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

Citation: *R. L. v. Minister of Employment and Social Development*, 2016 SSTADIS 276

Tribunal File Number: AD-16-543

BETWEEN:

**R. L.**

Applicant

and

**Minister of Employment and Social Development**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division

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Leave to Appeal Decision by: Neil Nawaz

Date of Decision: July 20, 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) dated January 15, 2016. The GD conducted an in-person hearing on December 7, 2015 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, 2012. On April 7, 2016, within the specified time period, the Applicant's representative filed an application requesting leave to appeal, advancing numerous grounds of appeal and relying on various legal authorities. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

### THE LAW

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

[3] Subsection 58(1) of the DESDA sets out that 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.

[4] 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."

**ISSUE**

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

**SUBMISSIONS**

**Errors of Law**

[6] The Applicant submits that in making its decision the GD erred in law, whether or not the error appeared on the face of the record:

(a) The GD failed to apply *Garrett v. Canada*[1] by not considering or applying the factors set out in *Villani v. Canada*[2].

(b) The GD failed to apply *E.J.B. v. Canada*[3] by inadequately considering all of the Applicant's conditions and their collective impact on her functionality in a "real world" context.

(c) The GD failed to apply *Attorney General of Canada v. Dwight-St. Louis*[4] by giving insufficient consideration to the available evidence that the Appellant's disability was severe in the context of her personal circumstances.

(d) The GD failed to apply *Nova Scotia v. Martin*[5] in not giving credence to the Applicant's subjective symptoms underlying her claim that she suffers from chronic pain.

(e) The GD failed to apply the principles of *Inclima v. Attorney General*[6] by not taking into consideration the Applicant's efforts to return to work.

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[1] *Garrett v. Canada (Minister of Human Resources Development)*, 2005 FCA 84
[2] *Villani v.* Canada (*Attorney General)*, 2001 FCA 248
[3] *E.J.B. v. Canada (Attorney General)*, 2011 FCA 47
[4] *Attorney General of Canada v. Dwight-St. Louis*, 2011 FC 492
[5] *Nova Scotia (Worker's Compensation Board) v. Martin*, [2003] SCJ 54
[6] *Inclima v. Attorney General*, 2003 FCA 117

**Erroneous Findings of Fact**

[7] 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:

(a) At paragraph 78 of its decision, the GD found that the first time depression was mentioned in the Applicant's medical record was Dr. Friars' note of March 2014—ignoring a June 2008 consultation note from St. Joseph's Health Centre that referred to "non-physical" issues.

(b) In paragraph 78 of its decision, the GD stated that post-MQP diagnostic testing of the Applicant did not reveal any severe pathology, but it failed to consider findings reported by Dr. Friars in October 2013 and by Dr. Shende in May 2014.

(c) The GD failed to consider, or give due weight to, the Applicant's oral evidence, in which she described her various medical conditions and their negative impact on her life.

**ANALYSIS**

[8] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada.*[7] 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.*[8]

[9] 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, before leave can be granted.

**Errors of Law**

***Failure to Apply Garrett***

[10] The Applicant submits that the GD failed to apply *Garrett* by inadequately considering the *Villani* factors. The Applicant acknowledges that the GD correctly cited *Villani* at paragraph

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[7] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ 1252
[8] *Fancy v. Canada (Attorney General)*, 2010 FCA 63

72 of its decision and noted aspects of her personal background and characteristics, including her age (54 when she stopped working), education (a high school diploma and some post-secondary training in cookery) and work experience (35 years of employment in total).

[11] However, the Applicant alleges that the GD erred in assuming that she obtained transferrable skills during her many years working at an Imperial Tobacco factory, ignoring evidence that her job mainly involved operating machinery. Not only did the GD misrepresent some of the Applicant's personal characteristics, but it also erred in not applying them to the real world context when factoring in her medical problems, which included chronic obstructive pulmonary disease (COPD), pain in her right shoulder, right hip and lower back, osteoarthritis, osteoporosis, high blood pressure, low sodium, anxiety and depression and lack of restorative sleep, resulting in fatigue, exhaustion and cognitive impairments, including problems with her memory and concentration.

[12] On this ground, I see no reasonable chance of success on appeal. First, the Applicant alleges that the GD misrepresented some of the Applicant's personal characteristics—apparently referring to paragraph 80, where it mentioned her "college certificate" in cooking, rather than a "cook's basic certificate." I find that this is, at most, an immaterial error that likely had no bearing on the outcome of the proceeding before the GD. I would also note that the GD had earlier correctly characterized the Applicant's certification in paragraphs 8 and 52.

[13] Second, the Applicant alleges that the GD erred in assuming that she obtained transferrable skills during her 31 years working at Imperial Tobacco, ignoring evidence that her job mainly involved operating machinery and performing manual labour. Closer inspection of the GD's decision indicates that at paragraph 80 it noted the Applicant worked as a file clerk in her twenties but did not have any computer skills. Nevertheless, the GD continued: "She has over 35 years of earnings and work experience where she has obtained transferable job skills that can assist her in finding suitable employment." I do not find that these words mischaracterized the Applicant's status. It is clear that the reference to the Applicant's 35-year work history includes not only her 31 years as a factory worker but also her two years as a cook, which came after she completed a retraining program. It is not unfair to say that the Applicant has transferrable skills, even if they largely originate from the last years of her employment. In

any case, “transferrable work skills” need not refer only to expertise specific to a particular job but also general aptitudes and habits developed during an extended period in a the labour market.

[14] Finally, the Applicant alleges GD erred in not applying her personal characteristics to the real world context when factoring in her medical problems, but the *Villani* analysis comes after a an extended discussion of the Applicant’s condition in paragraphs 77 and 78 and is followed by this passage:

> None of her treating physicians opine that the Appellant is completely unable to work because of her condition. While the Appellant may experience limitations as a result of her condition, it is reasonable to expect that she could find, or retrain for other suitable employment within those limitations.

[15] Based on a reading of entire analysis, I conclude that the GD adequately discharged its obligation to apply the *Villani* real world test. In my view, this ground of appeal had no reasonable chance of success.

***Failure to Apply E.J.B.***

[16] *E.J.B.* is another case that reiterates the *Villani* principles, one that emphasizes the importance of considering all of an applicant’s medical conditions, not just her main complaint. The Applicant submits that the GD erred in law by failing to take into account the totality of her condition in determining that her impairments were less than severe. Specifically, the GD is alleged to have considered the Applicant’s background and personal characteristics only in the context of her dominant condition—COPD.

[17] I have already addressed the issue of whether the GD adequately considered the Applicant’s *Villani* factors and found no arguable case that it failed to do so. Here, the Applicant is suggesting that the GD ignored, or failed to give adequate consideration to, a wide array of ailments which she claims contributes to her disability. The Applicant refers specifically to paragraph 77 of the GD’s decision, which states:

> The Tribunal is not convinced by the medical evidence provided that the Appellant suffered from a severe disability at the time of her MQP as a result of her COPD.

[18] The Applicant also extracts a sentence from paragraph 78:

> Prior to and up until her MQP, it is clear from the medical record that the Appellant's dominant condition was her COPD.

[19] Having reviewed the section of the GD's decision headed "Analysis," I see no reasonable chance of success on this ground. The bulk of the GD's decision consists of summaries of most, if not all, of the medical evidence, which document, to varying degrees, the Applicant's many complaints. However, it is inaccurate to say that the GD simply disregarded, or gave short shrift to, her conditions apart from COPD. In an effort to show the GD took a unidimensional approach to her medical conditions, the Applicant quoted a single sentence from paragraph 78, but it is instructive to consider all of the text from that passage:

> At the hearing, the Appellant testified that in addition to COPD, she was also suffering from right shoulder, right hip and lower back pain, osteoporosis, high blood pressure, low sodium, anxiety, depression and problems with tiredness, memory and concentration, prior to her MQP in December 2012. However, the Tribunal would like to highlight the fact that none of these conditions were included by her or her family physician in her CPP application date stamped October 29, 2013. Prior to and up until her MQP, it is clear from the medical record that the Appellant's dominant condition was her COPD. Dr. Shende, her respirologist, noted in August 2010 that she denied anxiety and depression. The first time depression is indicated in her medical record is Dr. Friars' note of March 2014, which is subsequent to her MQP. Furthermore, diagnostic testing of the Appellant after her MQP did not reveal any severe pathology that would support the presence of a severe and prolonged disability at the time of the Appellant's MQP. Her bone scan in April 2014 found normal bone density and a low fracture risk. The MRI and X-ray of her lumbar spine in 2014 found no disc herniation and spinal stenosis, or other significant findings. In fact, Dr. Friars noted that the Appellant had no major health problems during March 2012, her last visit prior to her MQP.

[20] This paragraph suggests that the GD made a full and genuine attempt to sort through the Applicant's various complaints to determine whether they constituted a "severe" disability prior to the end of the MQP. In my view, I see no arguable case that the GD ignored the Applicant's secondary complaints or failed to give consideration to her whole condition.

***Failure to apply Dwight-St. Louis***

[21] The Applicant referred to this precedent in arguing that it is not enough for a tribunal to merely recognize its obligation to consider the *Villani* factors, it must actually apply them to a claimant's condition and personal circumstances. It also quoted a passage that emphasized the necessity of discussing a piece of evidence before discounting it. The Applicant specifically criticized the GD for finding that it was reasonable to expect that she could maintain alternative

employment within her limitations without explaining how that might be possible given her many medical conditions.

[22] I have already concluded that the GD discharged its obligation to consider the Applicant's background and personal factors. The question that remains is whether the GD adequately addressed how she could work given her circumstances. In paragraph 77, the GD discussed the Applicant's primary condition, which in its view was COPD, and followed that in paragraph 78 with an analysis of her secondary conditions and their effect on her functionality. In paragraph 80, the GD placed the Applicant's impairments in the context of her personal characteristics and concluded that she was still capable of suitable employment, noting that "none of her treating physicians opine that the Appellant is completely unable to work because of her condition."

[23] While the GD's discussion did not arrive at the conclusions the Applicant would have preferred, it is not my role here to retry the evidence but to assess whether the outcome was acceptable and defensible on the facts and the law. It cannot be said that the GD failed to explain why it believed the Applicant remained capable of work, and for that reason I see no reasonable chance of success on this ground.

***Failure to Apply Nova Scotia v. Martin***

[24] There is no authoritative definition of chronic pain, but it is generally considered to be pain whose existence is not supported by objective findings and is disproportionate or persists beyond the normal healing time ordinarily expected for the underlying injury. In *Martin*, the Supreme Court of Canada recognized chronic pain as a medical condition that can be genuinely disabling despite an absence of objective findings. The Applicant alleges the GD in effect dismissed her claim that she suffers from chronic pain and gave inadequate consideration to her evidence that it has disabled her.

[25] On this ground, I can see no arguable case. In reading the GD's decision, it seems clear that it was alive to the Applicant's pain complaints. Her symptoms of forearm and lower back pain were relayed in reports from Dr. MacCallum, Dr. Friars and Dr. Kinat, all of which were noted by the GD. The Applicant's testimony about pain and limitations in her hip, shoulders and

back were also documented in the decision. In her Application for Leave to Appeal, the Applicant cites her chiropractic treatment, her use of pain medication and the approval of her Disability Tax Credit and disabled parking permit, but all of these were included in the GD's summary of the evidence, even if they were not explicitly mentioned in the analysis. It is true that while the GD noted her pain complaints in this section, it did not address those symptoms at any length; but it is also true that chronic pain was not specifically pleaded, either in the Application for Disability Benefits or in oral submissions during the hearing. Instead, it appears the disability claim was based largely on symptoms originating from the Applicant's COPD, which it must be said was the subject of the majority of the specialist reports made available. I note that the Applicant has not pointed to a specific instance in which one of her treatment providers diagnosed her with Chronic Pain Syndrome, a condition that is not merely a disease of exclusion but one with discrete physical and psychological indicators.

***Failure to Consider Inclima***

[26] The Applicant submits that the GD failed to follow the directive of the Federal Court of Appeal:

> …an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.

[27] The Applicant alleges that the GD failed to consider her oral evidence that after being terminated from Dana Foods, she conducted an unsuccessful job search.

[28] I am not persuaded there an arguable case on this ground. The GD cited *Inclima* in paragraph 76, although I acknowledge that merely reciting the ratio from a case is insufficient. There must also be some indication that the decision-maker has correctly applied facts to principle. Contrary to the Applicant's allegation, the GD did document (in paragraph 57) her testimony about her efforts to find employment after her last job ended:

> After she was laid off at Dana, she applied for EI for a short period of time. She tried looking for other jobs. She tried looking for jobs at restaurants and factories. She had two interviews but did not get any offers. She was breathing heavily and coughing at the interviews, so she believes that turned the employers off. She states that it became hard to look for a job because of her condition.

[29] In paragraph 81, the GD drew conclusions based on this information:

> The Appellant stopped working at Dana in 2010 for non-medical reasons. Since then, she has not returned to any form of employment, nor has she tried to do any retraining. The Appellant has not demonstrated an effort to obtain or maintain employment has been unsuccessful by reason of her health condition.

[30] The GD was strictly accurate in noting that the Applicant had not returned to any form of employment (although she says she mounted a job search) or engaged in any retraining. In my view, whether the Applicant's effort to obtain or maintain employment was unsuccessful because of her health is a matter of judgment. In this case, it was open to the GD as finder of fact to weigh the evidence and make an assessment about the intensity of her effort to find suitable work.

[31] Finally, the Applicant alleges that the GD failed to consider reports from Dr. Friars (October 22, 2013 and August 23, 2015) and Dr. Shende (May 28, 2014). However, each of these reports was referenced in the GD's decision. Even if they had gone unmentioned, an administrative tribunal is presumed to have considered all the evidence need not refer to each and every piece of evidence before it in setting out its reasons (*Simpson v. Canada*[9]).

[32] I find no arguable case on this ground.

**Erroneous Findings of Fact**

***First Mention of Depression***

[33] The Applicant objects to paragraph 78 of the GD's decision, which stated that the first time depression was indicated in the medical record was Dr. Friars' note of March of 2014. This was an error, says the Applicant, because it overlooked a June 2008 consultation note, which noted that she may have also had "non-physical issues."

[34] This consultation note was written by Dr. Johnstone MacCallum, a specialist in physical medicine, who examined the Applicant for symptoms of arm pain. As the physical examination revealed very little, Dr. MacCallum concluded that "non-physical issues" could be present. Dr. MacCallum is not a mental health specialist and has no expertise in making mental health

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

diagnoses. In any case, his reference to “non-physical issues” is at best a diagnosis of exclusion and there is no mention of “depression” in his report. Even then, he says that non-physical issues “could” be present, leaving open the possibility that there is no psychological dysfunction present at all.

[35] In all, I do not believe that Dr. MacCallum’s passing comment can fairly be described as firm evidence that the Applicant’s psychiatric condition goes back as far as 2008. In my view there is no arguable case on this ground.

***Severe Pathology in Post-MQP Diagnostics***

[36] The Applicant submits that the GD erred when it stated in paragraph 78 of its decision that post-MQP diagnostic testing did not reveal any severe pathology. In doing so, it failed to consider the October 22, 2013 report of Dr. Friars, who noted that the Applicant suffered from COPD and that her lung capacity had diminished since April 2011, causing marked restrictions in walking. It failed to take into account the May 28, 2014 report of Dr. Shende, who stated that the Applicant suffers from moderate COPD, causing “severe” shortness of breath at times. He also noted that her lung function had declined since 2011.

[37] I find that there is no arguable case on this point. Both reports are fully and accurately summarized in the GD’s decision and while both cite respiratory testing results, neither Dr. Friars nor Dr. Shende describe the Applicant’s overall condition as “severe.” Dr. Shende calls her COPD “moderate,” and while he notes that she is subject to “severe” shortness of breath, he is likely referring to the Applicant’s self-reported symptoms. Even so, Dr. Shende does indicate that the Applicant’s breathlessness, whatever its degree, is episodic.

***Failure to Consider Evidence***

[38] The Applicant submits that the GD failed to consider the Applicant’s oral evidence, which described her various medical conditions, all of which were present prior to her December 31, 2012 MQP, and their negative impact on her life. Specifically, it disregarded her COPD, pain in her right shoulder, right hip and lower back, osteoarthritis, osteoporosis, high blood pressure, low sodium, dizziness, anxiety and depression; and, lack of restorative sleep, resulting in fatigue, exhaustion and cognitive impairments, including problems with memory and concentration. She

said she found it difficult to sit for more than 30 minutes, stand for any prolonged period of time and walk for more than five minutes due to ongoing back pain, hip pain and shortness of breath. While her pain fluctuated, it was always there and it usually increased during a day, which prevented her from performing the majority of her activities of daily living or engaging in any form of gainful occupation on a regular basis.

[39] In my view, this submission is so broad that it amounts to a request to rehear the evidence. As discussed, the GD has already thoroughly canvassed the facts and arguments summarized above. The Applicant is in effect recapitulating her claim and asking me to find in her favour, but I am unable to do this, as my authority permits me to determine only whether the GD has committed any errors that fall within the specified grounds and whether any of them have a reasonable chance of success. Appealing to the AD is not an opportunity for an applicant to re-argue their case, and I see no reasonable chance of success on this ground.

**CONCLUSION**

[40] As the Applicant has not presented an arguable case on any ground, the application for leave to appeal is refused.

Member, Appeal Division