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

Citation: *C. R. v. Minister of Employment and Social Development*, 2016 SSTADIS 287

Tribunal File Number: AD-16-337

BETWEEN:

C. R.

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

LEAVE TO APPEAL DECISION BY: Janet Lew

DATE OF DECISION: July 29, 2016

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division dated November 3, 2015. The General Division determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that his disability was not "severe" by the end of his minimum qualifying period of December 31, 2012. The Applicant filed an application requesting leave to appeal on February 18, 2016, within the time permitted, on the grounds that the General Division erred in law and 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. The Respondent did not provide any submissions. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

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

SUBMISSIONS & ANALYSIS

[3] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

> (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) the General Division 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] Before I can consider granting leave, I need to be satisfied that the reasons for appeal fall within the grounds of appeal and that the appeal has a reasonable chance of

success. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

(a) *Villani*

[5] The General Division did not specifically refer to *Villani v. Canada (AG),* 2001 FCA 248. Nonetheless, it considered the Applicant's personal characteristics, such as his intelligence, education and work capacity. The Applicant argues that this is insufficient to fulfil the *Villani* requirements, as it should have considered his "qualifications in relation to his conditions". The Applicant contends that the General Division erred by suggesting that he could perform some theoretical work that accommodates his disabilities, without considering him in a real world context. The Applicant relies on *M.B. v. Minister of Human Resources and Skills Development*, (January 14, 2013), 2013 LNCPEN 3 (QL) (PAB) in this regard.

[6] However, the Federal Court of Appeal stated at paragraph 49 of the *Villani* decision that:

> . . . 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 an y substantial gainful occupation. The A ssessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere. (My emphasis)

[7] If the General Division considers an applicant's personal circumstances, one generally ought not to interfere with that assessment, even if on the face of it, it might not appear to be comprehensive. In this particular case, the General Division appeared to have undertaken the *Villani* analysis required of it when it considered the Applicant's intelligence, education and prior work experience. As the trier of fact, the General Division was in the best position to "judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantial gainful occupation".

[8] At the same time, it is clear that the General Division was mindful of the Applicant's limitations, as it considered that he was capable of at least part-time employment, provided that it did not involve heavy physical demands or prolonged sitting.

Given these considerations, I am not satisfied that the appeal has a reasonable chance of success on this ground.

(b) Erroneous finding of fact

[9] The Applicant alleges that the General Division made an erroneous finding of fact that was made without regard to the evidence before it, when it assessed his capacity regularly of pursuing any substantially gainful occupation. He argues that the General Division did this by "adopt[ing] faulty reasoning" in its assessment and by failing to consider critical factors. In particular, the Applicant submits that the General Division misinterpreted Dr. K. Adelman's medical opinion that he "has not found something he can do without exacerbating his pain" as the basis to find him capable of at least some work. He argues that the General Division also erred in suggesting that it is acceptable to experience pain, provided the Applicant was physically capable of working.

[10] The onus of proof and the test for severity are somewhat misstated by the Applicant.

[11] The General Division assessed the severity issue at paragraphs 49 and 50:

> [49] Significant reliance must therefore be placed on Dr. Adelman's Medical Report of December 12, 2012, as it is the only medical documentation after September 11, 2012 that also predates the expiry of the Appellant's MQP period on December 31, 2012. Dr. Adelman's report confirmed that the Appellant was unable to continue any sustained activities. She suggested that the Appellant was motivated to get better but has been unable to find any job that he was capable of doing without exacerbating his pain symptoms. This motivation was also noted by Ms. de Mora and Dr. Murphy in subsequent documentation. Nonetheless, to fully satisfy the "severe" requirement, the Appellant will need to show that his disability was severe and remained severe through the date of hearing. **When assessing severity, it is also worth noting that Dr. Adelman said that the Appellant was unable to find "something he can do without exacerbating his pain": this is not the same as "incapable regularly of pursuing any substantially gainful occupation".**
>
> [50] **The common theme throughout the documentation and the hearing evidence is that the Appellant was capable of doing at least some work. Dr. Adelman, Dr. Murphy and Ms. de Mora all made statements to this effect. Sustained work is the problem for the Appellant**. (Emphasis added)

[12] It is clear that the General Division did not come to its finding on the basis of Dr. Adelman's report alone. The General Division suggests that there was evidence from at least three different practitioners, including Dr. Adelman, that the Applicant is capable of doing "at least some work". I have reviewed the medical opinions of these practitioners to verify that they could be the basis upon which the General Division made its findings.

[13] Dr. Adelman's report of December 12, 2012 (GD4-35 to GD4-38) indicates that "any sustained activity such as sitting, driving, working with arms makes the pain severe and [the Applicant] is unable to continue those activities". The report also indicates that radio frequency ablation provides 50% relief for approximately four months. The report concludes that while he has shown motivation to improve and retrain for other jobs, he "has not found something he can do without exacerbating his pain".

[14] Ms. de Mora, an occupational therapist, conducted a home visit. In her report of January 22, 2014 (GD6-16 to GD6-17). In terms of his productivity, she wrote:

> [The Applicant] has been a good worker and provide [*sic*] prior to this diagnosis. He has tried to alter the type of work he does and he has attempted to retrain. He is limited by the amount of time he is able to be productivity active and engaged before he cannot tolerate the pain. One day of work/school has severals of [*sic*] repercussions.

[15] Dr. Murphy prepared a report, which appears to be dated May 17, 2003 (GD6- 12). Much of the report is illegible. Dr. Murphy wrote that the Applicant has limitations, especially in jobs that require lifting, bending, twisting, carrying, standing, sitting or concentrating for prolonged periods of time. He also wrote that he believed the Applicant to be willing to work but "his chronic pain condition is a deterrent to that end". Dr. Murphy was also of the opinion that the Applicant is able to follow directions and focus on basics as well as work independently "except when tasks become overbearing; again, the longevity of the task becomes too much".

[16] Finally, in a subsequent report dated March 27, 2015, Dr. Murphy wrote that the Applicant is unable to remain seated for more than 15 minutes at a time and that he reports that he may be able to work on a part-time basis if he was standing and not in too much pain. Dr. Murphy was of the opinion that as the Applicant's pain levels vary greatly, "he

may be able to work 1 day a week or a few hours a day, depending on the pain he is expriencing [*sic*] at the time … As the patient ages his pain continues to get worse"(GD6-10 and GD8-11).

[17] There was an evidentiary foundation upon which the General Division could conclude that Drs. Murphy and Adelman and Ms. de Mora had suggested that the Applicant was capable of performing some degree of work, even if this involved or exacerbated his pain. The General Division then turned its mind to considering what type of work each of the practitioners contemplated the Applicant might be capable of performing and whether it could constitute a substantially gainful occupation. The General Division acknowledged that the Applicant would face several limitations but determined that he was capable of par-time employment, provided it did not involve heavy physical demands or prolonged sitting.

[18] Given the evidentiary foundation, I am not satisfied that this ground has a reasonable chance of success.

CONCLUSION

[19] The application for leave to appeal is dismissed.

Janet Lew
Member, Appeal Division