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

Citation: *R. D. v. Minister of Employment and Social Development,* 2016 SSTADIS 403

Tribunal File Number: AD-16-718

BETWEEN:

R. D.

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: October 17, 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 26, 2016. The GD, having earlier conducted a hearing by way of written questions and answers, 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), which ended December 31, 2010.

[2] On May 24, 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.

THE LAW

[3] 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.

[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.

[5] According to subsection 58(1) of the DESDA the only grounds of appeal are 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.

[6] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development).*[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 (A.G.).*[2]

[7] 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

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

SUBMISSION

[9] In his application requesting leave to appeal, the Applicant's representative made a number of submissions, which I categorize as follows:

General

(a) The Applicant participated in a treatment plan and put forth reasonable efforts.

(b) His significant functional limitations would prevent him from performing any work, even "highly accommodated" light work. As a result, he has a severe disability and does not have any residual work capacity.

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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

Alleged Errors of Fact

(c) The GD based its decision on erroneous findings of fact, in particular:

(i) In paragraph 33, the GD noted that Dr. Baer considered, but never performed, a right elbow release, disregarding the fact that the Applicant has a chronic pain condition that would not respond to surgery.

(ii) In paragraph 35, the GD found that the Applicant had not optimized his treatment options, whereas the evidence showed he submitted to the recommendations given by his physicians. Any non-compliance can be attributed to the severity of his conditions, referenced in paragraph 26.

Alleged Errors of Law

(d) The GD erred in law by failing to consider, in paragraph 34, the totality of the evidence, specifically how the Applicant's personal characteristics, such as his education and employment experience, combined with his incapacity to carry on daily activities, prevent him from pursuing light or sedentary employment. He worked for more than 20 years as a mover and has no transferable skills for other suitable occupations within his known restrictions.

(e) The GD found that the Applicant had an obligation to pursue alternative employment, even though the evidence indicated that he did not have capacity for light or even highly sedentary work. As suggested by *Leduc v. MNHW*,[3] while there may be a theoretical possibility that the Applicant might be able to perform some unspecified form of employment despite his impairments, the question is whether it is realistic to postulate, given his well-documented difficulties, that any employer would even remotely consider engaging him.

[3] *Leduc v. MNHW* (January 29, 1988), CP 1376 (PAB)

ANALYSIS

General

[10] The Applicant submits that he suffers from functional limitations that prevent him from performing any work. He also says that he has made all reasonable efforts to seek treatment.

[11] I find these claimed grounds of appeal, if this is what they are, to be so broad that they amount to a request to retry the claim. Notwithstanding the Applicant's protestations to the contrary, they are in essence a recapitulation of submissions already presented to the GD. If the Applicant is requesting that I reconsider and reassess the evidence and decide in his favour, then I am unable to do this. My authority permits me to determine only whether any of his reasons for appealing fall within the specified grounds of subsection 58(1) and whether any of them have a reasonable chance of success.

[12] As the Applicant has not identified any specific errors on the part of the GD, I am unable to consider granting leave under these grounds of appeal.

Errors of Fact

Right elbow surgery

[13] The Applicant objects to a passage from paragraph 33 of the GD's decision, wherein it noted, and appeared to draw an adverse inference from, the fact that he was considered for a right elbow release, but the procedure was ultimately never performed. The Applicant submits that the GD disregarded his chronic pain condition, which would not have responded to surgery.

[14] I see no reasonable chance of success on this ground. The relevant extract from paragraph 33 reads as follows: "Dr. Baer reported on January 20, 2009 that surgical release can be considered if his right elbow pain persisted. However, there is no indication on file that this treatment was ultimately necessary or pursued."

[15] The Applicant rightly notes that he has been diagnosed with a chronic pain condition, but I see no evidence that the GD was unaware of this fact. On the contrary, the GD referred in its decision to several WSIB Interdisciplinary Assessment Reports, in which that diagnosis was

documented and discussed. Indeed, paragraph 33, which the Applicant highlights as problematic, explicitly mentions chronic pain, albeit only to dismiss it as a potential impediment to light work.

[16] While the Applicant may have ultimately developed a chronic pain disorder, the source of his pain was still in question in early 2009, when he was still undergoing investigations by specialists such as Dr. Baer. My review of the decision indicates that the GD summarized—accurately—the rheumatologist's assessment, which concluded that surgical intervention might eventually be needed. If, as I suspect, the GD was doing nothing more than noting that mechanical issues had been ruled out as the source of the Applicant's pain, I see no arguable case that it distorted Dr. Baer's findings or drew an unreasonable inference from them.

Non-compliance with treatment

[17] The Applicant also alleges, in finding he had not optimized his treatment options, the GD disregarded evidence that he generally accepted medical advice, and where he did not, his non- compliance was reasonably explained by the severity of his conditions.

[18] On this ground, too, I see no reasonable chance of success. Paragraph 35 reads as follows:

> Furthermore, the Tribunal finds that the Appellant has not optimized his treatment options. The Tribunal considered *Bulger* v. *MHRD* (May 18, 2000), CP 9164 (PAB), which stated that an applicant for a disability pension is obligated to abide by and submit to treatment recommendations and, if this is not done, the applicant must show the reasonableness of his or her noncompliance. Dr. Nathanson reported on January 21, 2010 that he may require specialized treatment for his alcoholism if his drinking does not remit with participation in the FRP. Dr. Nathanson also recommended the addition of medications for his insomnia and depression, which were not tried. Mr. Meaney reported on March 26, 2010 that he failed to attend multiple scheduled meetings and was absent 12 of 30 days of treatment due to reported illness. Dr. Nathanson recommended that he participate in individualized substance treatment given the severity of his problems. However, there is no indication that the Appellant pursued or attempted such treatment. Given the Appellant's failure to establish the reasonableness of his noncompliance, the Tribunal finds that he has not made reasonable efforts to improve his health.

[19] The Applicant points to paragraph 26 of the decision, presumably as proof that his conditions hindered his ability to follow recommendations. However, since it summarizes the WSIB return-to-work team's precautions against repetitive movement and prolonged postures, this paragraph itself indicates that the GD was cognizant of the Applicant's limitations. These restrictions were further considered and discussed in the analysis, where the GD weighed them against competing evidence, before concluding that the Applicant possessed residual work capacity.

[20] In addition to the Applicant's non-attendance at WSIB-sponsored sessions, the GD cited several other instances in which the Applicant did not follow through on treatment recommendations, including non-attendance at alcohol and substance abuse counselling and failure to try medications for insomnia and depression. The Applicant has not specified any factual errors on which the GD relied in concluding that he was non-compliant, nor has he raised any valid extenuating circumstances that the GD failed to take into account.

Errors in Law

Totality of medical evidence

[21] The Applicant alleges that the GD erred in law by failing to consider the totality of the medical evidence, in particular how his background and personal characteristics, combined with his impairments, impede his capacity to carry on any kind of gainful employment.

[22] Although he does not plead as such, the Applicant is in effect arguing that the GD failed to properly apply *Villani v. Canada (A.G.)*,[4] in which it was held that the severe criterion must be assessed in a "real world" context. As noted by the Applicant, this means that when assessing a person's ability to work, an adjudicator must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.

[23] My review of the GD's decision suggests that the Applicant's appeal would have no reasonable chance of success on this ground. The decision contains a detailed analysis of the Applicant's claimed impairments, but it also cited *Villani* and noted biographical details—the

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

fact that he was 50 years old, with a Grade 9 education and 20 years of experience as a mover—that would affect his vocational prospects. In paragraph 36, the GD acknowledged that the Applicant was no longer capable of physically demanding work, but determined he was still able to pursue lighter occupations. I note 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.

[24] I would not overturn the assessment undertaken by the GD, where it has noted the correct legal test and taken the Applicant's personal circumstances into account.

Obligation to Pursue Employment

[25] The Applicant alleges the GD erred in finding he had an obligation to pursue alternative work, even though the evidence suggested he had no capacity for any sort of employment. Citing *Leduc,* he described the possibility that he might be able to maintain a job as no more than "theoretical."

[26] The issue raised by the Applicant on this ground is mitigation, which was directly addressed by the Federal Court of Appeal in *Inclima v. Canada (A.G.)*:[5]

> …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.

The Applicant alleges that the GD erroneously concluded that he had capacity to work at the time of his MQP, even though there no evidence he had the capacity to be engaged regularly in a substantially gainful occupation as of December 2010.

[27] 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

[5] *Inclima v. Canada (A.G.)*, 2003 FCA 117

that there was no evidence he had capacity and that the GD erred in concluding he was able to work at the time of his MQP, but of course, the entire purpose of the hearing was to determine whether he had such capacity. 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 an 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.

[28] In this case, having conducted what appears to be a reasonably thorough survey of the medical evidence, the GD found that, while the Applicant suffered from chronic pain, back and elbow strain and alcohol and substance dependence, he did have some residual functionality that warranted an *Inclima* inquiry. Paragraph 34 indicates that the GD relied on the documentary record to determine that his efforts to find alternative employment were insufficient.

[29] I am not persuaded that the Applicant has an arguable case on this ground.

CONCLUSION

[30] As the Applicant has submitted no grounds of appeal that would have a reasonable chance of success, the application is refused.

Member, Appeal Division