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

Citation: *G. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 400

Tribunal File Number: AD-16-692

BETWEEN:

G. 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

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: October 13, 2016

Canada

REASONS AND DECISION

DECISION

Leave to appeal is allowed.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal dated April 12, 2016. The GD had earlier conducted a hearing by teleconference 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) ending December 31, 2016.

[2] On May 16, 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.*[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]

[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?

SUBMISSIONS

[9] In his application requesting leave, the Applicant made the following submissions:

(a) The GD erred in failing to properly consider the medical evidence of Dr. Mariam Vania. In her report dated April [sic] 17, 2015, she indicated that the Applicant was suffering from an adjustment disorder with moderate depression, anxiety disorder and occasional panic attacks, as well as hepatitis C, psoriasis, sciatica, migraines and hemorrhoids. She declared his prognosis guarded and found that he was not well enough emotionally to work full time or part time in any 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

(b) The GD erred in failing to properly consider the August 29, 2012, MRI of the Applicant's low back, which found disc bulging and foraminal narrowing at L4-S1, among other degenerative changes.

(c) The GD erred in failing to properly consider the medical evidence of Dr. Degala Krishnaprasad, whose report dated September 25, 2012, found the Applicant was suffering from a bipolar II disorder, drug abuse, withdrawal-induced mood disorder and an organic affective disorder, as well as mixed personality traits.

(d) The GD erred in failing to properly consider Dr. Jean-Claude Bisserbe's September 30, 2013, report, which indicated that the Applicant suffers from an adjustment disorder with anxious and depressive moods and a personality disorder.

(e) The GD erred in failing to properly consider the Applicant's oral evidence, in which he indicated that he is depressed, fatigued and in pain. He also testified that he suffers from a severely reduced functional capacity, leaving him unable to perform housekeeping and home maintenance tasks.

(f) The GD erred in failing to apply the legal test in *Villani v. Canada*,[3] which requires a tribunal to adopt a "real world" analysis in determining whether a claimant is employable. Given his advanced age and lack of transferable skills and education, the Applicant claims he is effectively unemployable and should be found disabled for purposes of the CPP.

ANALYSIS

Alleged Failure to Consider Medical Reports

[10] For the most part, the Applicant's submissions on these grounds amount to a recapitulation of evidence and argument that, from what I was able to determine, were already presented to the GD. In essence, the Applicant argues that the GD gave inadequate

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

consideration to evidence that it felt proved he was suffering from a severe and prolonged disability as of the hearing date.

[11] The Applicant has had ample opportunity to present his case, and it appears that he took full advantage of it, making several submissions in the more than three years it took for this matter to come to hearing. An administrative tribunal is presumed to have considered all the evidence before it, but in this case, the GD made its decision after conducting what appears to be to be a thorough survey of the evidentiary record. All of the medical reports mentioned in the Applicant's submissions were summarized in detail in the GD's reasons, and some were referred to in its analysis. While the 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.

[12] 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 v. Canada (AG)*,[4] the appellant's counsel identified a number of medical reports which she said that the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the application for judicial review, the Federal Court of Appeal held:

> First, a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence. Second, 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…

[13] The thrust of the Applicant's submissions is that I reconsider and reassess selected documentary evidence and decide in his favour. I am unable to do this, as my authority permits me to determine only whether any of the Applicant's reasons for appealing fall within the enumerated grounds of subsection 58(1), and whether any of them have a reasonable chance of success. In the absence of any specific allegation of error, I do not think there is an arguable case that the GD gave insufficient consideration to the medical reports listed by the Applicant.

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

Alleged Failure to Consider Testimony

[14] I see no indication that the GD failed to give due consideration to the Applicant's oral evidence, which was summarized at length in its decision. His complaints of pain, fatigue and mood disruption were all noted, as was his inability to "do much of anything." Paragraphs 24, 25 and 26 indicate that the GD was cognizant of the Applicant's claimed impairments, and paragraph 37 acknowledges that they did in fact limit his functionality.

[15] In my view, the Applicant has no arguable case on this ground.

Alleged Failure to Apply *Villani*

[16] The Applicant submits that the GD erred in law by failing to apply the principles set out in *Villani*, specifically that it did not take into consideration the Applicant's limitations in a "real world context," assessing the severity test without regard for his background and personal characteristics.

[17] In *Garrett v. Canada*,[5] the Federal Court of Appeal decided that the failure to conduct an analysis in accordance with the principles set out in *Villani* was an error of law. In this case, I note the GD did not explicitly refer to *Villani* in its decision, although that by itself does not prove the GD disregarded binding authority if it otherwise considered the Applicant as a "whole person" as directed. That said, while the GD noted the Applicant's age, education and work history in its summary of the evidence (at paragraphs 8 and 23), it made no reference to the Applicant's profile in its analysis. On that basis, the Applicant has an arguable case that that the GD may have erred in law.

CONCLUSION

[18] I am allowing leave to appeal on the sole ground that the GD may have erred in law by failing to apply the principles set out in the *Villani* decision.

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[5] *Garrett v. Canada (Minister of Human Resources Development)*, 2005 FCA 84

[19] I invite the parties to provide submissions on whether a further hearing is required and, if so, what form of hearing is appropriate. The parties are also free to make submissions on what remedies, if any, they believe may be appropriate.

[20] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Member, Appeal Division