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

Citation: *D. Y. v. Minister of Employment and Social Development*, 2016 SSTADIS 195

Tribunal File Number: AD-16-217

BETWEEN:

D. Y.

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 28, 2015. The GD conducted a hearing by way of videoconference on October 20, 2015 and determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP), as it found his disability not was "severe and prolonged" as of the minimum qualifying period (MQP) of December 31, 2012.

[2] On January 28, 2016, within the prescribed time limit, the Applicant's representative filed an application with the Appeal Division (AD) requesting leave to appeal.

THE LAW

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

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

[5] According to subsection 58(1) of the DESDA 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.

[6] 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

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

SUBMISSIONS

[8] The Applicant 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, specifically:

(a) It failed to consider evidence that reports provided by the Applicant's employer were inaccurate;

(b) It ignored or gave insufficient weight to Dr. Martin's independent medical report dated December 23, 2009;

(c) It ignored or gave insufficient weight to Dr. Zuliani's CPP medical report dated February 28, 2012.

[9] The Applicant also submits that the GD erred in law by failing to apply the principles set out in *Villani v. Canada*,[1] specifically it failed to consider the Applicant's limitations in a "real world context," assessing the severity test without regard for background factors such as age, education and vocational experience.

ANALYSIS

[10] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada.*[2] 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.*[3]

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[1] *Villani v. Canada (A.G.),* 2001 FCA 248
[2] *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC)
[3] *Fancy v. Canada (Attorney General),* 2010 FCA 63

[11] 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.

Accuracy of Employer's Reports

[12] The Applicant alleges that the GD based its decision on an erroneous finding of fact without regard for the material before it by failing to consider evidence that reports provided by the Applicant's employer were inaccurate. Specifically, the Applicant claims that the GD relied on a letter (p. GD6-8) prepared by his employer's human resources department that was contradicted by the Appellant's testimony and enclosed WSIB memos dated October 15, 2009 and November 23, 2009, which documented that: (i) he was given accommodations at his last job; (ii) he did not receive any severance and (iii) he was subject to restrictions in prolonged sitting, standing, walking, bending and twisting.

[13] I do not find the Applicant has an arguable case on this ground. The Applicant claims the GD ignored evidence that contradicted his employer's letter, but a review of the reasons for decision indicates this is not true. In paragraph 15, the GD summarized the September 19, 2008 letter from M. S., the HR representative who wrote that the Applicant performed his regular duties between October 4, 2005 and September 4, 2008 and did not miss any time from work because of his condition. Contrary to the Applicant's suggestion, the GD noted evidence that he was accommodated in his last job. Paragraph 28 refers to the Applicant's testimony that after 2005 he worked with a partner who did all the heavy work because "he himself was unable to work on the floor, climb, or go into small spaces… His employer accommodated his condition, for example, allowing him to rest when necessary."

[14] The GD did not ignore the Appellant's testimony but instead weighed it against documentary evidence and found the former lacking. In paragraph 40, the GD deemed the Applicant to be an "unreliable historian" because he could not remember basic details about his training and work history. For this reason, the GD preferred to rely on, not only the employer's letter, but other evidence indicating the Applicant performed his regular duties between 2005 and 2008: Dr. Zuliani's July 2006 report, in which he wrote the Applicant was doing his regular full-time job, and Dr. Zuliani's 2009 statement that he had missed almost no work because of

his condition. The GD devoted the bulk of paragraph 45 to this issue, and it cannot be said it simply dismissed the Applicant's submissions on accommodation.

[15] In *Simpson v. Canada*,[4] the Applicant identified a number of medical reports which the Pension Appeals Board was alleged to have ignored, given too much weight, misunderstood or misinterpreted. In dismissing the Applicant's application for judicial review, the Federal Court of Appeal held that:

> …assigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact. . .

[16] In keeping with *Simpson,* the GD was acting within its jurisdiction in sifting through the relevant facts, assessing the quality of the evidence, determining what facts, if any, it chose to accept or disregard and deciding on their respective weights, before ultimately coming to a decision based on its interpretation and analysis of the material before it. Hence, I do not see how this ground has a reasonable chance of success, arising out of the fact that the GD chose to place more or less weight on some of the evidence than the Applicant submits was appropriate.

[17] Based on my review of the file, the two WSIB memos submitted with the Application for Leave were not before the GD at the time of hearing. If the Applicant wishes to submit additional documents, they must relate to the stated grounds of appeal, but he has not explained how the two memos support his claim that the GD made an erroneous finding of fact without regard for the material before it. If the Applicant is asking me to consider those additional documents, reassess the evidence and decide in his favour, I am unable to do so at this stage given the constraints of subsection 58(1) of the DESDA. Neither a Leave Application, nor an appeal, provides an opportunity to hear the merits of a case anew. In short, there are no grounds on which I can consider the documents noted above for the purposes of an application for leave to appeal.

[18] If there are any new facts or records which the Applicant intends to file in an effort to rescind or amend the decision of the GD, he must now comply with the requirements set out in

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

sections 45 and 46 of the *Social Security Tribunal Regulations* and file an application to rescind or amend with the GD. Subsection 66(2) of the DESDA requires that an application to rescind or amend be made within one year after the day on which the decision in question is communicated to the parties. Under paragraph 66(1)(b) of the DESDA, an applicant must show that the new fact is important and would not have been discovered at the time of the hearing with the exercise of reasonable diligence.

Weighting of Dr. Martin's Report

[19] The Applicant alleges the GD erred in not giving merit to "significant objective findings" in Dr. Martin's independent medical report dated December 23, 2009, among them limitations to his range of motion, a finding that he had a herniated disc with nerve impingement and an assessment of 16 percent functional loss as a result of permanent impairment of the low back and right leg paresthesia. The Applicant also notes that the GD noted the report was found on pages GD6-10 of the hearing file, when in fact it was a six-page report "found on GD 10 to GD 16."

[20] It is established law that an administrative tribunal is not required to refer to each and every piece of evidence before it, and it can be presumed to have considered all of the evidence (*Simpson*, supra). In this case, the GD *did* refer to the report in question, summarizing it at paragraph 19 and citing it again at paragraph 43 to acknowledge that Dr. Martin accepted that the Applicant suffered from low back pain, numbness, and sciatica in his right leg. The Applicant has not claimed that the GD ignored or mischaracterized Dr. Martin's report, only that it failed to emphasize those findings the Applicant wanted emphasized.

[21] As for the allegation that the GD incorrectly described the location and length of Dr. Martin's report, I find that it was in fact at p. GD6-10 of the hearing file in a packet of documents labelled with the prefix "GD6" for Social Security Tribunal cataloguing purposes. Contrary to the Applicant's suggestion, the GD made no representations as to the length of the report. As an aside, even if the GD were wrong about page count, I do not see how that would have been a material error.

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

Weighting of Dr. Zuliani's CPP Medical Report

[23] The Applicant alleges that the GD did not give proper consideration to significant objective findings contained in the medical report, prepared by Dr. Zuliani, that accompanied the CPP application. Although it was not specified in the leave to Appeal application, I presume the Applicant is referring to the questionnaire dated February 28, 2012 found on p. GD2-51 of the hearing file. The Applicant also suggests that the GD disregarded testimony that he suffered from periodic falls.

[24] Again, I refer to *Simpson* in relieving the GD of the obligation to recapitulate each and every medical finding in its reasons. The fact that the GD did not include the findings the Applicant wanted highlighted does not mean that the GD did not consider them. In any event, a review of the decision indicates multiple references to Dr. Zuliani's several reports, as well as his office notes, including a brief synopsis of the CPP medical report in question at paragraph 21. The GD's analysis of the severity criterion contains a full discussion of various aspects of Dr. Zuliani's CPP medical report, in particular at paragraph 48.

[25] As for the Applicant's suggestion that the GD ignored or gave insufficient consideration to oral evidence that he experienced several falls over the years, I note that the decision made explicit reference to testimony that he suffers from back spasms and has a tendency to fall down, which has left him "terrified of going down the stairs."

[26] An appeal is not an occasion to reargue the evidence on its merits. I see no arguable case on the present ground.

Villani Factors

[27] The Applicant submits that the GD erred in law by failing to apply the principles set out in *Villani*, specifically that it failed to consider the Applicant's limitations in a "real world context," assessing the severity test without regard for background factors such as age, education and vocational experience. He was 52 years old at the time of his application, never completed high school and had been licensed as an electrician for only ten years before his work accident. He had always worked in a skilled trade at a medium level, and he now lacked the physical capacity to maintain employment in that field.

[28] In its decision, the GD referred to the correct test at paragraph 50 and discussed the Appellant's functionality in the context of the same personal characteristics listed above, although it concluded that the fact he had qualified as an electrician only ten years earlier suggested that he was "capable of learning at a mature age."

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

> . . 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 is a question of judgment with which this Court will be reluctant to interfere.

[30] I would not overturn 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 so here, I see no arguable case on this ground.

CONCLUSION

[31] I find that none of the claimed grounds of appeal carry a reasonable chance of success. The Application is refused.

Member, Appeal Division