fact without regard for the material before it—specifically, it may have omitted from its consideration the 12 mg of Hydromorph Contin the Applicant claims to be taking nightly. Such an omission is potentially significant, as the Applicant founded much of his case on the claim that he is perpetually befogged by narcotic-based pain medications.

"Generic" information on medication

[17] The Applicant disputes the GD's finding that documentation relating to the side effects of his prescription medications (GD1A-21 to GD1A-51) was "generic" and nonspecific to him. He argues that the information on file was given to the Applicant by the pharmacist and had the Applicant's name and address on it—hence it was specific to the Applicant.

[18] I see no arguable case that the GD erred on this point. While the Applicant's name and address are on the documents in question, they were clearly generated from a Rexall Pharmacy database of the uses and side effects of various drugs. In describing them as nonspecific to the Applicant, the GD merely reflected the truism that a given medication may produce a range of responses—with some individuals suffering severe adverse symptoms and others seeing only

mild side effects. The GD appeared merely to be making the point that the Rexall printouts said nothing about where the Applicant fell within those ranges.

Narcotic side effects

[19] The Applicant takes issue with the GD's statement in paragraph 29 about "potential" side effects, insisting that "narcotic side effects are real for everyone and treated very seriously by the law…"

[20] Again, I do not see how this ground has a reasonable chance of success on appeal. I see nothing to indicate the GD denied that narcotic painkillers induce adverse symptoms, only a description of the nature and purpose of the information contained in the Rexall printouts.

Finding of no evidence corroborating incapacity to work or retrain

[21] The Applicant denies there is an absence of evidence, beyond his testimony, that his medical conditions render him incapable of work, noting that he was approved for Employment Insurance sick benefits and is suffering from ADHD, which impairs his concentration and memory.

[22] In my view, this ground amounts to a request that I reconsider and reassess the evidence and decide in the Applicant's favour. I am unable to do this, as my authority permits me to determine only whether any of his reasons for appealing fall within the specified grounds and whether any of them have a reasonable chance of success. The GD's words are not so much a statement of fact than a conclusion, which was drawn after what appears to be a thorough assessment of the evidence. The GD noted in its decision that the Applicant has been diagnosed with ADHD, but apparently decided (and it was within its jurisdiction to do so) that this condition did not contribute to a severe disability. While the GD made no mention of EI sick benefits in its decision, it is well established in case law that an administrative tribunal need not refer to every item of evidence before it. Matters deemed to have little or no relevance may be safely ignored.

[23] I do not see an arguable case on this ground.

Cumulative effect of medications

[24] The Applicant suggests that the GD failed to consider the cumulative effect of the many strong medications he has been taking, in particular the impact of taking narcotic painkillers on top of strong antidepressants and drugs for anxiety.

[25] I see this as part and parcel of the dosage issue, a ground for which I have already allowed leave to appeal. If the GD has made an erroneous finding of fact with respect to the Applicant's intake of narcotics, then it may be appropriate to reconsider their interaction with each other and their effect on the Appellant's ability to function.

[26] In my view, there is an arguable case on this ground of appeal.

Eye surgeries

[27] The Applicant alleges the GD made an erroneous finding of fact in stating in paragraph 33 that "he has completed all necessary eye surgeries while maintaining his vision." In highlighting this as a ground for appeal, the Applicant referred to his testimony that the "maximum allowable surgeries have been performed and there are 'floaters' in his eyes that affect his vision. No more surgeries can be performed; hence any blood vessel burst will cause blindness."

[28] This ground essentially invites a reassessment of the Applicant's eye condition, which is beyond the purview of the AD's jurisdiction. I would note also that the Applicant has not pinpointed what is erroneous about the GD's statement, which is not contradicted by anything in his Application for Leave to Appeal.

[29] I see no reasonable chance of success on this ground.

Capacity to sit or stand for more than 15 minutes

[30] The Applicant argues that the GD should not have discounted his statement that he could not sit for more than 15 minutes at a time. Again, this ground challenges a conclusion made by the GD after it conducted an assessment of the evidence and found there was no independent corroboration of the Applicant's testimony. If the Applicant disagrees with this

conclusion, he should have identified a specific item of evidence that the GD overlooked. In my view, the Applicant has improperly characterized this issue as a finding of fact when it was part of the process which a review tribunal goes through in coming to its decision.

[31] I do not allow leave on this ground.

Errors of Law

[32] The Applicant submits that the GD failed to apply the legal principles set out in and *Villani*, and in particular, in assessing the Applicant's disability in a "real world context". This involves assessing an applicant's personal characteristics. Here, the GD referred to the test at paragraph 26 and later referred to the Applicant's background, mentioning his education and work history, albeit in passing. Although the assessment undertaken by the GD was brief, it is clear that it considered the Applicant's personal characteristics in a "real world context" from the perspective of his capacity regularly of pursuing any substantially gainful occupation.

[33] Essentially, the Applicant is requesting that I reassess the evidence as it pertains to the Applicant's personal characteristics, in assessing whether, in a real world context, he can be found disabled. In this regard, I note the words of the Federal Court of Appeal in *Villani,* 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 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

[34] I would not interfere with the assessment undertaken by the GD, where it has noted the correct legal test and taken the Applicant's personal circumstances into account, as it has done here, albeit in a cursory manner. I am not satisfied that the appeal has a reasonable chance of success on this ground.

[35] A final note on this point: The Applicant referred to *Leduc* as a case the AD is obliged to follow. As decision of the old Pension Appeals Board, the predecessor tribunal to the AD, *Leduc* carries no more than persuasive force in my reasoning.

Natural Justice

Failure to draw a reasonable conclusion

[36] The Applicant alleges the GD failed to recognize that no employer would hire a person who was suffering from ADHD and impaired by the effects of narcotic painkillers. He says that he is effectively unemployable because he is unfocused, disorganized and forgetful.

[37] This ground is better characterized as an alleged error of fact than as a breach of natural justice. Even so, I do not see a reasonable chance of success on appeal because it amounts to another request to reassess and reweigh the evidence in the Applicant's favour. It is open to an administrative tribunal to sift through the relevant facts, assess the quality of the evidence, determine what evidence, if any, it might choose to accept or disregard, and to decide on its weight. In determining that there was no other evidence to support the Applicant's testimony that he was incapable of work, the GD was permitted to consider the evidence before it and attach whatever weight, if any, it determined appropriate and to then come to a decision based on its interpretation and analysis of the evidence before it.

Refusal to admit documentary evidence

[38] The Appellant alleges the GD refused to admit a document entitled *A Clinical Approach to Treatment of Painful Diabetic Neuropathy*, unfairly denying him an opportunity to present his fullest case.

[39] I see no mention of any attempt to admit a late document in the GD's reasons for its decision. Even assuming that the Applicant has accurately described the GD's refusal to accept the neuropathy brochure, any attempt to introduce new documentary evidence would have come weeks after the submission deadline. At that point, the Applicant had benefitted from nearly two years in which to introduce evidence to the GD.

[40] On this ground, I see no arguable case that any principle of natural justice was ignored.

CONCLUSION

[41] As indicated, the Application is granted on the ground that the GD may have made an erroneous finding of fact in describing the Applicant's prescription medications and dosages. The appeal will go forward on this ground only.

[42] I also invite the parties 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).

[43] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Member, Appeal Division