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

Citation: *S. P. v. Minister of Employment and Social Development*, 2016 SSTADIS 261

Tribunal File Number: AD-16-342

BETWEEN:

S. P.

Applicant

and

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

On Leave to Appeal

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: July 11, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal dated January 28, 2016. The GD conducted a hearing by teleconference and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan* (CPP), as it found that his disability was not "severe" prior to the minimum qualifying period (MQP) of December 31, 2013.

[2] On February 18, 2016, within the specified time limitation, the Applicant submitted to the Appeal Division (AD) an Application Requesting Leave to Appeal detailing alleged grounds for appeal.

[3] For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

OVERVIEW

[4] The Applicant was born in Jamaica and immigrated to Canada in 1991 at the age of 37. After obtaining college certification in food preparation, he worked for a company that provided catering services to a large law firm in Toronto. In June 2010, he was involved in a motor vehicle accident (MVA) that left him with injuries to his back and shoulders. He made several attempts to return to his job at varying capacities and has not worked since November 2011.

[5] The Applicant applied for a CPP disability pension on April 5, 2012. The Respondent denied the application initially and upon reconsideration. The Applicant then appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals and this appeal was transferred to the GD in April 2013.

[6] At the hearing before the GD on January 26, 2016, the Applicant testified about his schooling and work experience. He also testified about his injuries and treatment. He received surgery on his left shoulder and participated in physiotherapy until September 2014. He received cortisone injections in his back and knees with no lasting effect. He said he had not

attempted to retrain or search for sedentary employment. He had only performed physical work during his career and was no longer capable of it. His back pain would prevent him from sitting in a classroom for extended periods.

[7] In its decision of January 28, 2016, the GD dismissed the Applicant's appeal, finding that he did not suffer from a severe disability, on a balance of probabilities, under the definition set out in paragraph 42(2)(a) of the CPP, as of the December 31, 2013 MQP. While acknowledging that he was subject to some functional impairments, the GD found the Applicant remained capable of duties lighter than his previous employment, and he faced no significant barriers to retraining.

THE LAW

[8] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), 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.

[9] 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.

[10] 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.

[11] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada.*[1] 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.*[2]

[12] 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

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

SUBMISSIONS

[14] After filing his Application Requesting Leave to Appeal, the Applicant made a series of written submissions, dated March 8, 2016, March 29, 2016 and April 27, 2016. I note that the Applicant's letter of March 29, 2016 was largely occupied with recounting his history and adopted, nearly verbatim, wording from the decision of the GD. However, I was able to extract allegations about the way in which the GD conducted his hearing and disposed of his appeal. I would summarize them follows:

(a) The GD's decision was unfair. He suffers from chronic shoulder and back pain that has rendered him incapable of all substantially gainful employment. He has a severe and prolonged disability that qualifies him for a CPP disability pension.

(b) The GD should not have placed significant weight on Dr. Chan's July 10, 2012 report, which concluded that the Applicant's left shoulder problems did not qualify him for a CPP disability pension. This report did not consider the severe pain in his right shoulder and back. The GD also gave inadequate weight to other medical reports, specifically:

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

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

- Dr. Gozlan, clinical psychologist, August 28, 2010;
- Dr. Chan, orthopedic surgeon, January 17 2012;
- MRI of the lumbar spine, March 22, 2012;
- Dr. Alan Drayton, chiropractor, March 22, 2012 and April 13, 2012;
- Dr. Woo, family physician, March 29, 2012 and July 28, 2012;
- Imaging report of the right knee, December 3, 2012;
- Dr. Lui, neurosurgeon, April 29, 2013;
- Rothbart Centre for Pain Management, July 29, 2013;
- Dr. Michael West, orthopedic surgeon, March 10, 2014.

(c) The GD failed to observe the principles of natural justice by not holding an in-person or videoconference hearing. Its decision made reference to reports (for example, in paragraph 20) that suggested the Applicant was prone to exaggeration, but the GD restricted its opportunity to assess his credibility by insisting the matter proceed by teleconference. *T.S. v. Canada Employment Insurance Commission*[3] offers a relevant example of a case in which the AD allowed leave to appeal based on the GD's refusal to hold a hearing that did not permit visual assessment of testimonial credibility.

(d) The GD erred in law by failing to give inadequate consideration to the "real world" test set out in *Villani v. Canada*.[4] In deciding whether a person's disability is severe, the GD must keep in mind factors such as age, level of education, language proficiency and past work and life experience. In this case, the Applicant was 59 years old at the MQP and worked exclusively in physical occupations for his entire life, including 19 years as a food preparer. Moreover, the GD made an erroneous finding of fact in a perverse or capricious manner without regard for the material before it when it suggested (based on medical findings summarized in paragraphs 23, 26 and in particular 34) that he had the capacity to retrain or upgrade his education or perform sedentary work.

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[3] *T.S. v. Canada Employment Insurance Commission* 2015 SSTAD 1076 September 12, 2015.
[4] *Villani v. Canada (A.G.)*, 2001 FCA 248.

ANALYSIS

Decision Was Unfair

[15] The Applicant may not agree with the decision of the GD, but merely asserting unfairness does not constitute a valid ground of appeal under section 58 of the DESDA. To succeed on leave, an applicant must put forward a specific ground of appeal that falls into one or more of the three enumerated headings and demonstrate that there is reasonable chance of success on appeal. The Applicant has not done so in this instance.

Reliance on Dr. Chan's Report to the Exclusion of Others

[16] In his submissions, the Applicant suggested that the GD erred by placing undue weight on Dr. Chan's report of July 10, 2012. In its analysis, the GD wrote:

> The Tribunal places significant weight on the opinion of Dr. Chan a specialist in orthopedics that the Appellant from his perspective does not qualify for CPP/Disability Pension due to his left shoulder problem and a vocational assessment should be undertaken. The Tribunal does not abdicate its responsibility to determine the issue of a severe disability however this observation by Dr. Chan is significant.

[17] If the GD had relied exclusively on Dr. Chan's report, then this allegation might have had some validity, but the decision also assesses the Applicant's testimony and makes reference to many other items of documentary evidence. While the GD placed a great deal of weight on Dr. Chan's opinion, it did so because it found that it was consistent with much of the remaining medical evidence.

[18] The Applicant also listed several medical reports to which the GD allegedly gave inadequate weight, but I note that each of these items appear to have been summarized and fully considered in the decision. In *Simpson v. Canada*[5], the Federal Court of Appeal stated 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. *Simpson* goes on to state that assigning weight to evidence, whether oral or written, is the job of the trier of fact.

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

[19] The Applicant is essentially requesting that I re-weigh the evidence that was available at the hearing and come to a different conclusion than that made by the GD. This is beyond the scope of a leave application. The AD may not substitute its view of the evidence for that of the trier of fact. The DESDA does not contemplate a reassessment of the evidence at the leave stage. It does, however, require an applicant to satisfy the AD that there is at least one reviewable error that has a reasonable chance of success, and the Applicant has not done so in this regard.

Hearing by Teleconference Did Not Permit Proper Credibility Assessment

[20] In paragraph 2 of its decision, the GD stated that the appeal was originally scheduled to be heard by videoconference for the following reasons:

> (a) The Appellant was to be the only party attending the hearing;
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> (b) The form of hearing provided for the accommodations required by the parties or participants;
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> (c) Videoconferencing was available in the area where the Appellant lives; and
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> (d) The form of hearing respected the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[21] The GD further noted that there were a number of adjournments. In order to accommodate rescheduling and move the matter forward in a timely manner, the hearing was rescheduled as a teleconference. The GD felt the issues were conducive to a teleconference hearing.

[22] I have reviewed the record of the proceedings and note that the hearing was originally scheduled by videoconference on June 23, 2015. The hearing was adjourned twice at the request of the Applicant and/or his representative. On the eve of second date, November 25, 2015, a large volume of new evidence was introduced. Shortly afterward, the GD changed the form of hearing from videoconference to teleconference. It appears a brief hearing was held focusing on

the admissibility of the late documents. On December 7, 2015, another teleconference hearing was scheduled, this time for January 26, 2016.

[23] Section 21 of the SST Regulations states that the GD may hold a hearing by one of several methods, including written questions and answers, teleconference, videoconference or personal appearance. Use of the word "may" in the text in the absence of qualifiers or conditions suggests that the GD has discretion to make this decision.

[24] I would not suggest that the GD's discretion to make such a decision can be completely divorced from reason. The Federal Court of Appeal has confirmed that setting aside a discretionary order requires an appellant to prove that the decision-maker committed a "palpable and overriding error,"[6] but I see nothing like that here.

[25] The Applicant is alleging that the GD failed to observe a principle of natural justice by holding the hearing by teleconference. He suggests that because the GD subsequently found his testimony was exaggerated, the hearing format should have allowed visual assessment of testimonial credibility. The Supreme Court of Canada dealt with the issue of procedural fairness in *Baker v. Canada*,[7] which held that that a decision affecting the rights, privileges or interests of an individual is sufficient to trigger the application of the duty of fairness. The concept of procedural fairness, however, is variable and it is to be assessed in the specific context of each case. *Baker* then lists a number of factors that may be considered to determine what the duty of fairness requires in a particular case, including the importance of the decision to the individual affected, the legitimate expectations of the person challenging the decision, and the choices of procedure made by the agency itself, particularly when the legislation gives the decision-maker the ability to choose its own procedure.

[26] I accept that the issues in this matter are important to the Applicant, but I also place great weight on the nature of the statutory scheme that governs the GD. The Social Security Tribunal was designed to provide for the most expeditious and cost effective resolution of disputes before it. To accomplish this, Parliament enacted legislation that gave the GD the

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[6] *Imperial Manufacturing Group Inc. and Home Depot of Canada Inc. v. Décor Grates Incorporated,* 2015 FCA 100; *Horseman v. Twinn, Electoral Officer for Horse Lake First Nation,* 2015 FCA 122; *Budlakoti v. Canada (Citizenship and Immigration),* 2015 FCA 139.

[7] *Baker v. Canada (Minister of Citizenship and Immigration),* 1999 699 (SCC), [1999] 2 SCR 817.

discretion to determine how hearings are to be conducted, whether in person, by videoconference or in writing, etc. The discretion to decide how each case will be heard should not be unduly fettered.

[27] While the GD has wide discretion to rule on this matter, its decision to change the format of the hearing in this case was not done on a whim, but for reasons explained in its decision, albeit cursorily. The decision to switch from videoconference to teleconference followed an adjournment and late submission of a large volume of documents, which the GD likely foresaw would be the basis for a highly unusual second adjournment (and which it subsequently granted). The choice of hearing format may be based on numerous factors other than assessment of credibility. Whatever the form of the hearing, the Applicant was given the opportunity to present his case and answer the Respondent. Although he felt the GD's choice of hearing did not allow adequate assessment of credibility, he did not explain how he was disadvantaged by giving his testimony via teleconference as opposed to videoconference.

[28] Finally, I note that the case cited by the Applicant, *T.S. v. Canada Employment Insurance Commission*, is a decision of the AD, which I am not bound to follow. After considering all factors, I am satisfied that simply because the GD hearing was held by teleconference, procedural fairness was not breached in this case.

Inadequate Consideration of Villani

[29] The Applicant submitted that the GD failed to apply the legal principles set out in *Villani*, in particular, by not assessing his disability and personal characteristics in a "real world context."

[30] I must disagree. In this case, the GD referred to the test at paragraph 42 and discussed the Applicant's background in the following paragraph, mentioning his age, education and work history from the perspective of his capacity regularly of pursuing any substantially gainful occupation. Essentially, the Applicant has requested that I assess the evidence as it pertains to the Applicant's personal characteristics—something that in my view has already been sufficiently done. 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

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

CONCLUSION

[32] In my view, the Applicant has not presented an arguable case on any ground. The application for leave to appeal is refused.

Member, Appeal Division