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

Citation: *A. B. v. Minister of Employment and Social Development*, 2016 SSTADIS 266

Tribunal File Number: AD-16-498

BETWEEN:

A. B.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

On Leave to Appeal

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: July 12, 2016

REASONS AND DECISION

DECISION

Leave to appeal is allowed.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal dated December 31, 2015. The GD conducted a hearing by videoconference 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, 2007.

[2] On April 1, 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 36 years old when she applied for CPP disability benefits on May 30, 2012. In her application, she wrote that she was last employed as receptionist for a firm of chartered accountants in August 2004, when she stopped working due to severe chronic back pain, migraine headaches, fatigue, anxiety and depression. She also indicated that she performed similar work as an independent contractor between August 2007 and January 2008.

[5] At the hearing before the GD on September 17, 2015, the Applicant testified about her education and work experience. She said that she had suffered from fibromyalgia since the age of 15. She described her symptoms and how they limited her ability to function at home and at work.

[6] In its decision of December 31, 2015, the GD dismissed the Applicant's appeal, finding that, on a balance of probabilities, she did not suffer from a severe disability as of the MQP. Although the GD found the Applicant credible, it noted that her fibromyalgia was not diagnosed until October 2011—well after December 31, 2007. It also found that her medical conditions were apparently being managed successfully by medication and noted that she was employed at the MQP.

THE LAW

[7] 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.

[8] 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.

[9] 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.

[10] 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]

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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.

[11] 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

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

SUBMISSIONS

[13] In her Application Requesting Leave to Appeal, the Applicant submitted that the GD made the following errors in coming to the conclusion that she was not disabled:

(a) It misapprehended *Villani v. Canada*[3] in determining that the absence of any age, language or education considerations justified the finding that the Applicant's disability fell short of "severe."

(b) It misapplied the principle from *Inclima v. Canada*[4] by giving inadequate consideration to evidence that the Applicant unsuccessfully attempted to hold on to series of jobs prior to applying for CPP disability benefits.

(c) It mischaracterized the Applicant's four-month contract between August and December 2007 as evidence of capacity, when in fact it was an unsuccessful attempt to return to the workforce offered by a benevolent employer.

(d) It disregarded the difference between disability and diagnosis, ignoring evidence that the Applicant had experienced debilitating symptoms for years before being formally diagnosed with fibromyalgia in October 2011.

ANALYSIS

Villani

[14] The Applicant submits that the GD misapplied *Villani* when it concluded the Applicant's disability fell short of severe based on its finding that her personal factors (such as

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[3] *Villani v. Canada (A.G.)*, 2001 FCA 248.
[4] *Inclima v. Canada (A.G.)*, 2003 FCA 117.

age, language skills, education and work experience) would not preclude her from retraining or finding alternative employment.

[15] The Applicant further submits that if the so-called *Villani* factors are determined to be substantial roadblocks to an applicant's employability at a substantially gainful occupation, then those factors are to be taken into account assessing whether his or her disability is severe. In this case, the GD appeared to use the absence of any considerations with respect to age, language, education or experience to justify the finding that the Applicant's disability was not severe. It is the *presence* of *Villani* factors which deem limitations as severe. However, the reverse cannot be said to be true: The *absence* of *Villani* factors cannot play a role in determining whether or not limitations are severe.

[16] I see an arguable case on this ground. In paragraph 40 of its decision, the GD wrote:

> The Appellant was 37 years of age at the time of application. She has a grade XII education with one year of post-secondary attendance at a college/university. The Appellant's work experience comprises of receptionist and office manager duties. The Tribunal finds that she has transferrable skills based on her age, language proficiency and work experience. Therefore, it is the Tribunal's finding that the Appellant is a suitable candidate for retraining or an alternate job suitable to her physical limitations. Hence, based on the *Villani* factors and taking a real world approach, the Tribunal does not find the Appellant to be suffering from a severe medical condition at the time of her MQP of December 31, 2007.

[17] I note the words of the Federal Court of Appeal in *Villani*:

> [40] …the mandatory requirement that applicants supply the Minister with information related to their education level, employment background and daily activities can only indicate that such "real world" details are indeed relevant to a severity determination made in accordance with the statutory definition in subparagraph 42(2)(a)(i) of the *Plan*.
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> [49] …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 applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere.

[18] While the GD correctly noted the *Villani* test in its decision, it is not immediately obvious to me that it was applied correctly to the Applicant's circumstances. Having found that that the Applicant's background presented few impediments to her participation in the workforce, the GD concluded that she was not suffering from a severe medical condition at the

time of her MQP—and this was before there was any consideration of the medical conditions that formed the basis of her claimed disability. It appears, based on a plain reading of the text, that the GD may have taken a leap in logic that is not justified by the *Villani* "real world" approach. I am granting leave to appeal to permit further exploration of this question.

Inclima

[19] The Applicant alleges that the GD misapplied *Inclima* by giving inadequate consideration to evidence that the Applicant unsuccessfully tried a series of jobs prior to applying for CPP disability benefits. The GD took as evidence of work capacity that fact that the Applicant was employed as of the MQP date and faulted her for not seeking accommodation from her last employer or looking for work suitable to her limitations. In doing so, however, the GD ignored the Applicant's long history of taking jobs that proved beyond her capacity as her medical condition continued to deteriorate.

[20] The Applicant claims that she has suffered from disabling factors such as fatigue, chronic pain and anxiety since 1990. She lost her first job in April 1998 due to her functional limitations. She worked again from December 2001 to September 2002 but was "encouraged to seek alternate employment" due to unreliable attendance. Even at this point, the Applicant did not give up trying to return to the work force. While she could have applied for CPP benefits at any point after 2002, she focused instead on resuming her working life. From February 2003 to August 2004, she worked as receptionist, stopping due to severe back pain. Her last employment was from August to December 2007, when pain and fatigue once again removed her from work. When one reviews the Applicant's work history, it is "obvious" that her functional limitations have hindered her efforts to maintain employment.

[21] In my view, this ground carries a reasonable chance of success on appeal. *Inclima* stands for the proposition that where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition. While the GD correctly cited *Inclima*, it went on to state:

> [41] The onus is on the Appellant to prove that she sought alternatives to managing her job duties as well as her medical conditions, instead of resigning from her position. While it is certainly not the Tribunal's prerogative to suggest what the Appellant should have done, she certainly could have spoken with her

> employer about managing her situation since Mr. K. had accommodated her needs at the time she was hired. The Appellant did not provide any such evidence. Subsequently, the Tribunal finds that she did not satisfy the principle upheld in *Inclima*.

[22] Mitigation—whether an applicant has done everything reasonably possible to remain in the labour market—is an issue that looms large in many disability hearings, but unfortunately *Inclima* provides little guidance on how it is to be applied in practice. In this case, the GD's discussion on mitigation focused entirely on the Applicant's conduct during a final, part-time contract position and made no reference to her previous, similarly short-lived jobs. An arguable case can be made that the GD erred in failing to give consideration to the Applicant's entire work history in assessing whether she fulfilled her obligation to mitigate her impairments.

Benevolent Employer

[23] The Applicant submitted that the GD gave inadequate consideration to whether the Applicant's final job as an office manager and receptionist was meaningful and competitive. The GD noted that her last employer at Synthesis Designs already allowed her to set her own schedule and work 20-24 hours per week, but it still faulted her for not requesting further modifications. It was not realistic, given commercial realities, to expect any employer, no matter how benevolent, to accommodate a worker who was unable to deliver predictable performance.

[24] I see an arguable case on this ground of appeal. There is a body of case law led by *Atkinson v. Canada (A.G.)*[5] that evidence of a so-called "benevolent employer" must be taken into account where a claimant remains in the workforce despite her claimed disability. Although the GD acknowledged accommodations offered by the Applicant's last employer, its decision contained no discussion about the possibility that her performance might have been held to something less than a commercial standard.

[25] In fact, it seems the GD took the Applicant's final job not as a failed work trial but as evidence that she had capacity as of the MQP date. In paragraph 41, it stated that the fact she was employed on December 31, 2007 was evidence of work capacity. I am not sure whether so categorical a statement can be justified based on the available evidence. I have already noted

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[5] *Atkinson v. Attorney General of Canada*, 2014 FCA 187.

that an arguable case can be made that her four months at Synthesis Designs was a failed work trial, the product of employer benevolence or both. I would add that the GD accepted testimony that the Applicant was unable to get out of bed on January 2, 2008 (presumably the first working day of the New Year), leaving open the question of precisely when she stopped actively working as a receptionist.

Disability Versus Diagnosis

[26] The Applicant submits that the GD erred in disregarding the difference between disability and diagnosis, ignoring evidence that she had experienced debilitating symptoms for years before being formally diagnosed with fibromyalgia in October 2011. Diagnosis is irrelevant to the determination of benefit entitlement. Whether the Applicant suffered from fibromyalgia in childhood has no bearing on her eligibility for CPP disability benefits; the only relevant issue is whether the Applicant had functional limitations that prevented her from regularly pursuing a substantially gainful occupation as of December 31, 2007, and on this point, the Applicant submits there was enough evidence, both anecdotal and medical, which clearly pointed to disability.

[27] In my view, this ground is unlikely to succeed on appeal. The Applicant objects to this passage at paragraph 42 of the GD's decision: "The Appellant has argued that she has had fibromyalgia since the age of 15. The Tribunal does not doubt the Appellant's credibility and accepts that she suffers from this condition. However, this diagnosis was made in October 2011, which is after December 31, 2007." In my view the GD is simply expressing the truism that it is difficult to be sure about the date of onset of a medical condition retrospectively. I agree with the Applicant that there is a difference between diagnosis and disability, but I would suggest there is a relationship: A diagnosis can explain a disability; the absence of a diagnosis makes explaining (and therefore proving) a disability that much harder. In this case, the GD did not say that the absence of a fibromyalgia diagnosis prior to the MQP disproved the Applicant's disability claim; instead, it said that the available evidence suggested her symptoms prior to December 31, 2007 fell short of severe: There were no objective findings of back pathology, and her pain was managed conservatively. Her depression was stable on Cipralex, and she appeared happy during visits to her family physician.

[28] Although the Applicant argues that the evidence clearly pointed to disability, this is not a forum to reargue the case on its merits. The DESDA permits the AD only to determine only whether any of an applicant's reasons for appealing fall within the specified grounds and whether any of them have a reasonable chance of success. I see no reasonable chance of success on this ground.

CONCLUSION

[29] I am allowing leave to appeal on the grounds that the GD may have made errors of mixed fact and law by: (i) misapprehending *Villani v. Canada*; (ii) misapplying the principle from *Inclima v. Canada* and (iii) mischaracterizing the Applicant's four-month contract between August and December 2007.

[30] I invite the parties to provide submissions on whether a further hearing is required and, if so, what the type of hearing is appropriate.

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

Member, Appeal Division