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

Citation: *M. C. v. Minister of Employment and Social Development*, 2016 SSTADIS 308

Tribunal File Number: AD-16-249

BETWEEN:

M. C.

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: Hazelyn Ross

DATE OF DECISION: August 10, 2016

REASONS AND DECISION

DECISION

[1] The Appeal Division of the Social Security Tribunal, (the Tribunal), refuses leave to appeal

INTRODUCTION

[2] The Applicant applies for leave to appeal, (the Application), the decision of the General Division of the Social Security Tribunal of Canada, (the Tribunal), of November 6, 2015. In its decision the General Division determined that she was not eligible for a disability pension under the *Canada Pension Plan*, (CPP).

REASONS FOR THE APPLICATION

[3] Counsel for the Applicant has submitted that in coming to its decision the General Division breached a principle of natural justice, committed errors of law, and based its decision on erroneous findings of fact.

ISSUE

[4] The Appeal Division must decide if the appeal has a reasonable chance of success.

THE LAW

[5] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), govern the granting of leave to appeal. As provided by subsection 56(1) of the DESD Act, leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division. According to subsection 56(1) "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(3) provides that "the Appeal Division must either grant or refuse leave to appeal."

[6] In order to obtain leave to appeal, subsection 58(2) of the DESD Act requires an applicant to satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal. Subsection 58(2) of the

DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[7] An applicant satisfies the Appeal Division that his appeal would have a reasonable chance of success by raising an arguable case in his application for leave.[1] In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 and in *Fancy v. Canada (Attorney General)*, 2010 FCA 63 an arguable case has been equated to a reasonable chance of success.

[8] Subsection 58(1) of the DESD Act sets out the only three grounds of appeal, which are:-

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.

[9] *Tracey v. Canada (Attorney General)*, 2015 FC 1300 supports the view that in assessing an application for leave to appeal the Appeal Division must first determine whether any of the Applicant's reasons for appeal fall within any of the stated grounds of appeal.

ANALYSIS

The General Division breached a principle of natural justice

[10] On the behalf of the Applicant, her counsel submitted that the General Division failed to observe a principle of natural justice, or otherwise acted beyond or refused to exercise its jurisdiction by coming to its decision to dismiss the appeal. Counsel argued that the General Division had enough evidence before it, in the form of medical evidence, both oral and written submissions, and did not have any refuting or contradictory medical evidence to support the incorrect decision that it came to.

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

[11] The gist of Counsel's submissions were:-

> "Mrs. M. C. submitted all of the requisite forms and application materials, as well as supporting documentation provided by Dr. Aspin, who completed the requisite CPP disability forms, confirming his medical diagnosis that Mrs. M. C. has suffers from severe and prolonged disabilities, which although were not incurred in a devastating single event, progressed to the point of severe and prolonged over time. This evidence, coupled with Mrs. M. C.'s multiple attempts at recommended treatment and significant trials of many narcotic pain medications, which have caused severe side effects, demonstrates, in my respectful submission, Mrs. M. C.'s entitlement to CPP disability benefits from the date of the initial application. CPP has provided no medical evidence to the contrary, further supporting Mrs. M. C.'s entitlement to benefits." (AD1-6)

[12] The principles of natural justice are concerned with ensuring that parties are able to present their cases fully; to know the case they have to meet; and to have their cases heard by an impartial decision-maker. In the administrative law context "natural justice" is particularly concerned with fairness which embodies all of the above concepts and also extends to procedural fairness.

[13] Counsel's arguments do not show in what way the General Division prevented the Applicant from fully presenting her case; denied her the opportunity to know the Respondent's position; or acted in a less than impartial manner towards her. The Tribunal record shows that the Respondent made submissions in the matter. (GD3 and GD8) The Applicant's counsel has not shown that the General Division prevented access to these submissions or indeed access to any document in the Tribunal record.

[14] Further, the Applicant was given ample opportunity to present her case. A hearing was held by videoconference; she was represented by counsel; there were two witnesses. The Appeal Division is not persuaded that the General Division denied the Applicant the opportunity to present her case.

[15] In the view of the Appeal Division the Applicant's counsel has equated the making of a negative decision with a breach of natural justice. The Appeal Division rejects this position. Leave to appeal is not granted in respect of this submission.

[16] Counsel for the Applicant submitted that the General Division erred in law in making its decision, whether or not the error appears on the face of the record, by "misapplying the specific definitions given within the ***Act,*** in accordance with the statutory interpretation of those definitions within the relevant case law." Counsel cited the following specific errors of law:-

[17] That the General Division:-

1) erred in its interpretation of the word "impairment"; misapplied or failed to apply the "real world" approach suggested in *Leduc* v. *MNH&W (1988)* CEB & PGR # 8546 and also *Bilinski (Nov.* 7, *1988),* CEB & PGR #8561;
2) misapplied or failed to apply the principles set out by the Federal Court of Appeal, (FCA), in *Villani v. Canada (Attorney General)* 2001 FCA 248;
3) failed to follow the principle in *Herd v. MHRD (August 15, 1996)* C.P. 4048 (PAB); and
4) erred in respect of its application of the test for "substantially gainful occupation".

The General Division erred in its interpretation of the word "impairment"

[18] Counsel for the Applicant contended that the decision appeared to be based solely on available objective evidence and the General Division's interpretation of the evidence as opposed to a consideration of the evidence provided by the Applicant's family physician, Dr. Aspin, and by her testimony. (AD1-7). Counsel submitted that this was an error of law.

[19] *Villani,* and the line of cases that follow *Villani*, makes it clear that medical evidence is required to establish disability. Thus, applicants for CPP disability benefits are required to provide satisfactory medical evidence to establish that their disability is both severe and prolonged. In its decision, the General Division considered the medical evidence, including the medical reports of Dr. Aspin as well as the Applicant's testimony that included her perception of why she has been unable to secure employment since being laid off in 2011.

[20] Weighing evidence is within the purview of the General Division. In the absence of clear error, it is not for the Appeal Division to reweigh the evidence with a view to reaching a conclusion more favourable to an applicant: *Tracey.* In the instant case, the General Division

considered the various pieces of medical evidence and where it preferred evidence other than that of Dr. Aspin, or any other medical practitioner, it provided clear reasons for doing so. The Appeal Division finds no error on the part of the General Division arising from the way in which it weighed the medical evidence.

The General Division misapplied the real world approach

[21] Counsel for the Applicant contended that the General Division misapplied the real world approach by equating her ability to do light housework with a capacity to work. In counsel's submission *Leduc* and *Bilinski* make it clear that the ability to perform light housework is not inconsistent with disability. Two points arise from this submission. First, while they may be of persuasive value, the General Division is not bound by decisions of the former PAB, which *Leduc* and *Bilinski* both are. Second, the Appeal Division is not persuaded that the General Division did, in fact, equate the Applicant's ability to do light housework with retained work capacity.

[22] At paragraph 38 of its decision, the General Division sets out the basis for its conclusion that the Applicant retained work capacity. This included that the Applicant had worked with back pain up until June 2011 when she was laid off; and that in June or August 2012 her chiropractor was of the view that with proper treatment her prognosis for recovery was good. In addition, the General Division referred to the fact that the Applicant had retrained. Thus, Dr. Aspin's finding in 2013 that she could do light housework was not the sole basis for the General Division's conclusion that the Applicant had retained work capacity. Accordingly, the Appeal Division finds that this submission does not present a ground that would have a reasonable chance of success on appeal.

The General Division failed to apply the real world approach

[23] Counsel for the Applicant submitted that the General Division failed to apply the real world approach suggested in Leduc. Counsel also submitted that the General Division did not take into account that the Applicant's attempts to find alternate work had been stymied by her medical conditions. Counsel made virtually an identical submission with respect to the General Division's application of *Villani*.

[24] The Appeal Division is persuaded by neither submission. In fact, the Appeal Division finds that the General Division did take into account the Applicant's attempts to find alternate employment and the reasons why she failed to do so. Additionally, the General Division took into account the Applicant's testimony that factors, other than her medical conditions appeared to play a major part in her inability to obtain any substantially gainful occupation. At paragraph 37 of the decision, the General Division recited the Applicant's testimony that potential employers appeared to have reacted negatively to the fact that she was obese. In the result, the Appeal Division finds that the General Division did not err in respect of its application of the "real world" approach.

[25] At paragraph 8 of its decision, the General Division set out information usually recognised as pertinent to an applicant's "*Villani*" factors. While in its analysis, the General Division did not refer to the Applicant's age, the Appeal Division is not persuaded that in the context of its finding that the she retained work capacity, the General Division erred in this regard: *Giannaros v Canada (Minister of Social Development),* 2005 FCA 187.

[26] In *Giannaros*, Rothstein, J.A. writing for the Court indicated that in certain circumstances the *Villani*, real world analysis may not be necessary. In relation to *Giannaros* he stated that, "as the Board (PAB) was not persuaded that the applicant suffered from a severe and prolonged disability, as of December 31, 1995, there was, in my view, no necessity for it to apply the "real world" approach. The Appeal Division relies on *Giannaros* for its findings concerning the General Division's treatment of the "real world" approach. Accordingly, the Appeal Division finds that counsel's submission on the point does not disclose a ground that might have a reasonable chance of success on appeal.

The General Division failed to apply the principle set out in *Herd*

[27] Relying on *Herd v. MHRD (August 15, 1996)* C.P. 4048 (PAB), Counsel for the Applicant submitted that the General Division erred in law because it failed to consider that the Applicant's medical conditions rendered her an unreliable employee.

[28] In *Herd* the Pension Appeals Board discussed what it meant to be "incapable regularly of pursuing any substantially gainful occupation". the PAB stated that the words must be read in their ordinary, grammatical sense to mean that:-

(a) the applicant lacks the capacity, whether for physical or mental reasons;
(b) to engage in, on a reasonably consistent and regular basis,
(c) any form of occupation;
(d) which provides gainful remuneration;
(e) of a substantial nature i.e. not token, or minimal, but, on the other hand, not necessarily totally adequate.

[29] In light of the General Division's findings concerning the medical evidence and the Applicant's testimony set out in paragraphs 38 and 39 of the decision, the Appeal Division is not persuaded that the General Division erred as Counsel for the Applicant submitted. The Tribunal record and the Applicant's evidence was not that she attempted alternate work; but that she made unsuccessful attempts to obtain work. Consequently, the Appeal Division is not satisfied that these submissions disclose grounds that would have a reasonable chance of success on appeal.

[30] It was also submitted that the General Division erred in its application of the test for substantially gainful occupation. Counsel for the Applicant referred to a number of PAB cases that addressed whether or not the applicant was engaged in any substantially gainful occupation. Counsel also cited *Villani* as support for the principle that for an occupation to be substantially gainful, it must be an actual occupation that provides lucrative, paid employment. The occupation must also have some security of tenure. (AD1-13)

[31] Counsel for the Applicant submitted that the General Division erred in law by not following the line of cases he referred to because while she may have been capable of doing light housework, light housework did not fit into any of the,

> "categories of employment in the competitive marketplace, which Mrs. M. C. has made attempts to obtain any substantially gainful employment, including entry-level, minimum wage, part-time employment, without success due to her disabilities, which confirms Dr. Aspin's opinion that she is not fit for any employment, as he further described her injuries as severe and prolonged in nature." (AD1)

[32] The Appeal Division is not persuaded of Counsel's interpretation of the case law. In the view of the Appeal Division the issue does not involve "categories of employment" rather the

question is whether an applicant for CPP benefits can pursue regularly any substantially gainful occupation: *Villani*. Furthermore, Counsel's argument that the fact that the Applicant could not find alternate employment confirms her family physician's opinion that she is unable to work is, at best, circular. On the Applicant's evidence alone, it proves no such thing. Thus, the Appeal Division is not satisfied that this submission discloses a ground that would have a reasonable chance of success on appeal.

The General Division based its decision on an erroneous finding of fact

[33] Counsel for the Applicant submitted that the General Division based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it. This submission is grounded on the position that the General Division "Member based his decision mainly on his interpretation of objective medical reports, rather than placing the appropriate weight and emphasis on the opinion of Dr. Aspin, Mrs. M. C.'s regular family physician." (AD1-15)

[34] By means of this submission Counsel for the Applicant is challenging the way in which the General Division assessed the medical evidence. Counsel wrote:

> "Specifically, and including the errors of law above, the Member based his decision mainly on his interpretation of objective medical reports, rather than placing the appropriate weight and emphasis on the opinion of Dr. Aspin, Mrs. M. C.'s regular family physician. In his subsequent report, dated December 24th, 2014, Dr. Aspin wrote that Mrs. M. C. has had prolonged and severe back pain, and is not fit for any employment, thus providing medical evidence and fulfilling the requirements to describe Mrs. M. C.'s level of disability. This report was in addition to the multiple reports, records, and CPP medical reports he had provided since the date of Mrs. M. C.'s initial application. The Member, without any medical evidence to the contrary, dated on or after December 24th, 2014, relied on a medical report of Dr. Mossaed, chiropractor, dated June 8, 2012, more than 2.5 years prior to Dr. Aspin's report, to attempt to discredit Dr. Aspin's opinion, and deny Mrs. M. C. CPP Disability benefits." (AD1-15)

[35] Counsel also submitted that, there was "no other independent evidence, medical or otherwise, to refute the opinion of Dr. Aspin, and thus any decision not placing heavy weight, and placing criticism instead, (on Dr. Aspin's report), amounts to an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[36] As stated earlier, weighing evidence is reserved to the General Division, not the Appeal Division. The General Division offered a cogent analysis of the content, findings (diagnoses) and recommendations (prognoses) of the various medical reports. It is entitled to prefer some evidence to others. Also, as stated earlier, when it did so, the General Division offered clear explanations why it preferred other evidence to that of Dr. Aspin or another medical practitioner. The Appeal Division finds no error on the part of the General Division. Leave to appeal cannot be granted on this basis.

CONCLUSION

[37] Counsel for the Applicant submitted that the General Division made several errors of law and fact as well as breached a principle of natural justice in its determination of whether the Applicant met the test for severe and prolonged disability contained in paragraph 42(2)(a) of the DESD Act. On the basis of the foregoing analysis, the Appeal Division is not satisfied that the submissions disclose grounds that have a reasonable chance of success on appeal.

[38] The Application is refused.

Hazelyn Ross
Member, Appeal Division