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

Citation: *P. A. v. Minister of Employment and Social Development,* 2016 SSTADIS 273

Tribunal File Number: AD-16-540

BETWEEN:

P. A.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: July 18, 2016

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal dated January 22, 2016. The GD had conducted an in-person hearing 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, 2011.

[2] On April 8, 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 March 7, 2012. In her application, she disclosed that she attended school up to Grade 7 in India, her country of origin, and after immigrating to Canada worked in a pizza dough processing plant and then a furniture factory. When she was laid off from the latter job in December 2007, she was already suffering from pain and swelling in her right wrist and arm. In September 2008, she attempted to work in a bakery but quit after a month.

[5] At the hearing before the GD on January 5, 2016, the Applicant testified about her background and work experience. She also described her symptoms and how they limited her ability to function at home and at work. She stated that she would have continued to work at the

furniture factory had she not been let go. She had been prescribed medication to treat depression but was reluctant to take them due to concern about side effects.

[6] In its decision of January 22, 2016, the GD dismissed the Applicant's appeal, finding that, on a balance of probabilities, he did not suffer from a severe disability as of the MQP. In the GD's view, the available medical evidence suggested that the Applicant retained capacity that did not preclude substantially gainful work. The GD acknowledged that her education and English skills were lacking but noted these deficiencies had not prevented her from securing gainful occupation since coming to Canada in 1993.

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

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

arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada.*[2]

[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 based its decision on an erroneous finding of fact in a perverse or capricious manner or without regard to the material before it. She also submitted that:

(a) She made an attempt to return to work in a modified role with her employer and subsequently worked at a bakery in 2008;

(b) She made a reasonable effort to continue to work after she was laid off in 2007 and failed due to significant functional limitations;

(c) She has a severe condition that prevents her from working and lacks residual work capacity;

(d) Although she wanted to work, she was not equipped with coping strategies to deal with her condition;

(e) She struggles with daily activities and is not even able to care for herself or perform basic housework;

(f) She does not drive and is unable to prepare her own meals;

(g) She has difficult mornings and does not seem to be able to carry on an active life in afternoon either;

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

(h) Her prospects for finding work are significantly limited because of her limited education, English-language skills and a history of manual labour.

[14] The Applicant also submitted that the GD erred in law by failing to consider the totality of the medical evidence, specifically Dr. Pinto's rheumatology report dated November 28, 2011. The Applicant alleges that the "criterion of severability in real work context [sic]" was not assessed properly. She continues to seek medical treatment and rehabilitation for her condition, which is becoming progressively worse. She has only limited ability to perform her activities of daily living and requires assistance from others. The GD did not asses any weight to this evidence.

ANALYSIS

Erroneous Finding of Fact

[15] The Applicant alleges that the GD erred in finding that her disability fell short of the severity threshold. She then itemized various aspects of her impairments that she claimed demonstrated her incapacity to sustain substantially gainful employment.

[16] I find the Applicant's claimed grounds of appeal to be so broad that they amount to a request to retry the entire claim. The Applicant's submissions on this ground amount to a recapitulation of evidence and argument already presented to the GD. In essence, she is requesting that I reconsider and reassess the evidence and decide in her favour, but I am unable to do this. My authority permits me to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds of subsection 58(1) and whether any of them have a reasonable chance of success.

[17] As the Applicant has not identified any specific errors of fact, I am unable to consider granting leave under the claimed grounds of appeal.

Failure to Consider the Totality of Medical Evidence

[18] The Applicant alleges that the GD erred in law by failing to consider the totality of the medical evidence, specifically Dr. Pinto's rheumatology report dated November 28, 2011.

[19] A review of the GD's decision reveals that it included a detailed summary of the report at issue, at subparagraph 9(o), going as far as to quote at length a passage that ended with this sentence: "Given the prolonged nature of her condition, lack of language and educational skills, I do not anticipate a return to any useful form of employment." The GD again referred to Dr. Pinto's November 2011 report in its summaries of the Applicant's and Respondent's submissions, but ultimately decided to discount it because it did not qualify as "primary" evidence, of which none had otherwise been submitted. The GD drew an adverse inference from the fact that no evidence was introduced from physicians who had actually treated the Applicant for her medical conditions, Dr. Pinto having been commissioned to prepare a medical-legal assessment.

[20] The Applicant has not persuaded be that the GD gave no weight to Dr. Pinto's report. While Applicant may not agree with the GD's conclusions, 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.

[21] The courts have previously addressed this issue in other cases where it has been alleged that administrative tribunals failed to consider all of the evidence. In *Simpson v. Canada (AG)*[3], the appellant's counsel identified a number of medical reports which she said that the Pension Appeals Board—the predecessor to the AD—ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the application for judicial review, the Federal Court of Appeal held:

> First, a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence. Second, 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….

[22] I see no arguable case on this ground.

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

Inadequate Consideration of Villani

[23] I presume that when the Applicant refers to the GD's failure to assess the severe criterion in a "real work context," she actually means a "real world context", which is an important phrase from *Villani v. Canada*[4], the leading case on the CPP's definition of disability.

[24] In its decision, the GD summarized the Applicant's background and personal characteristics at subparagraphs 9(a), 9(b), 9(g) and10(b) and referred to the correct test at paragraph 18. While acknowledging that the Applicant had a "lower level of language abilities and lesser educational capabilities," the GD noted that they had not prevented her from securing gainful occupation since coming to Canada in 1993.

[25] In 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.

[26] 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, albeit cursorily, I see no arguable case on this ground.

CONCLUSION

[27] The Application is refused.

Member, Appeal Division

[4] *Villani v. Canada (Attorney General)*, 2001 FCA 248