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

Citation: *F. V. v. Minister of Employment and Social Development*, 2016 SSTADIS 192

Tribunal File Number: AD-16-193

BETWEEN:

F. V.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division– Leave to Appeal

DECISION BY: Neil Nawaz

DATE OF DECISION: May 31, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) dated October 29, 2015. The GD conducted an in-person hearing on October 27, 2015 and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan* (CPP), as it found that her disability was not "severe" prior to the minimum qualifying period (MQP) of December 31, 2009. On January 26, 2016, the Applicant's representative filed an application requesting leave to appeal, advancing numerous grounds of appeal and relying on various legal authorities. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

THE LAW

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

[3] Subsection 58(1) of the DESDA sets out that 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.

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

ISSUE

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

SUBMISSIONS

Erroneous Findings of Fact

[6] The Applicant's representative submits that the GD based its decision on erroneous findings of fact made in a perverse and capricious manner or without regard for the material before it:

(a) At paragraph 18 of its decision, the GD noted that Dr. Kruger's medical notes for 2014 and 2015 did not relate to the Applicant's medical issues prior to 2014. This led the GD to incorrectly conclude that the Applicant did not have a severe and prolonged medical condition.

(b) In finding at paragraph 38 of its decision that the Applicant was able to function in a variety of occupations in English, the GD failed to consider that her work experience is limited to manual labour jobs that did not require her to be fluent in English.

(c) The GD failed to appreciate selected items of documentary evidence prepared by medical experts.

Errors of Law

[7] The Applicant's representative submits that in making its decision the GD erred in law, whether or not the error appeared on the face of the record:

(a) The GD failed to apply *E.J.B. v. Canada*[1] by inadequately considering all of the Applicant's conditions and their collective impact on her functionality in a "real world" context.

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[1] *E.J.B.* v. *Canada (Attorney General),* 2011 FCA 47

(b) The GD failed to apply *D'Errico v. Attorney General*[2] by failing to consider the "regular" aspect of the disability severity test.

(c) The GD failed to apply the principles set out in *Taylor v. MHRD*[3] in not assessing the Applicant's physical and psychological conditions as a whole.

(d) The GD failed to assess the Applicant's disability as of the December 31, 2009 MQP.

(e) The GD failed to apply the principles of *Inclima v. The Attorney General*[4] by not taking into consideration the Applicant's efforts to return to work.

ANALYSIS

[8] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada.*[5] 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.*[6]

[9] 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.

Erroneous Findings of Fact

Prescription Records and Medical Notes

[10] The Applicant objects to paragraph 18 of the GD's decision, which stated that the Applicant's prescription record showed her medication history from 2004 to 2015 and that Dr. Kugler's notes for the years 2014 and 2015 did not relate any of her medical issues prior to 2014. The Applicant argues that these findings do not lead to the conclusion that she did not have severe and prolonged medical problems prior to 2014.

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[2] *D'Errico v. Attorney General,* 2014 FCA 95

[3] *Taylor v. MHRD* (July 4, 1997), CP 4436

[4] *Inclima v. The Attorney General*, 2003 FCA 117

[5] *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC)

[6] *Fancy v. Canada (Attorney General)*, 2010 FCA 63

[11] I fail to see an arguable case on this ground, as the Applicant has not identified what in paragraph 18 is factually incorrect. A perusal of the file indicates the noted documents are accurately described (with the trivial exception of Dr. Kruger's notes commencing in December 2013, rather than after the beginning of 2014). In its analysis of the evidence, the GD chose to place little or no weight on the office notes, having determined they did not relate to the severity of the Applicant's condition during the MQP—which ended four years earlier. As an administrative tribunal charged with making findings of fact, the GD was within its jurisdiction to assess the quality of the evidence and assign it appropriate weight.

Functionality in English

[12] The Applicant submits that the GD mischaracterized her as being functional in English, finding her able to work in a variety of occupations in that language. In fact, argues the Applicant, her work experience was limited to jobs that demanded manual labour, rather than any ability to communicate in English.

[13] A review of the GD's decision persuades me that this ground of appeal has no reasonable chance of success. It appears the GD was alive to the issue of how the Applicant's facility in English, or lack of it, would affect her employability. The GD devoted a paragraph to discussing how the majority of the hearing was conducted without reliance on the interpreter, who was on hand at the request of the Applicant. The GD also noted the Applicant's testimony that she could read some periodicals in English, albeit with difficulty and later referred to her submission that her poor English skills accounted for discrepancies contained in her signed questionnaires. While the GD found that she was "able to work at a variety of occupations and function in the workplace in English," it also continued in the next sentence:

> Although she has some difficulties with English they are not to an extent that would serve as a barrier to all forms of employment. Her past work and life experience has given her some transferable skills that would allow her to perform any substantially gainful occupation.

[14] While the Applicant may not agree with the GD's assessment of her ability to communicate in English, it cannot be said the GD failed to consider this factor in assessing her employability.

Expert Medical Opinions

[15] The Applicant submits that the GD failed to appreciate expert evidence, specifically the following reports:

- MRI of the right shoulder dated October 25, 2005;
- Report from Total Care Management and Vitality Health Care Centres dated October 6, 2006;
- Clinical notes of Dr. Kugler dated April 13, 2007 and April 19, 2010;
- Medical Report by Dr. Kugler dated January 9, 2013.

[16] First, it should be noted that the right shoulder MRI described above is likely the same MRI that was summarized in the GD's decision at paragraph 21, although it appears to have been misdated as October 25, 2010, rather than October 25, 2005. Second, it also appears that one of the medical reports referred to in paragraphs 23 and 24 of the GD decision, authored by "Dr. Kolger" and "Dr. Kroger," respectively, is in fact the report referenced above by Dr. Kugler. The confusion in names is admittedly puzzling but is not in my view a material error.

[17] As for the remaining documents, it is established law that an administrative tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all of the evidence.[7] Therefore, omitting reference to some document will not, by itself, amount to an erroneous finding of fact without regard to the material before it. Matters deemed to carry little weight may be safely ignored in the reasons for decision.

[18] I find this ground has no reasonable chance of success on appeal.

Errors of Law

Failure to Apply E.J.B.

[19] The Applicant submits that the GD erred in law by failing to take into account her entire condition in determining that her impairments fell short of severe. Specifically, the GD is

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[7] *Simpson v. Canada (Attorney General)*, 2012 FCA 82

alleged to have given insufficient consideration to her *Villani*[8] personal characteristics such as age, education, language proficiency and work and life experience, while disregarding her symptoms of chronic pain, non-restorative sleep, cognitive impairment, anxiety and depression.

[20] I have already touched upon the issue of whether the GD adequately considered the Applicant's background and personal characteristics. I will add that in paragraph 25 of its decision the GD specifically noted the Applicant's submissions with respect to her non-fluency in English, limited work experience and lack of computer skills. Later, in paragraphs 37 and 38, the GD discussed these factors and concluded they did not present an impediment to further employment.

[21] The bulk of the GD's analysis was occupied with sorting through the Appellant's various physical complaints and attempting to determine what, if any, of them constituted a "severe" disability prior to the end of the MQP. In the end, the GD concluded, on a balance of probabilities, that the Applicant did not suffer from any physical impairment that rendered her incapable regularly of pursuing any substantially gainful occupation. It must be noted that the Applicant's reported symptoms of chronic pain, non-restorative sleep and cognitive deficit all appeared to be by-products of the Applicant's main condition—the rotator cuff tear and right arm impairment. It also appears that the GD came to its decision in part because it found the Applicant's evidence to be unreliable. As for depression and anxiety, the GD addressed them in paragraph 34, finding the absence of psychiatric treatment suggested these claimed impairments fell short of the severity threshold.

[22] While the GD's discussion on these issues did not arrive at the conclusions the Applicant would have preferred, it is not my role here to retry the evidence but to assess whether the outcome was acceptable and defensible on the facts and the law. It cannot be said that the GD simply ignored some of the Applicant's major complaints, and for that reason I see no reasonable chance of success on this ground.

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[8] *Villani v. Canada (AG)*, 2001 FCA 248

Failure to Apply D'Errico

[23] The Applicant submits that the GD committed an error in law by not considering how her impairment prevented her from "regularly" pursuing employment, which the Federal Court of Appeal interpreted to mean "consistent frequency." In particular, it is alleged that the GD failed to consider evidence that the Applicant's employment in 2008-09 constituted a work trial, whose abandonment served to illustrate how she was unable to offer regularity prior to the MQP.

[24] A cursory review of the hearing file indicates that the Applicant recorded what appears to be nominal earnings in 2008-09 after a four-year absence from the labour market. The GD decision does not contain any significant discussion of whether the Applicant's approximately nine months working at a cafeteria kitchen constituted a failed work trial, but if it was pleaded or argued at the hearing, there may be an arguable case on this ground.

[25] For this reason, I find that the appeal has at least a reasonable chance of success on this question of mixed law and fact.

Failure to Apply Taylor

[26] The Applicant submits that the GD erred in law by failing to assess the totality of her various medical problems, which were objectively verified by her medical providers and include chronic pain, anxiety, depressive symptoms, non-restorative sleep and cognitive impairments.

[27] *Taylor* was rendered by the Pension Appeals Board, so is not binding on this tribunal, yet the principle for which it stands has been transmitted in the courts, most prominently in *Bungay v. Canada*.[9] The thrust of these decisions is that multiple conditions cannot be assessed and dismissed individually without also considering their cumulative effect on an applicant's functionality.

[28] As discussed above, the GD looked at the objective medical evidence and considered the various conditions and complaints put forth by the Applicant. The GD noted that several of

[9] *Bungay v. Canada (Attorney General)*, 2011 FCA 47

the medical conditions (chronic pain, confusion, forgetfulness and depression) cited in the Applicant's most recent (March 2013) application for CPP disability benefits were not mentioned in her previous applications of May 2010 and January 2007, both of which were more proximate to the MQP. The GD also noted that there had been an intervening (post-MQP) car accident, and it ultimately discounted the additional complaints, focusing instead on the physical impairments (shoulder and back pain) that were claimed prior to the end of the MQP. The GD noted the family physician's guidance that the claimed conditions were progressive and cumulative but dismissed it as vague and unhelpful in determining when, if at all, the Applicant may have become disabled.

[29] I find the GD's reasoning defensible and consistent with *Taylor* and *Bungay*. I am not satisfied that the appeal has a reasonable chance of success on the ground that the GD did not consider the medical issues in their totality.

Failure to Assess Disability as of the MQP

[30] The Applicant submits that the GD failed to assess the Applicant's medical condition at her minimum qualifying period of December 31, 2009, a time when she was suffering from chronic pain, symptoms of anxiety and depression, as well as non-restorative sleep and cognitive impairments.

[31] I find this ground is merely a reiteration of some of the other (*E.J.B., Taylor*) arguments submitted with this application that were dismissed above. I would note in passing that, if anything, the GD devoted an inordinate portion of its analysis to attempting to isolate the Applicant's condition as of December 31, 2009.

Failure to Consider Inclima

[32] The Applicant submits that the GD failed to heed the words of Pelletier J.A., who wrote:

> Consequently, an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.

[33] The Applicant casts her taking a food service job in August 2008 as an admirable attempt to return to the workforce while convalescing from an earlier motor vehicle accident. She claims that she was soon forced to cease her employment due to pain and limitations, as well as anxiety, depression and fatigue.

[34] Again, this ground goes to the issue of whether the GD gave adequate consideration to the possibility the Applicant's employment in 2008-09 was a failed work trail. In its decision, the GD does not mention *Inclima* and is silent on whether it believed the Applicant discharged her duty to mitigate her impairments by attempting to remain in the workforce, and in fact took her nine-month job as evidence of functionality.

[35] I find there is an arguable case on this ground.

CONCLUSION

[36] As indicated, the Application for Leave to Appeal is granted on the grounds that the GD may have made the following errors in law:

(a) Failure to apply *D'Errico* in disregarding evidence of a failed work trial that showed the Applicant was incapable "regularly" of pursuing substantially gainful employment;

(b) Failure to apply *Inclima* in taking the Applicant's final job as evidence of functionality rather than an abortive attempt to mitigate her impairments.

[37] I 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).

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

Member, Appeal Division