



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 375

Tribunal File Number: AD-15-1590

BETWEEN:

S. S.

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

DECISION BY: Janet Lew

DATE OF DECISION: September 28, 2016

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division dated October 2, 2015, which determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that his disability was not “severe” by the end of his minimum qualifying period of December 31, 2011. The Applicant filed an application requesting leave to appeal on December 18, 2015 and further submissions on January 20, 2016, on the grounds that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, and also 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

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

SUBMISSIONS

[3] The Applicant submits that the General Division erred as follows:

- (a) did not consider the totality of the evidence before it and in particular, did not consider the opinions of various physicians and specialists that the Applicant is unable to work due to his condition;
- (b) did not ensure that he had a fair hearing;
- (c) in its findings of fact, given that the psychiatrist had diagnosed the Applicant with chronic pain, a major depressive disorder and gave a General Assessment of Functioning rating of 30 to 45; and
- (d) did not fully or properly consider or apply *Villani v. Canada (Attorney General)*, 2001 FCA 248, in that it did not keep in mind factors such as the Applicant’s age, level of education, language proficiency and past work and

life experience. The Applicant notes that he was 55 years of age when he applied for a Canada Pension Plan disability pension, has a grade 12 education in Punjabi, is not proficient in English and has limited work experience.

[4] The Applicant claims that he has not experienced any improvement in his condition, despite submitting to various treatment efforts, and that he continues to have difficulty managing his activities of daily living.

[5] The Respondent's representative argues that the Applicant has failed to establish any grounds of appeal under subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA). He submits that the General Division considered the evidence of the psychiatrist at paragraphs 62 and 64 of its decision, as well as the *Villani* factors at paragraph 12. He contends that the Applicant is essentially trying to re-litigate his case and that, as such, leave to appeal should be denied.

ANALYSIS

[6] Subsection 58(1) of the DESDA sets out the grounds of appeal as being limited to the following:

- (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.

[7] 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. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

(a) Totality of evidence

[8] The Applicant did not identify the specific evidence he alleges was overlooked by the General Division. He submits, however, that the Applicant stopped working due to asthma/allergies, hypertension, diabetes, hip replacement, left ankle injury, chronic obstructive pulmonary disease, shortness of breath, obesity, severe sleep apnea, difficulty breathing and disturbed sleep. He also listed numerous functional limitations and restrictions, such as being unable to lift, having difficulty walking short distances, limitations with personal needs and being unable to do any household maintenance.

[9] There was extensive medical evidence before the General Division, much of which was addressed in the General Division's summary of the evidence. The General Division indicated that the Applicant stated that he stopped working primarily because of his asthma, allergies, hypertension, diabetes, pain his hip and left ankle injury (paragraphs 9 and 11). The Applicant also indicated that his sleep apnea, asthma and depression also prevented him from working (paragraph 14).

[10] The General Division's analysis indicates that it reviewed the Applicant's disability relating to his hip and left ankle at paragraph 71. In the same paragraph, the General Division noted the Applicant's testimony that his "airway disease", diabetes and hypertension were now controlled, or reasonably well controlled. Although the General Division did not mention the Applicant's obesity in its analysis, that condition appears to be related to the Applicant's diabetes.

[11] The medical evidence on file includes a medical-legal report dated July 3, 2015, from Dr. Manohar Joshi, a psychiatrist (GD5-15 to GD5-17). Dr. M. Joshi noted that the Applicant saw another psychiatrist in 2010, but Dr. M. Joshi did not have a copy of that psychiatrist's consultation report. (It should be noted that the Applicant's family physician shares the same last name as the psychiatrist.)

[12] The General Division did not undertake any analysis of the Applicant's depression, apart from noting that the Applicant began seeing Dr. M. Joshi in 2015 and that he has an

appointment every three months with him for his depression, despite the fact that the Applicant stated that it was one of the reasons preventing him from working.

[13] I have reviewed the initial reconsideration file (GD2) and 394 pages of medical records filed on August 5, 2015, which were before the General Division. Apart from the psychiatrist's consultation report dated January 24, 2015, and his medical-legal report of July 3, 2015, there is no other documentary evidence to suggest that the Applicant complained of or sought any treatment regarding depression at any time prior to the end of his minimum qualifying period. Although the Applicant testified that his depression prevented him from working in 2010, and there was some indication that he saw a psychiatrist at about that time, given the lack of evidence before the General Division, I am not satisfied that the General Division failed to consider the totality of the evidence, on the basis that it did not analyze the Applicant's depression.

(b) Impartiality of hearing

[14] The Applicant wrote, "[I]n as far fairness and natural justice permit, the appellant should receive an impartial hearing so he may put forth his evidence of his disability". The Applicant suggests that he did not receive a fair and impartial hearing, however, did not explain how he may not have received a fair hearing. Absent such explanation, I am not satisfied that the appeal has a reasonable chance of success.

(c) *Villani*

[15] The Applicant submits that the General Division failed to apply the principles set out in *Villani v. Canada (Attorney General)*, 2001 FCA 248, in that it did not consider the Applicant's particular circumstances such as his age, level of education, language proficiency and past work and life experience. The Applicant contends that had the General Division considered his personal characteristics, it would have determined that the prospects of returning to any suitable occupation, and not necessarily his last employment, "are much diminished".

[16] The General Division indicated at paragraph 68 of its analysis that it was guided by the principles set out in *Villani*. The Respondent argues in submissions dated January 28, 2016 that this was sufficient for the purposes of fulfilling the *Villani* requirements.

[17] Although the General Division noted the Applicant's personal characteristics in the evidence section (at paragraph 12), it is not altogether apparent that the General Division indeed considered the Applicant's personal characteristics in a "real world context" in its overall analysis. As such, I am satisfied that the appeal has a reasonable chance of success.

(d) Medical considerations

[18] The Applicant submits that there are medical opinions which support his claim to a Canada Pension Plan disability pension. This submission calls for a reassessment. As the Federal Court held in *Tracey*, it is not appropriate for the Appeal Division, in determining whether leave should be granted or denied, to reassess the evidence or reweigh the factors considered by the General Division. Neither the leave, nor the appeal, provides opportunities to re-litigate or re-prosecute the claim. I am therefore not satisfied that the appeal has a reasonable chance of success. It is not appropriate that I conduct a reassessment of the evidence.

CONCLUSION

[19] The application for leave to appeal is granted.

[20] I invite the parties to make submissions as to whether a hearing is required or whether the appeal can be done on the record. If they advocate for a hearing, the parties should make submissions in respect of the form that the hearing should take (i.e. whether it should be conducted by teleconference, videoconference or other means of telecommunication, whether it should be held in-person or conducted by exchange of written questions and answers). If a party requests a hearing other than by exchange of written questions and answers, I invite that party to provide an estimate of the time required to prepare oral submissions.

[21] This decision granting leave to appeal does not in any way prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division