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

Citation: *M. B. v. Minister of Employment and Social Development*, 2016 SSTADIS 352

Tribunal File Number: AD-16-297

BETWEEN:

M. B.

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: September 9, 2016

Canada

REASONS AND DECISION

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

BACKGROUND

[2] On May 30, 2013 the Applicant suffered a workplace accident that resulted in a fracture to his lower jaw; lacerations to his face; a fractured right humerus; and 2 broken ribs. He had been hauling scrap metal at the time of the accident. He had done home repairs including roofing; siding; doors and windows. (GD3-80) He applied for a disability benefit pursuant to paragraph 42(2)(a)(i) of the *Canada Pension Plan*, (CPP).

[3] On his application, the Applicant indicated that his injuries prevented him from working. As well, he indicated that he had suffered with "low back pain for several years due to repetitive heavy work." (GD3-80)

[4] In completing the CPP medical report, his doctor noted that the Applicant had:-

1. Suffered an accident at work when a tire rim exploded. Suffered open fracture of right humerus, mandible. Large laceration on face. Required surgery at London Health Sciences Centre. Currently on home care. Has follow ups with the surgeon. See accompanying notes
2. Has had low back pain for several years due to repetitive heavy work. Has managed pain with OTC medications. (GD3-56)

[5] On June 25, 2013 the Applicant applied for disability benefits. The Respondent denied his application. It maintained the denial on reconsideration noting that at the time he made the application, the Applicant was expected to recover from his injuries. The Respondent also noted that some 8 months after the accident, there were no medical reports providing the current status of the Applicant's medical conditions. (GD3-40)

[6] The Applicant appealed the reconsideration decision to the Tribunal's General Division, which in a decision dated November 16, 2015, denied the appeal. He now seeks leave to appeal from the General Division's decision.

GROUNDS OF THE APPLICATION

[7] On his behalf, Counsel for the Applicant requested leave to appeal on the basis that the General Division. In other words, that the General Division breached paragraphs 1(b) and (c) of subsection 58(1) of the *Department of Employment and Social Development*, (DESD), *Act*. Thus, Counsel argues that the General Division erred in law whether or not the error appears on the face of the record and also based its decision on an erroneous finding a fact that it made a perverse or capricious manner or without regard for the material before it.

THE LAW

What must the Applicant establish on an Application for Leave to Appeal?

[8] Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success; subsection 58(2) of the DESD Act. Case law has established that on an Application for Leave to Appeal the hurdle that an applicant must meet is a first, and lower, one than that which must be met on the hearing of the appeal on the merits.

[9] A reasonable chance of success has been equated with an arguable case[1]; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63. Furthermore, to grant the Application, the Appeal Division must be satisfied that the applicant has put forward reasons for the appeal that fall within the grounds of appeal set out in subsection 58(1).

[10] Subsection 58(1) of the DESD Act states that the only grounds of appeal are the following:

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

(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.

ISSUE

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

ANALYSIS

[12] Counsel for the Applicant has submitted that the General Division made a number of errors of law and fact. Exception was taken to the Division finding that 'there was no indication that the Applicant was incapable of lighter work. Counsel for the Applicant submits that this is an error of law as the General Division did not consider the Applicant's age, education, work; and life experience as mandated by *Villani v. Canada (Attorney General)* 2001 FCA 248.

[13] At paragraph 37 of the decision, the General Division first noted that the severe criterion must be assessed in a real world context. The Member cited *Villani* and then went on to state,

> "although the Appellant has limitations in regard to his right arm and shoulder and his neck and low back, there is no indication that he is incapable of lighter work. It is acknowledged that the Appellant has done only heavy physical work before his accident, but he should be capable of doing less physical work in future.

[14] The Appeal Division is of the view that the General Division did not relate its conclusion back to *Villani* and did not show how it came to the conclusion that the Applicant should be capable of doing less physical work in the future. The Appeal Division finds that this failure may indicate a possible error of law on the part of the General Division.

[15] Counsel for the Applicant also submitted that the General Division erred by inferring, incorrectly, from the Applicant's attempt to obtain his GED that he retained work capacity or was eligible for lighter work.

[16] In the view of the Appeal Division this was not the gist of the General Division's statement. At paragraph 37 of the decision the General Division wrote: "Although the Chiropractor stated that he should not attempt work as a fork-lift operator, the evidence shows that the Appellant has been taking classes to upgrade his academic skills. Shen (sic) he has completed this program, it is anticipated that he should have suitable skills to be able to seek and maintain some sort of employment."

[17] In the view of the Appeal Division this is no more than the General Division positing that upon the Applicant's completing and obtaining his GED, he should have skills that would allow him to seek and maintain some form of employment. In the view of the Appeal Division, where the Applicant has only a grade 10 education and would obtain the equivalency of Grade 11 or 12 on completing his GED, this was not an unrealistic position for the General Division to take. Thus, the Appeal Division finds that the submission does not disclose a ground of appeal that would have a reasonable chance of success.

[18] Counsel for the Applicant also submitted that the General Division erred in law by failing to consider the totality of the Applicant's medical conditions. She also submitted that the General Division focused only on the Applicant's back when there were other medical issues that it should have considered.

[19] In the view of the Appeal Division the submission lacks support as in its decision the General Division addressed the Applicant's memory concerns; disc herniation; the injuries from his accident; as well as his depression. (paras. 38-41) The Appeal Division finds that a ground of appeal that would have a reasonable chance of success has not been disclosed.

[20] Another possible error that was raised concerned the way in which the General Division interpreted "severity". Counsel for the Applicant submitted that the General Division erred because while it referenced *Klabouch v. Minister of Social Development*, [2008] FCA 33 it failed to take into account the *Villani* factors in its determination. She argued specifically that the General Division failed to take into account the fact that the Applicant is a "55 year-old-man with a background of heavy manual labour and a grade 10 education."

[21] At paragraph 44 of the decision, the General Division states:-

> [44] The Tribunal is mindful of the following decision of the Federal Court of Appeal: It is the Appellant's capacity to work and not the diagnosis of [his/her*]* disease that determines the severity of the disability under the CPP: Klabouch v. Minister of Social Development, [2008] FCA 33.

[22] The General Division goes on to state:

> [45] The Tribunal has concluded that the Appellant does not suffer from any severe pathology or impairment that would prevent him from seeking and maintaining suitable gainful employment at the time of his hearing.

[23] It is not clear to the Appeal Division how the General Division applied *Klabouch* nor is it clear how it arrived at the conclusion that the Applicant does not suffer from any severe pathology or impairment that would prevent him from seeking and maintaining suitable gainful employment at the time of his hearing. This indicates a possible error of law and a ground of appeal that could have a reasonable chance of success.

[24] Counsel for the Applicant raised the following as instances where the General Division based its decision on an erroneous finding of fact. She submitted that the General Division erred in fact when it stated at paragraph 37 of the decision that the Applicant had not made any attempt to obtain alternate employment. Counsel advanced the argument that:-

> "The Appellant, if anything, has shown determination in an attempt to qualify himself for some type of employment but unfortunately with his physical disabilities that include his neck, back and right arm restrictions, along with his limitations in education and prior work history he is unable to secure employment in a real world context." AD1A-5

[25] The Tribunal record does not indicate that the Applicant made any effort to obtain alternate employment. Nor does it appear that he testified to any work attempts. Furthermore, his Counsel's submissions while offering a rationale for his inability to obtain and maintain substantially gainful employment do not indicate what, if any, attempts he made to do so. Therefore, the Appeal Division finds no error on the part of the General Division when it concluded that the Applicant had made no attempt to obtain alternate employment.

[26] Counsel for the Applicant also submitted that the General Division erred in fact by making the inference that that his back condition was not serious because the Applicant did not take medication to relieve his back pain and was able to work for many years with the condition.

[27] The Appeal Division is not persuaded that this is an error, because this finding is based on the prognosis of the Applicant's family physician that he would continue to have problems with his back as well as on the General Division's uncontroverted observation that the Applicant controlled his back issues using over-the-counter medication only.

[28] Counsel for the Applicant also submitted that the General Division erred when it made reference to the fact that the Applicant had not undergone a functional abilities evaluation and that he was not taking medication to treat his depression. She submitted that as the Applicant did not have the means to pay for these processes, the General Division should not have expected that he would show evidence of these processes.

[29] The Appeal Division is perplexed by this submission. The Appeal Division does not see what error arises from the General Division's statements. While the Applicant's want of means may have some impact on his ability to pay for a functional abilities evaluation as well as for medication to treat his depression, the Appeal Division is not persuaded that the General Division erred. In the Appeal Division's view the Appeal Division was pointing out that the Applicant had taken none of the steps usually taken by persons in his situation, which in the General Division's view raised questions about the severity of his conditions. In light of the requirement that applicants for a CPP disability pension substantiate their claim with objective medical evidence: *Villani*, the Appeal Division is not persuaded that the General Division erred.

CONCLUSION

[30] Counsel for the Applicant submitted that the General Division committed several errors of fact and law in its decision of November 16, 2015. The Appeal Division is satisfied that grounds of appeal that have a reasonable chance of success have been raised with respect to the General Division's finding that the Applicant should be capable of doing less physical work in the future. As well, the Appeal Division finds that grounds of appeal that have a reasonable

chance of success have also been raised in regard to the General Division's application of Klabouch and its conclusion that the Applicant does not suffer from any severe pathology or impairment that would prevent him from seeking and maintaining suitable gainful employment at the time of his hearing

[31] The Application for Leave to Appeal is granted.

Hazelyn Ross
Member, Appeal Division