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

Citation: *C. H. v. Minister of Employment and Social Development*, 2016 SSTADIS 405

Tribunal File Number: AD-16-749

BETWEEN:

C. H.

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 March 17, 2016. The GD had earlier conducted an in-person hearing and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan* (CPP), as it found that her disability was not "severe" prior to the minimum qualifying period (MQP) ending December 31, 2015.

[2] On June 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.

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

(a) She stopped working due to pain in her back, knees, left leg, right arm and right shoulder. She is subject to many physical restrictions and is unable to perform tasks related to personal care and household maintenance. She also suffers from coronary artery disease, high cholesterol, headaches and disturbed sleep. She has consulted specialists and taken numerous medications, to little effect. Her family physician, psychiatrist and other treating specialists agree that her prognosis for recovery is poor and he is an unlikely candidate to return to gainful employment.

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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 not taking in to consideration the totality of the evidence before it in deciding that the Applicant was not entitled to a disability pension. She suffers from a severe and prolonged disability within the meaning of the paragraph 42(2)(a) of the CPP.

(c) The GD erred by failing to apply the principles of *Villani v. Canada*,[3] which required it to consider factors such as age, level of education, language proficiency and past work and life experience. The Applicant was 61 years old at the time of the hearing and has only a grade 12 education from India. She has no proficiency in spoken English and has only worked in labour-intensive jobs where she was surrounded by co-workers who spoke Punjabi, her native language. In a real world context, her chances of returning to any suitable occupation are much diminished.

ANALYSIS

Failure to Recognize Severity of Applicant's Condition

[10] Much of the Applicant's submissions amount to a recapitulation of evidence and argument that was already presented to the GD. She alleges that the GD dismissed her appeal despite medical evidence indicating that her overall condition was "severe," according to the CPP criteria.

[11] Outside of these broad allegations, the Applicant has not identified how, in coming to its decision, the GD failed to observe a principle of natural justice, committed an error in law or made an erroneous finding of fact. My review of the decision indicates that the GD analyzed in considerable detail the Applicant's claimed medical conditions—principally widespread pain, headaches and coronary artery disease—and whether they affected her capacity to regularly pursue substantially gainful employment during the MQP. In doing so, it took into account the Applicant's background—including her limited education and lack of facility in English—but found they were not significant impediments to her ability to retrain or perform alternate work.

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

[12] While applicants are not required to prove the grounds of appeal at the leave stage, they must set out some rational basis for their submissions that fall into the enumerated grounds of appeal. The AD ought not to have to speculate as to the true basis of the application. It is not sufficient for an applicant to state their disagreement with the decision of the GD, nor is it sufficient for an applicant to express her continued conviction that her health conditions render her disabled within the meaning of the CPP.

[13] In the absence of a specific allegation of error, I must find the Applicant's claimed grounds of appeal to be so broad that they amount to a request to retry the entire claim. If she is requesting that I reconsider and reassess the evidence and substitute my decision for the GD's in her favour, I am unable to do this. My authority as a member of the AD permits me to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds of subsection 58(1) and whether any of them have a reasonable chance of success.

[14] I see no reasonable chance of success on these grounds.

Failure to Consider Totality of Evidence

[15] The Applicant alleges that the GD erred in failing to consider the totality of the impairments that rendered her disabled. The Applicant did not specify which impairments she believes the GD overlooked, but it is settled law that an administrative tribunal charged with finding fact is presumed to have considered all of the evidence before it and need not discuss each and every element of a party's submissions.[4] That said, I have reviewed the GD's decision and found no indication that it ignored, or gave inadequate consideration to, any of the Applicant's major complaints.

[16] The GD's decision contains a comprehensive summary of the medical evidence, including many reports that document investigations and treatment for the Applicant's various medical problems. The decision closes with an analysis that meaningfully discusses the written and oral evidence before concluding that the Applicant's conditions and their symptoms—whether considered individually or collectively—did not preclude her from performing all forms of work.

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

[17] I see no arguable case on this ground.

Failure to Apply *Villani*

[18] In its decision, the GD summarized the Applicant's personal characteristics at paragraph 8 and referred to the correct test at paragraph 28. It further discussed her background in paragraphs 39 and 41 before determining that, while her education and English-language skills were limited, her long and varied experience in the Canadian workforce had shown she was capable of adapting to changed circumstances.

[19] In 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.

[20] I would not overturn the assessment undertaken by the GD, where it has noted the correct legal test and considered the Applicant's "real world" employment prospects in the context of not only her impairments but also her personal profile. As the Applicant has failed to show how the GD misapplied *Villani*, I see no arguable case on this ground.

CONCLUSION

[21] As the Applicant has not identified grounds of appeal under subsection 58(1) that would have a reasonable chance of success on appeal, the application is refused.

Member, Appeal Division