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

Citation: *S. M. v. Minister of Employment and Social Development*, 2016 SSTADIS 272

Tribunal File Number: AD-16-531

BETWEEN:

S. M.

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: July 15, 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 6, 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, 2011.

[2] On April 6, 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 50 years old when he applied for CPP disability benefits on October 25, 2012. In his application, he disclosed that he suffered from pain and limitations to his left knee and lower back, as well as depressions and anxiety, conditions that he claimed disabled him from substantially gainful work. He stated that he was last employed as a cabinet maker in August 2009, when he sustained a work-related injury.

[5] At the hearing before the GD on January 4, 2016, the Applicant testified about his education and work experience. He also described his symptoms and how they limited his ability to function at home and at work. He said that he had sought treatment from numerous specialists and taken a variety of medications. He underwent arthroscopic surgery on his left knee in April 2010 and received physiotherapy for both his back and his knee.

[6] In its decision of January 6, 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 residual capacity that did not preclude light work. In addition, it found that his depression and anxiety were being adequately managed through medication.

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 the Application Requesting Leave to Appeal, the Applicant's representative made the following submissions:

(a) The GD erred in finding that the Applicant's physical and psychological condition did not constitute a severe and prolonged disability prior to the MQP. In particular, it gave insufficient weight to the following reports:

- Dr. Martin Svihra, October 18, 2010;
- Discharge Summary, St. Joseph's East Regional Mental Health Clinic re treatment from July 5, 2011 to June 28, 2012;
- Dr. William Tam and Barry Rosen, MSW, November 29, 2011;
- Dr. Svetlana Milenkovic, June 21, 2013;
- Dr. Sean Shahrokhenia, September 12, 2014 and December 10, 2015.

(b) In paragraph 25 of its decision, the GD acknowledged that the Applicant attended a work hardening program in January 2011 and that he was only able to complete 10 percent of the program because of pain and fatigue. The treating therapist stated that the Applicant was not an appropriate candidate for the program and noted that he exhibited a range of physical restrictions on examination. These findings were evident in the file but were not given proper consideration by the GD in determining the severity of the condition.

(c) The Applicant had unsuccessful surgery to his left knee in 2010 that left him with permanent impairment and functional loss. The Ontario Workplace Safety and Insurance Board awarded him a 26 percent whole person impairment in

November 2011. The loss of function and physical restrictions resulted in an incapacity to return to his occupation as a cabinetmaker.

(d) In paragraph 37 of its decision, the GD acknowledged that the severity of disabling conditions needs to be examined in a real world context in accordance with *Villani v. Canada*[3]. However, the GD failed to properly consider the *Villiani* factors that prevented the Applicant from seeking or maintaining less physical gainful employment. These factors included:

- His inability to work at the only occupation for which he was ever been trained;
- His lack of formal education in Canada and in his home country;
- His inability to read, write or communicate in the English language.

ANALYSIS

Inadequate Consideration of Selected Reports

[14] The Applicant's representative alleges that the GD erred in finding that the Applicant's physical and psychological condition did not constitute a severe and prolonged disability.

[15] I find the Applicant's claimed grounds of appeal to be so broad that they amount to a request to retry the entire claim. For the most part, the Applicant's submissions amount to a recapitulation of evidence and argument already presented to the GD. In essence, he is requesting that I reconsider and reassess the evidence and decide in his favour, but I am unable to do this, as 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.

[16] The Applicant had ample opportunity to present his case, and it appears that he took full advantage of it, making several submissions in the more than three years it took for this matter to come to hearing. The GD made its decision after conducting what appears to be a thorough assessment of the evidentiary record. All of the reports mentioned in the Applicant's

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

submissions were summarized in the GD's reasons and some were referred to in its analysis. 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.

[17] 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)*[4], the appellant's counsel identified a number of medical reports which she said that the Pension Appeals Board 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…

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

Improper Consideration of Villani

[19] 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 noted that he was 50 years old at the time of his application, lacked education, possessed narrow work skills and was unable to communicate in English.

[20] In its decision, the GD noted the Applicant's background and personal characteristics (at paragraphs 8, 9 and 35) and referred to the correct test at paragraph 38, acknowledging that the Applicant had only performed physical labour throughout his working career. In the end, the GD concluded that there did not appear to be any *Villani* factors that would prevent the Applicant "from seeking and maintaining suitable, less physical gainful employment."

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

[21] The remainder of the Applicant's submission on this ground is essentially a request to reassess the evidence as it pertains to the Applicant's personal characteristics. 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.

[22] 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

[23] The Application is refused.

Member, Appeal Division