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

Citation: *K. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 280

Tribunal File Number: AD-16-573

BETWEEN:

K. S.

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 25, 2016

Canada

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 13, 2016. The GD 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, 2013.

[2] On April 14, 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 46 years old when she applied for CPP disability benefits on November 26, 2012. In her application, she disclosed that she had a high school education and had completed a one-year diploma in computer programming. She was last employed as a steward and dishwasher in a hotel restaurant, a job she gave up in September 2012 due to pain in her hands, arms, feet, knees, and back. She indicated that she had been diagnosed with numerous conditions, for which she was receiving treatment and taking medication.

[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 said that most of her jobs had involved physically

demanding manual labour. If she were to take a new job, she would feel nervous about making mistakes because she does not trust her hands. She would have to take many breaks, and most employers would not allow this.

[6] In its decision, 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. In the GD's view, the available medical evidence suggested that, while the Applicant might no longer be able to perform heavy physical labour, given her chronic pain, she was still capable of sedentary work.

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 in making its decision, the GD erred in law by failing to:

(a) Consider the cumulative effect of all her medical conditions;

(b) Consider some of the "real world" factors contemplated by *Villani v. Canada*[3].

ANALYSIS

Cumulative Effect of Conditions

[14] The Applicant alleges that the GD erred in failing to consider all of her conditions. It is settled law that an administrative tribunal charged with finding fact is presumed to have considered all of the evidence before it and need not discuss each and every element of a party's submissions, however immaterial[4]. That said, I have reviewed the GD's decision and found no indication that it ignored, or gave inadequate consideration to, any of the Applicant's major complaints.

[15] In her original Application for CPP Disability Benefits, the Applicant claimed that she was disabled from employment because of including severe carpal tunnel syndrome in both

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

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

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

wrists, osteoarthritis in her left knee, osteoporosis in her right knee, tendinitis in both elbows, chronic tom left rotator cuff, venous insufficiency of lower limbs and painful cavus foot syndrome resulting in pitting edema below her knees. The GD's decision contains a comprehensive summary of the medical evidence, including many reports that document investigations and treatment for the conditions listed above. The decision closes with an analysis that meaningfully discusses the written and oral evidence before concluding that the Applicant's conditions and their symptoms—whether individually or in their totality—would not preclude her from all forms of work.

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

Inadequate Consideration of Villani

[17] The Applicant alleges the GD erred in law by failing to consider the severity of her disabling conditions in a "real world" context in accordance with *Villani.*

[18] In its decision, the GD noted the Applicant's background and personal characteristics at paragraphs 8 and 10-16 and summarized the correct test at paragraphs 49 and 50. After assessing the Applicant's condition, the GD found that she likely remained capable of some forms of employment, despite her physical limitations, having trained as a computer programmer and accrued administrative experience working in an office.

[19] The thrust 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.

[20] 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, I see no arguable case on this ground.

CONCLUSION

[21] The Application is refused.

Member, Appeal Division