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

Citation: *G. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 318

Tribunal File Number: AD-16-609

BETWEEN:

G. S.

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: August 16, 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 February 26, 2016. The GD conducted a hearing by videoconference on February 12, 2016 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, 2014. On April 26, 2016, within the specified time limitation, 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) It failed to apply *Garrett v. Canada*[1] by not considering or applying the factors set out in *Villani v. Canada.*[2]

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

(d) It disregarded subparagraph 42(2)(a)(ii) of the CPP when it inferred from Dr. Farooqi's prognosis of "guarded" that the Applicant's impairment fell short of the prolonged threshold.

(e) It failed to apply the principles of *Inclima v. Attorney General*[5] by finding that the Applicant had some capacity to return to work at the end of her MQP in December 2014.

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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] *Inclima v. Attorney General*, 2003 FCA 117

Erroneous Findings of Fact

[7] The Applicant submits that the GD based its decision on the following erroneous findings of fact made in a perverse and capricious manner or without regard for the material before it:

(a) In paragraphs 37 and 39 of its decision, the GD found that the Applicant's stress was directly related to the particular circumstances of her insurance company position—ignoring her testimony that her mental health had seen no improvement since leaving her job.

(b) In paragraph 42 of its decision, the GD stated that there was no objective medical evidence to support the Applicant's claim, ignoring the reports of Dr. Wlodarczyk dated December 12, 2013 and Dr. Farooqi dated October 15, 2014.

Breach of Natural Justice

[8] The Applicant submits that, in making its decision, the GD failed to observe a principle of natural justice or otherwise acted beyond, or refused to exercise, its jurisdiction. Specifically, the Applicant alleges the GD did not assess her oral evidence indicating the severity of her disabilities at the time of her December 31, 2014 MQP.

ANALYSIS

[9] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada.*[6] 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.*[7]

[10] 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.

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

Errors of Law

Failure to Apply Garrett

[11] 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 44 of its decision and noted aspects of her personal background and characteristics, including her age (49 at the time of her MQP), education (a high school diploma and some post-secondary training) and work experience (years of experience in the insurance industry).

[12] However, the Applicant alleges that the GD erred in concluding that she had transferrable skills would allow her to function in a workplace. Not only did the GD misrepresent some of the Applicant's personal characteristics, it also committed an error of law in not applying them in a real world context, as prescribed by *Villani*, when considering her medical problems, which included severe anxiety, dizziness, headaches, heart palpitations, gastrointestinal problems, nausea, sleep problems and cognitive impairments.

[13] 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 but does not identify any specific errors or distortions. It appears the Applicant takes issue with the GD's statement that she acquired "numerous transferrable skills" but offers to evidence to refute that finding. Indeed, the evidence suggests that the Applicant has worked in a variety of environments over the years, including jobs in restaurants, factories and offices. It appears that she held white collar positions as a medical secretary, office assistant, broker, assistant underwriter and accounting clerk. I do not see that it was incorrect or unreasonable to describe her as having transferrable skills,

[14] Second, the Applicant alleges that the 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 extended discussions of the Applicant's condition in paragraphs 38 and 40 to 42, followed by this passage:

> The Appellant was only 49 years of age at the time of the MQP. She is articulate and able to express herself without difficulty in English. She is well educated and shown an ability to continually upgrade her

> credentials receiving professional designations. She worked in a fast- paced industry with significant responsibilities.

[15] Based on my reading of the 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 has 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 not to have considered the Applicant's background and personal characteristics in the context of all of her medical conditions, which include severe anxiety, depression, dizziness, headaches, heart palpitations, gastrointestinal problems, nausea, lack of sleep and cognitive impairments. The Applicant also alleges that the GD disregarded her testimony about her lower back pain, which she said affects her ability to remain in position for prolonged periods.

[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.

[18] 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 documented, to varying degrees, the Applicant's medical conditions and associated symptoms. It is trite law that a trier of fact need not refer to each and every item of evidence before it when setting out reasons for its decision,[8] and it was within the GD's authority to make its own determination about which of the Applicant's claimed impairments were significant and which were not. The GD's analysis was largely occupied with assessing the impact of her depression and anxiety on her ability to

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

work, and the fact that it did not explicitly mention symptoms of dizziness, headache, heart palpitations, nausea, sleeplessness and cognitive deficits does not necessarily mean that they were excluded from consideration. In paragraph 43, the GD regarded the Applicant's overall condition from a functional perspective:

> It is not only the diagnoses of a condition that must be considered but also the effect of the condition on the person. The Appellant on her own self-assessment indicated no significant problems with physical health, social life, transport, looking after home, and daytime activities. Her own assessment indicates that the effect of her condition has not been severe. Her oral evidence at the hearing is not supported by her own self-assessment and by objective observations by her medical providers.

[19] I also note that the Applicant's Questionnaire, which accompanied her December 2013 Application for Disability Benefits, cited anxiety as the sole reason she was unable to work, and she mentioned dizziness, headache, heart palpitations, nausea, sleeplessness and cognitive deficits only as symptoms of her underlying psychological condition. In this context, I would not fault the GD for neglecting to consider these symptoms individually, as they were not medical conditions in their own right but manifestations of a larger syndrome.

[20] Paragraph 43 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.

[21] As for the GD's alleged failure to consider the Applicant's back pain, a cursory review of the documents that were before the GD indicate that it played a lesser role in her recent medical history. I also note that the Applicant mentioned limitations in bending, lifting and carrying in her Questionnaire, but she also said they lasted only a few months after her March 2013 oophorectomy.

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

Failure to apply Dwight-St. Louis

[23] 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 then specifically criticized the GD for failing to address how her anxiety, dizziness, headaches, heart palpitations, gastrointestinal problems, nausea, sleep problems and cognitive impairments affected her ability to engage in any form of regular and gainful occupation.

[24] In my view, *Dwight-St. Louis* stands for the proposition that a decision-maker must explain why he or she is discounting an item of evidence—but only if it is material. I have already concluded that the GD discharged its obligation to consider the Applicant's background and personal factors, and I have already determined that GD addressed the Applicant's array of symptoms when it considered her overarching depression and anxiety disorder. It is true that the GD's reasons do not contain a comprehensive and detailed discussion of the relative weights it assigned to every item of evidentiary minutiae, but there is nothing in the law—and certainly nothing in *Dwight-St. Louis* as I read it—that required the GD to do so. For this reason, I see no reasonable chance of success on this ground.

Failure to apply subparagraph 42(2)(a)(ii) by mischaracterizing Dr. Farooqi's prognosis

[25] The Applicant argues that the GD made a mixed error of law and fact by misinterpreting Dr. Farooqi's October 2014 prognosis of "guarded." Subparagraph 42(2)(a)(ii) reads:

> …a person shall be considered to be disabled only if he is determined… to have a severe and prolonged mental or physical disability… for the purposes of this paragraph… a disability is prolonged only if it… is likely to be long continued and of indefinite duration or is likely to result in death.

[26] The Applicant takes issue with paragraph 41 of the GD decision, which reads:

> In October 2014 [Dr. Farooqi] indicated the prognosis was guarded. A guarded prognosis does not support a finding that the condition of the Appellant is long continued and of indefinite duration. The medical evidence does not support a finding the Appellant's disability is severe and prolonged.

[27] The Applicant submits that the GD misinterpreted Dr. Farooqi's assessment of her prognosis as "guarded" by concluding that the medical evidence did not support a finding of "severe and prolonged." According to *Taber's Cyclopedic Medical Dictionary*, a guarded prognosis refers to a prognosis given by a physician when the outcome of a patient's illness is in doubt, which given the Applicant's disabling conditions, would be therefore prolonged.

[28] I find no arguable case on this ground. The Applicant assumes that her psychiatrist used "guarded" in the specific medical sense of the word, rather than its common meaning of "uncertain," yet even by the definition of "guarded" offered by the Applicant, I do not see how the GD misapplied the law. An applicant's disability must be not only severe but also prolonged, which means both "likely to be long continued" and "of indefinite duration." This definition connotes something just short of "permanent" and, as held by the Federal Court of Appeal in *Canada (MHRD) v. Henderson*,[9] it suggests that no recovery is foreseeable from the vantage point of the MQP date. A patient whose prognosis is "guarded" with the outcome of his illness in doubt benefits, in my view, from a not-insignificant hope that recovery is not just possible but within sight. A patient for whom recovery is impossible, or a distant hope, does not require his treatment providers to be on "guard" for him in case he should show signs of improvement; conversely, a patient whose prognosis is "guarded" is not a lost cause, and his condition cannot be deemed "prolonged."

Failure to Consider Inclima

[29] The Applicant submits that the GD failed to follow the directive of the Federal Court of Appeal on the issue of mitigation:

> …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.

[30] The Applicant alleges that the GD erroneously concluded that she had capacity to work at the time of her MQP. She submits that there was in fact no evidence that she had the capacity to be engaged regularly in a substantially gainful occupation as of December 2014 and points to five medical reports that documented her diagnosis of depression, anxiety and PTSD, including assessments from Dr. Wlodarczyk that she could not work.

[31] I am not persuaded that the Applicant has an arguable case on this ground. In support of her claim that the GD erred in finding work capacity, the Applicant points to paragraph 39 of the decision, which I quote in full:

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[9] *Canada (MHRD) v. Henderson*, 2005 FCA 309

> Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117). The evidence indicates the Appellant has not attempted to secure employment other than in an underwriting department. The Appellant testified she was depressed and upset that she is no longer pursuing her career goals. Dr. Scott noted the Appellant described episodes that seem more consistent with stress and a physical reaction, and these events occurred at work and never at home. It would be expected that if the Appellant removed the stress of her work environment that her symptoms would improve. The Family Doctor and Dr. Scott, Neurologist, both indicated the stress of the Appellant was focused on her work. The Appellant indicated she was depressed and upset she is no longer pursuing her career goals. The Appellant has not adjusted her career goals, or pursued an occupation within her restrictions. Dr. Wlodarczyk noted in December 2013 that the Appellant improved once she got off work and she will eventually recover, however, return to her job she was doing before her illness started is not advisable. This does not indicate a disability that is severe and prolonged as defined in the CPP. The Tribunal finds the Appellant's effort at obtaining and maintaining employment has not been unsuccessful by reason of her health condition but rather from her not pursuing alternate suitable occupations.

[32] I acknowledge that merely citing *Inclima* is insufficient. There must also be some indication that the decision-maker has correctly applied facts to principle. The Applicant alleges that there was no evidence she had capacity, and the GD erred in concluding that she was able to work at the time of her MQP, but of course, the entire purpose of the hearing was to determine whether she had such capacity, and the GD was within its authority to weigh the evidence and make findings on that question within the confines of the law. *Inclima* demands that where there is evidence of *some* work capacity (as opposed to none at all), the tribunal must investigate whether an applicant has taken steps to find work that is suitable to his or her health condition. If the applicant has failed to do so or stopped working for reasons other than that health condition, the tribunal may be justified in drawing an adverse inference.

[33] In this case, having reviewed the evidence, the GD found that while the Applicant suffered from depression and anxiety, she did have some residual functionality that warranted an *Inclima* inquiry. Paragraph 39 indicates that the GD relied on the Applicant's testimony to determine that her effort to find alternative employment was insufficient—she had not looked for work anywhere other than in an underwriting department.

[34] Finally, the Applicant alleges that the GD failed to consider reports from Dr. Wlodarczyk (April 4, 2013, December 12, 2013 and July 13, 2015) and Dr. Farooqi, (June 26, 2014 and August 27, 2014). However, all but one of these documents were explicitly referenced in the GD's decision, and the Attending Physician's Statement completed by Dr. Wlodarczyk in April 2013 contained assessments that were documented in his other reports. In any case, as

held in *Simpson v. Canada*,[10] 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.

Erroneous Findings of Fact

Linking Stress to Transitory Job

[35] The Applicant objects to paragraphs 37 and 39 of the GD's decision, which stated:

> Her stress appeared to be directly related to the particular circumstances of her position at the insurance company. Her attempt to secure another position indicated that she believed she was capable of working in another position….
>
> It would be expected that if the Appellant removed the stress of her work environment that her symptoms would improve.

[36] The Applicant submits that the GD made an erroneous finding of fact in a perverse or capricious manner or without regard for the material before it in failing to consider her testimony that her condition has not improved despite the fact that she stopped working in June 2012. She also suggests that the GD erred in speculating she would be expected to improve if the stress from her work environment were removed.

[37] In my view, this ground would have no reasonable chance of success on appeal. It is clear that the GD placed considerable weight on the Applicant's testimony about the events that led her to stop working at her last job at Economical Mutual:

> She testified that she was very happy as an assistant in underwriting. The changes in her company resulted in the elimination of this position but due to her good work record she was offered a position in accounting. She was not happy with this new position and felt it interfered with her career goal to become an underwriter. She decided to continue working until she could apply for an underwriting position.
>
> The Appellant indicated that the new position involved her dealing with a team leader that caused stress to the employees. The team leader had issues with the team and caused the Appellant to become anxious and upset. The Appellant considered the behavior of the team leader to be bullying.
>
> Since the Appellant was not enjoying the accountancy department she decided to complete courses and apply to other companies. She testified she also tried to obtain different jobs within her company. She indicated that there were numerous applicants for limited positions and she was not successful. She stated

[10] *Ibid.*

> that her job demands were excessive and created a lot of pressure on her. She further stated that "it felt like her brain was shaking".

[38] As noted previously, the GD as finder of fact is permitted to assess the available evidence and draw reasonable inferences from that evidence. In my view, what the Applicant has identified as "errors" are better characterized as an inferences with which she does not agree. The Applicant testified that she was happy before her transfer to the accounting department, which departed from her preferred career path and where she found herself supervised by a "bully." The decision indicates that the GD heard the Applicant's testimony and concluded that stresses specific to her last job triggered anxiety and caused her to take leave. I would not interfere with this finding, which strikes me as reasonable, as was its inference that removal of such stresses would be expected to produce some measure of improvement. As it happens, Dr. Wlodarczyk noted in December 2013 that her condition did in fact improve once she left her job. That the Applicant claims not to have recovered is not necessarily probative, especially if, as the GD found in this case, her impairments were never "severe" in the first place.

Ignoring reports of Dr. Wlodarczyk and Dr. Farooqi

[39] The Applicant submits that the GD erred when it stated in paragraph 42 of its decision that there were no reports in the evidence that were based on objective testing. It alleges the GD failed to consider Dr. Wlodarczyk's report of December 12, 2013, in which he noted that she suffered from legitimate medical problems and her prognosis was guarded, and Dr. Farooqi's report of October 15, 2014, in which he diagnosed her with major depression.

[40] I find that there is no arguable case on this point. Both reports are fully and accurately summarized in the GD's decision and, contrary to the Applicant's assertion, I see no evidence that they contained so-called objective findings, which are commonly held to mean results obtained by photo imaging, laboratory testing or other technological means, as opposed to "subjective" or qualitative assessments yielded by human judgment. Indeed, it is hardly surprising that objective results would be absent, as medical conditions that have a purely psychological basis —such the Applicant's depression and anxiety—are typically assessed using subjective criteria applied by trained professionals.

Failure to Consider Testimony

[41] 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, 2014 MQP, and their negative impact on her life. Specifically, the Applicant submits that the GD disregarded her severe anxiety, dizziness, headaches, heart palpitations, gastrointestinal problems, nausea, sleep problems and cognitive impairments, as well as her vision problems, which she claimed resulted resulting in frequent blinking and headaches.

[42] 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.

[43] 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.

CONCLUSION

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

Member, Appeal Division