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

Citation: *K. G. v. Minister of Employment and Social Development*, 2016 SSTADIS 337

Tribunal File Number: AD-16-639

BETWEEN:

K. G.

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 30, 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 February 4, 2016. The GD had 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) ending December 31, 2016.

[2] On May 4, 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. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

OVERVIEW

[3] The Applicant was 28 years old when she applied for CPP disability benefits on July 12, 2013. In her application, she disclosed that she had the equivalent of a Grade 11 education from India, her country of origin. She immigrated to Canada in 2004 and obtained work as a factory seamstress, followed by other jobs. In 2010, she was hired as a machine operator for an auto parts manufacturer. After three months on the job, she sustained an injury to her right thumb, leaving her with pain and limitations, as well as symptoms of fatigue and depression. She has not worked since.

[4] At the hearing before the GD on January 21, 2016, the Applicant testified about her background and work experience. She has limited English language skills and made use of a professional interpreter. She described her workplace injury and how it has left her with chronic pain and depression. She has received physiotherapy and psychological counselling, to limited

effect. She filed a claim with the Workplace Safety and Insurance Board (WSIB), which enrolled her in a work hardening program.

[5] In its decision, the GD dismissed the Applicant's appeal, finding that, on a balance of probabilities, she retained work capacity and did not suffer from a severe disability as of the MQP. The GD noted that she did not require ongoing psychological counselling and was only lightly medicated. She had been diagnosed with PTSD, but her psychiatrist said it was in remission. The GD also found the Applicant was non-compliant with a WSIB referral to a pain management program and had not made sufficient effort to pursue alternate work suitable to her limitations. The GD found that, while the Applicant's English language skills were poor, she had proved herself capable of finding jobs in the past.

THE LAW

[6] 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.

[7] 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.

[8] 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.

[9] 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 arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada.*[2]

[10] 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

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

SUBMISSIONS

[12] In her application requesting leave to appeal, the Applicant made the following submissions:

(a) She stopped working due to her right hand injury, which has left her with chronic pain and depression and anxiety. Her symptoms include sleeplessness, forgetfulness and inability to concentrate, and she is unable to drive, use public transit or perform household maintenance tasks. Despite consultations with specialists and continuous use of medications, her condition has not improved significantly.

(b) The GD erred in not taking in to consideration the totality of the evidence and material before it in deciding that the Applicant was not entitled to a disability pension. She suffers from a severe and prolonged disability within the meaning of the paragraph 42(2)(a) of the CPP.

(c) The GD failed to observe a principle of natural justice by failing to give the Applicant an impartial hearing and consider the numerous medical reports that indicated she was unable to work due to her condition.

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[1] *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC)
[2] *Fancy v. Canada (Attorney General),* 2010 FCA 63

(d) In its decision, the GD indicated that the Applicant's appointments with Dr. Sharma were not "in-depth psychological treatments." Furthermore, the GD placed insufficient weight on the assessments performed at the Centre of Addition and Mental Health (CAMH) because the Applicant was not constantly treated by the assessor. However, both Dr. Sharma and the CAMH assessment indicate that the Applicant has severe psychological issues. She has attended treatment recommended by her family doctor and psychiatrist. She does attend psychotherapy sessions with her psychiatrist. There was an erroneous finding regarding the nature of this disability not being severe.

(e) According to *Villani v. Canada*,[3] the GD must keep in mind factors such as age, level of education, language proficiency and past work and life experience. The Applicant was 30 years old at the time of the hearing and has only a grade 11 education from India. Her English is poor and she has never taken ESL classes. She has only worked in manual labour jobs where she was surrounded by coworkers who spoke her native language. In a real world context, her chances of returning to any suitable occupation are much diminished.

ANALYSIS

(a) Failure to Recognize Severity of Applicant's Condition

[13] Much of the Applicant's submissions amount to a recapitulation of evidence and argument that was already presented to the GD. She alleges that the GD dismissed her appeal despite medical evidence indicating that her overall condition was "severe," according to the CPP criteria.

[14] Outside of these broad allegations, the Applicant has not identified how, in coming to its decision, the GD failed to observe a principle of natural justice, committed an error in law or made an erroneous finding of fact. My review of the decision indicates that the GD analyzed in considerable detail the Applicant's claimed medical conditions—principally depression and

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

anxiety secondary to ongoing pain and limitation in her right hand—and her capacity to regularly pursue substantially gainful employment during the MQP. In doing so, it took into account the Applicant's background—including her limited education and lack of facility in English—but found they were not significant impediments to her ability to retrain or perform alternate work.

[15] While applicants are not required to prove the grounds of appeal at the leave stage, they must set out some rational basis for their submissions that fall into the enumerated grounds of appeal. The AD ought not to have to speculate as to the true basis of the application. It is not sufficient for an applicant to state their disagreement with the decision of the GD, nor is it sufficient for an applicant to express her continued conviction that her health conditions render her disabled within the meaning of the CPP.

[16] In the absence of a specific allegation of error, I must find the Applicant's claimed grounds of appeal to be so broad that they amount to a request to retry the entire claim. If she is requesting that I reconsider and reassess the evidence and substitute my decision for the GD's in her favour, I am unable to do this. My authority as a member of the AD permits me to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds of subsection 58(1) and whether any of them have a reasonable chance of success.

[17] I see no reasonable chance of success on these grounds.

(b) Failure to Consider Totality of Evidence

[18] The Applicant alleges that the GD erred in failing to consider the totality of the impairments that rendered her disabled. The Applicant did not specify which impairments she believes the GD overlooked, but 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.[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.

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

[19] The GD's decision contains a comprehensive summary of the medical evidence, including many reports that document investigations and treatment for the Applicant's various medical problems. 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 considered individually or collectively—did not preclude her from performing all forms of work.

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

(c) Failure to Hold Impartial Hearing

[21] Other than expressing its disagreement with the dismissal of her claim, the Applicant has not specified how the GD breached a principle of natural justice, or otherwise acted unfairly, in the conduct of her hearing.

[22] The threshold for a finding of bias is high, and the onus of establishing bias lies with the party alleging its existence. The Supreme Court of Canada[5] has stated that test for bias is: "What would an informed person, viewing the matter realistically and practically and having thought the matter through conclude?" A real likelihood of bias must be demonstrated, with a mere suspicion not being enough. Not every favourable or unfavourable disposition attracts the label of impartiality. Bias denotes a state of mind that is in some way predisposed to a particular result that is closed with regard to particular issues.

[23] I will not speculate on what ground the Applicant alleges bias, but if she is suggesting that the GD dismissed evidence without reason or improperly substituted its own medical opinions for those of medical practitioners, then I see no basis for either. Having reviewed the GD's decision, I not persuaded that an informed and reasonable person, viewing the matter realistically and practically, would conclude that the GD was biased.

[5] *Committee for Justice and Liberty v. Canada (National Energy Board)* 1976 2 (SCC), 1978 1SCR

(d) Failure to Give Appropriate Weight to Certain Reports

[24] The Applicant alleges that the GD erred in not giving Dr. Sharma's reports adequate weight because her appointments with him were not "in-depth psychological treatments." The Applicant is evidently referring to paragraph 76 of the decision, in which the GD wrote:

> By her testimony, the appointments lasted 15 minutes, which would not indicate in-depth psychological treatment. Dr. Sharma is a psychiatrist. Given the short duration of the appointments, it is reasonable to assume the doctor was primarily managing the pharmacological aspect of the Appellant's treatment.

[25] The Applicant has not identified any factual error in this statement, nor does she challenge the GD's understanding, derived from her testimony, that her sessions with Dr. Sharma were brief. The Applicant has also failed to explain why the GD's inference from that fact, once established, was incorrect or unreasonable.

[26] The Applicant also alleges that the GD erred in placing insufficient weight on her CAMH assessments because she was not treated at that facility. In paragraph 79, the GD wrote:

> The two CAMH assessments lasted one hour each and the testing was all self-reported accounts of the Appellant's psychological state. The Tribunal does not put much weight on the CAMH assessments as they were not constantly treating the Appellant, rather just assessing her once a year.

[27] Again, the Applicant has not specified any factual error in the above statement, nor has it explained how the inferences contained it were incorrect or unreasonable. The GD, relying on uncontradicted factual evidence, chose to give lesser weight to a pair of reports for a defensible reason that it set out in its decision: Assessors who see their subjects once or twice are apt to have less familiarity with their condition than are treatment providers who see them on a regular basis.

[28] The Applicant has not persuaded me that the GD erred in its weighting of the above reports. While Applicant may not agree with the GD's conclusions, it is open to an administrative tribunal to sift through the relevant facts, assess the quality of the evidence, determine what evidence, if any, it might choose to accept or disregard, and to decide on its weight.

[29] The courts have previously addressed this issue in other cases where it has been alleged that administrative tribunals failed to consider all of the evidence. In *Simpson*,[6] the appellant's counsel identified a number of medical reports which she said that the Pension Appeals Board— the predecessor to the AD—ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the application for judicial review, the Federal Court of Appeal held:

> …assigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact….

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

(e) Failure to Apply *Villani*

[31] In its decision, the GD summarized the Applicant's background and personal characteristics at paragraphs 8-10 and referred to the correct test at paragraph 83. In the following paragraphs, the GD found that while her education and English-language skills were limited, she was still young enough to undergo retraining.

[32] In 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.

[33] I would not overturn the assessment undertaken by the GD, where it has noted the correct legal test and considered the Applicant's "real world" employment prospects in the context of not only her impairments but also her personal profile. As the Applicant has failed to show how the GD misapplied *Villani*, I see no arguable case on this ground.

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[6] *Supra*

CONCLUSION

[34] The Applicant has not identified grounds of appeal under subsection 58(1) that would have a reasonable chance of success on appeal. Thus, the application is refused.

Member, Appeal Division