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

Citation: *C. E. v. Minister of Employment and Social Development,* 2016 SSTADIS 351

Tribunal File Number: AD-16-630

BETWEEN:

C. E.

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: Neil Nawaz

Date of Decision: September 8, 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 28, 2016. The GD had conducted a hearing by videoconference and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan* (CPP), as it found that his disability was not "severe" prior to the minimum qualifying period (MQP) of December 31, 2014.

[2] On May 2, 2016, within the specified time limitation, the Applicant's representative 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 51 years old when he applied for CPP disability benefits on August 26, 2013. In his application, he disclosed that he is a high school graduate and later earned a one- year building service certificate. He has worked as a meat cutter, truck driver and custodial worker. In April 2011, while riding his motorcycle, he broke his left leg and sustained injuries to his neck and back. He has not worked since the accident.

[4] At the hearing before the GD on December 21, 2015, the Applicant testified that he cannot work because he has constant pain in his left leg, making it difficult for him to walk or climb stairs. He experiences sharp pain from his shoulder to his neck, and he cannot turn his neck. There is no consistency or predictability to his pain symptoms. He is depressed and has cognitive difficulties.

[5] In its decision, the GD dismissed the Applicant's appeal, finding that, on a balance of probabilities, he retained work capacity and did not suffer from a severe disability. While the GD acknowledged that the Applicant was involved in a serious accident and likely could not return to physically demanding work, it found that he had residual capacity to upgrade his work skills and pursue alternative employment.

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]

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

[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 his application requesting leave to appeal, the Applicant made the following submissions:

(a) In paragraph 45 of its decision, 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 by finding that mere attendance at insurer-sponsored Functional Capacity Evaluations did not represent an effort to pursue alternative employment. The Applicant submits that, in fact, he also underwent a two-day Situational Assessment with Ross Rehabilitation in order to evaluate his future employment prospects in a safe environment.

(b) In paragraph 48, the GD based its decision on an erroneous finding of fact by mischaracterizing the opinions of Dr. Paul Grosso (July 4, 2012), Dr. Scott Garner (November 7, 2012), Maria Ross and Katrina Kotsopoulos (January 20, 2013) and Dr. Rick Ogilvie (March, 19, 2013).

(c) The GD erred in law in finding that the Applicant was not severely disabled because he had not physically attempted to go back to work or school. In doing so, the GD disregarded case law that relieves a claimant from such an obligation if, as is the case with the Applicant, he lacks any residual capacity to work or retrain, whether due to his medical condition, age, education or work experience.

(d) In paragraph 47, the GD erred in law by failing to consider chronic pain as a disability within the meaning of CPP. In doing so, it disregarded the Supreme Court of Canada's ruling in *Nova Scotia (Worker's Compensation Board) v.*

Martin[3] that chronic pain is a compensable disability, even if there is no objective evidence to support it. In dismissing the Applicant's claim to suffer from chronic pain, the GD also violated the Applicant's rights under subsection 15(1) of the Canadian Charter of Rights and Freedoms.

ANALYSIS

(a) Failure to Consider Ross Rehabilitation Situational Assessment

[13] The Applicant objects to the GD's findings on the Applicant's efforts to return to work, in particular paragraph 45 of its decision, which reads as follows:

> The Appellant has acknowledged in his oral evidence that he has made no efforts to upgrade his work skills and/or to pursue alternative employment. The Tribunal does not agree that merely attending Functional Capacity Evaluations in the course of MVA litigation represents efforts to pursue alternative employment. Ms. B. B. has stated that although the insurance company paid for the January 2013 FCE, it refused to pay for vocational follow up. This may have been the case, however, the Appellant has the responsibility to attempt to use available government or other available programs to upgrade his skills and search for work. He has made no efforts in this regard.

[14] The Applicant submits that he did not merely attend a Functional Capacity Evaluation in the course of MVA litigation but also underwent a two-day situational assessment with Ross Rehabilitation in order to evaluate his future employment prospects in a safe environment. The Applicant alleges that the report emerging from that assessment, dated May 28, 2015, was admitted by the GD but disregarded in its decision.

[15] I see no arguable case on this ground. Contrary to the suggestion of the Applicant, the May 2015 situational assessment was not disregarded by the GD; its findings were summarized in paragraph 35 of the decision and discussed in paragraph 49, with the GD noting that its conclusions appeared to stand at odds with the January 2013 Functional Capacity Evaluation, even though the two reports shared an author. The Applicant insists that the GD was incorrect to say that his attendance at the May 2015 situational assessment fell short of an attempt to pursue alternative employment, but I do not see how this finding was unreasonable. The GD

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[3] *Nova Scotia (Worker's Compensation Board) v. Martin* [2003] SCC 54

had already found that the January 2013 functional assessment did not fulfill the Applicant's obligation under *Inclima v. Canada*[4] to mitigate his impairments, and it is difficult to see how his attendance at a similar assessment at the behest of one's legal representative could be fairly characterized as an "effort to upgrade work skills" or "pursue alternative employment."

(b) Reliance on Expert Statements Out of Context

[16] The Applicant objects to the GD's reliance on four reports in determining that he had the capacity to pursue alternative work. He suggests that in paragraph 48 of its decision the GD either took selected quotations out of context or distorted the meanings intended by their authors. I will address these allegations individually:

(i) Dr. Gross

[17] The GD wrote:

> Dr. Grosso's July 4, 2012 report indicates that he "had stressed to the Appellant that he is not causing any harm or damage by being as active as he can, and rather the more he is able to continue within an activity program, the less likely he is to have symptoms in the short term."

[18] The Applicant noted that recommending one remain active within one's abilities is not equivalent to declaring that one is capable of regularly pursuing employment. He criticized the GD for not mentioning that Dr. Grosso also found that the Applicant had sustained limitations and disabilities as a result of his injuries. Furthermore, Dr. Grosso later found that that the Applicant was limited in his activity level and could not do physical work. He made it clear that the Applicant would have to be retrained for a more sedentary occupation but was not qualified to offer any opinion on whether this would be within the Applicant's capabilities.

[19] I find this argument has no reasonable chance of success. The Applicant is offended by the GD's use of Dr. Grosso's words, but he has not shown that the quote in question was cited incorrectly or that its meaning was distorted. Rather, the Applicant submits that the GD ignored Dr. Grosso's other statements that cast his condition in a less favourable light. First, I do not see that the other remarks listed by the Applicant necessarily supported his claim; whatever his

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1. [4] *Inclima v. Canada (Attorney General)*, 2003 FCA 117

qualifications to pronounce on the Applicant's capacity to retrain, the fact remains that Dr. Grosso did not prohibit all forms of work. Second, it is a principle of administrative law that a decision-maker need not refer to each and every aspect of the evidence before it and is entitled to assign weight to the evidence as it deems appropriate. In this case, I find that the GD was within its authority to highlight selected passages from the medical reports that informed its analysis of the severity of the Applicant's condition.

(ii) Dr. Garner

[20] The GD wrote:

> Dr. Garner's November 7, 2012 report indicated that although it is unlikely that the Appellant would be able to return to his previous employment as a custodian, "he would likely benefit from vocational rehabilitative interventions to find alternative careers that are more sedentary and allow for position change."

[21] The Applicant notes that Dr. Garner did not find the Applicant had the capacity to pursue alternative work. In fact, Dr. Garner found that he was "at an increased risk of not being able to return to the competitive job market, although he would likely benefit from vocational rehabilitative interventions to find alternative careers that are of a more sedentary nature and would have allowance for position change."

[22] Again, I find the Applicant's submission here less than persuasive. He does not claim that the GD misquoted Dr. Garner, only that it failed to take into account some of his other remarks. It should go without saying that a decision-maker cannot be expected to incorporate every subtlety and nuance of the evidence in its written reasons, but I must also note that the contextual comments highlighted by the Applicant are not inconsistent with the passage that the GD quoted in isolation. While Dr. Garner expressed caution about the Applicant's ability to return to the competitive job market, he did not rule out the possibility that he could be retrained.

(iii) Ross and Kotsopoulos

[23] The GD wrote:

> The FCE report prepared by Maria Ross, occupational therapist, and Katrina Kotsopoulos, vocational evaluator, on January 20, 2013, concluded "that the
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> Appellant was currently functioning at a sedentary category of work; that he did not meet the physical demands of his pre-accident employment as a custodian; and that vocational exploration is recommended to determine if alternative employment may be accessible."

[24] The Applicant noted that the report found that he was only able to function at a sedentary level. While it recommended vocational exploration to determine whether alternative employment was possible, it did not find that the Applicant had the capacity to obtain and/or maintain sedentary work.

[25] Again the Applicant has not demonstrated how the GD's use of the Ross-Kotsopoulos quote constituted an error or explained how it misrepresented the authors' findings. The fact that these two vocational assessors believed that further exploration was warranted suggests that they had not ruled out the possibility that the Applicant might be able to return to work.

(iv) Dr. Ogilvie

[26] The GD wrote:

> On March 19, 2013 Dr. Ogilvie opined that the Appellant "may be able to return to work in some form of light duties."

[27] The Applicant maintains that this statement does not indicate whether he has the capacity to pursue alternative work. The GD quoted "only a misleading portion" of Dr. Ogilvie's comment, which addressed whether or not the Applicant would be able to resume his work as a part-time custodian. Dr. Ogilvie said it was "difficult to say" whether the Applicant could return to this position, but he did not provide any opinion on whether he would be able to meaningfully participate in any form of work on a regular and consistent basis in the future.

[28] In my view, the quote selected by the GD is not "misleading" but accurately sums up the essence of Dr. Ogilvie's report. As has been the theme with all the preceding "factual errors" alleged by the Applicant, a quotation that is taken out of context is not always rendered untrue, nor is its intended meaning necessarily altered. It appears the GD highlighted these four

passages as a means of showing that none of the Applicant's treatment providers had proscribed some form of alternative work. In doing so, the GD was within its authority to weigh the evidence, within reason, establish facts and make inferences from those facts.

(b) Invocation of *Inclima* Where Applicant Had No Capacity to Work or Retrain

[29] In finding that the Applicant failed to sufficient mitigate his impairments, the GD cited *Inclima*:[5]

> The Appellant must not only show a serious health problem, but where there is evidence of work capacity, the Appellant must establish that he has made efforts at obtaining and maintaining employment that were unsuccessful by reason of his health… However, if there is no work capacity, there is no obligation to show efforts to pursue employment.

[30] The Applicant suggests that the GD erred in law in requiring him to demonstrate that he physically attempted to return to employment or the classroom. In *MHRSD v. ABR*,[6] a claimant was found to be disabled after he provided evidence that he consulted two rehabilitation facilities, which were not able to identify any employment for which he was capable. In *Appleton v. MHRD*,[7] a claimant was found to be disabled due to the fact that he did not have any transferrable market skills and retraining was unlikely due to his age, education and episodes of pain. In *Bennett v. MNHW*,[8] a claimant was deemed an unsuitable candidate for retraining in sedentary positions because he had a learning disability.

[31] The Applicant also cites *Leduc v. MNHW*[9] in arguing that it is not enough to consider a disability claim in an abstract and theoretical sense; a decision-maker must also ask how a claimant, with his or her handicaps, would be able to find and maintain employment in a "real world" context, peopled by real employers who are required to deal with the realities of commercial enterprise. In this case, the Applicant submits that he attended two vocational assessments, which found that he did not have residual capacity to work or retrain. As well, the medical evidence indicated that he was unable to perform strenuous jobs, given his accident-

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[5] *Supra*
[6] *MHRSD v. ABR,* 2009 LNCPEN 134, Appeal No. CP-26100
[7] *Appleton v. MHRD* (November 21, 1997) CP-4619
[8] *Bennett v. MNHW* (October 22, 1993) CP-2549
[9] *Leduc v. MNHW* (June 29, 1998) CP-1376

related injuries, or be retrained for more sedentary positions. The Applicant submits that his low aptitude for deskwork, combined with his difficulties with memory, concentration and mood, would preclude any kind of retraining and he would not be employable in a competitive labour market.

[32] Having reviewed the GD decision and the documents on which it relied. I find this submission has no reasonable chance of success on appeal. The GD determined that the Applicant had made no efforts to upgrade his work skills and/or to pursue alternative employment and, as discussed, above, I saw no reason to overturn that finding. Citing *Inclima*, the GD drew an adverse inference from the fact that the Applicant had made no attempt to remain in the workforce despite having residual capacity. The essence of the Applicant's submissions is that he has no residual capacity, but the GD disagreed and I can find no error, either in fact or law, that might justify overturning its conclusion.

[33] I note that the decisions cited by the Applicant all emanated from the now-defunct Pension Appeals Board (PAB), the predecessor body to the AD, and thus carry no more than persuasive weight in this forum. All of them, unlike the present appeal, were hearings *de novo* in which the PAB considered disability claims on their merits, making determinations of fact through firsthand assessments of testimony and medical evidence. The decisions of each were based on specific circumstances unique to their respective claimants and, with one exception, stand on no overarching legal principle. Even *Leduc*, which warns against finding work capacity apart from the realities of the competitive labour market, is no more than a restatement of the *Villani* "real world" principle.

[34] In this case, the GD's decision contains detailed summaries of the Applicant's testimony and the available medical evidence, including numerous medical-legal assessments as well as reports that documented investigations and treatment for the Applicant's injuries. The GD also noted the Applicant's background and personal characteristics (at paragraphs 11, 13 and 16) and referred to the *Villani* test at paragraph 41, acknowledging that the Applicant had only performed physical labour throughout his working career, although his education was "good" and his education "varied." In the end, having undertaken a meaningful analysis of the evidence, the GD made an explicit finding that the Applicant did have residual capacity that

warranted invocation of the test set out in *Inclima.* It also found that none of the Applicant's *Villani* factors prevented him "from seeking and maintaining suitable, less physical gainful employment."

[35] In the absence of an error in law, the Applicant's submission is essentially a request to reassess the evidence that was before the GD. I would not overturn the decision where the GD noted the correct legal tests and took the Applicant's personal circumstances into account.

(c) Failure to Apply *Nova Scotia v. Martin*

[36] There is no authoritative definition of chronic pain, but it is generally considered to be pain whose existence is not supported by objective findings and is disproportionate or persists beyond the normal healing time ordinarily expected for the underlying injury. As noted by the Applicant, the Supreme Court of Canada has ruled that chronic pain is a medical condition that can be genuinely disabling, and peremptorily dismissing a claimant's evidence of this condition is a potential violation of section 15 of the Charter. As such, the Applicant submits that the GD erred in law when it stated at paragraph 47:

> Chronic pain however is not sufficient to establish a severe disability. As the *Densmore* case, supra, indicates the pain must be such as to prevent the sufferer from regularly pursuing a substantially gainful occupation. The limitations described by the Appellant do not preclude his pursuing alternative less physically demanding employment.

[37] The Applicant alleges that this statement effectively denies that chronic pain can constitute a disability that precludes regular employment. With respect, this seems to miss the point that the GD was attempting to make, which is that a claimant who has been diagnosed with chronic pain must also furnish evidence that the condition causes functional limitations that prevent him from working.[10] This approach is entirely consistent with *Martin*, which recognizes that a key issue for administrators of compensation schemes is when chronic pain crosses the threshold to permanent impairment.

[38] The Applicant also submits that the GD's dismissal of the Applicant's chronic pain is contrary to the opinion provided by Ross Rehabilitation, which concluded that he was not

[10] *MNH v. Densmore* (June 2, 1993), CP 2389 (PAB)

capable of less physically demanding employment. However, it is clear that the GD was cognizant of the Applicant's pain complaints, documenting his account of their extent and intensity as relayed via testimony and the medical reports. I note that the GD gave lesser weight to the May 2015 Ross-Blair report because it appeared to contradict a report co-authored two years earlier by one of the same assessors. In the absence of error, I see no reason to challenge this finding, as the GD was entitled as trier of fact, to assess and assign weight to the evidence, drawing reasonable conclusions, where necessary.

[39] In my view, this ground has no reasonable chance of success on appeal.

(d) Additional Information

[40] Finally, I note that the Applicant submitted to the AD additional medical information that was not available at the hearing before the GD.

- Dr. Paul Grosso's orthopedic report dated September 11, 2013;
- Lori Guzzo's Psychological Assessment and Treatment Plan Report dated August 6, 2013; and
- Lori Guzzo's Psychological Treatment Progress Report dated May 21, 2014.

[41] An appeal to the AD is not ordinarily an occasion on which new evidence can be considered, given the constraints of subsection 58(1) of the DESDA, which do not give the AD any authority to make a decision based on the merits of the case.

[42] Once a hearing before the GD has concluded, there is a very limited basis upon which any new or additional information can be raised. An applicant could consider making an application to the GD to rescind or amend its decision. However, an applicant would need to comply with the requirements set out in section 66 of the DESDA and sections 45 and 46 of the *Social Security Tribunal Regulations.* Not only are there strict deadlines and requirements that must be met to succeed in an application to rescind or amend, but an applicant would also need to demonstrate that any new facts are material and that they could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

CONCLUSION

[43] 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