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

Citation: *G. D. v. Minister of Employment and Social Development*, 2016 SSTADIS 407

Tribunal File Number: AD-16-723

BETWEEN:

G. 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 granted.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal dated February 22, 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 her disability was not "severe" prior to the minimum qualifying period (MQP) ending December 31, 2016.

[2] On May 20, 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 GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The GD 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) The GD erred in law by failing to apply the provisions set out by the Federal Court in *Villani v. Canada*,[3] which requires the severity of a claimant's disability to be assessed in a real world context that takes into account his or her employability in the labour market. In this case, the GD disregarded that aspect of the *Villani* test, focusing only on the Applicant's age, level of education, language proficiency and past work and life experience.

(b) The GD based its decision on an erroneous finding of fact when it found, in paragraph 26 of its decision, that the Applicant continued to demonstrate the capacity to work part time after she was terminated from her job. In fact, the evidence shows that her employer only accommodated her temporarily, allowing her to work non-consecutive days from her home. KPMG ultimately concluded

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

that her medical condition precluded her from working not only as a senior manager, but also any position, as indicated in its letter of November 30, 2015—a document referenced by the GD in its decision.

ANALYSIS

(a) Villani

[10] The Applicant submits that the GD misapplied *Villani* in failing to consider how her impairments rendered her unemployable in a real world context. While she acknowledges that the GD took into account her personal factors, she argues that it should have asked why a prospective employer would hire an individual with chronic pain syndrome subject to physical limitations that prevented her from working non-consecutive days.

[11] Having reviewed the GD's decision, I see at least a reasonable chance of success on this ground. I agree that *Villani* requires not just consideration of an applicant's personal factors, but also a reckoning of those personal factors with both his or her claimed impairments and the commercial imperatives faced by employers. In this case, the GD found that the Applicant's impairments did not prevent her from performing "regular" part-time work, given her relative youth and education, but I think an argument can be made that it gave inadequate consideration to the realities of the labour market: Could an individual who was said to be capable, at best, of working a sedentary job on non-consecutive days be capable of "substantially gainful" employment?

(b) Capacity for Part-Time Work

[12] The Applicant alleges that the GD based its decision on an erroneous finding of fact by in effect disregarding the circumstances surrounding her dismissal from KPMG. In my view, this ground is better characterized as a potential error of mixed law and fact because it is also predicated on the argument that the GD gave insufficient emphasis to the "regular" aspect of clause 42(2)(a)(i) of the CPP, which sets out the "severity" test for disability.

[13] The GD aptly cited case law in paragraph 28 of its decision to equate regularity with predictability and the capacity to go to work as often as is necessary. In the end, one of the main factors influencing the GD's decision appears to have been what it found was the Applicant's

supposed ability to perform part-time employment—an eight-hour day, twice a week—between May and July 2015. In that regard, I agree the Applicant has an arguable case that the GD gave insufficient consideration to KPMG's subsequent termination of her employment and its reasons for doing so. While the GD acknowledged the Applicant's loss of her job, it found in paragraph 26 that she was dismissed for reasons other than incapacity:

> Her employment stopped not due to her inability but because her pre-accident employer did not have suitable work to accommodate her medical restrictions.

[14] In my view, an arguable case can be made that the GD did not accurately or completely represent the November 30, 2015, termination letter from KPMG, which said:

> Unfortunately, we have not been able to identify any such positions in which your medical restrictions could be accommodated without KPMG incurring undue hardship. Based on the medical information provided by your physician, it appears that you will continue to be subject to your current medical restrictions for an undetermined period of time, and KPMG simply does not have positions in Tax in which you could do meaningful work subject to these medical restrictions.

[15] I see a reasonable chance of success on this ground.

CONCLUSION

[16] I am allowing leave to appeal on the grounds that the GD may have: (i) erred in law by misapplying *Villani* and (ii) erred in fact and law by disregarding the regularity aspect of the test for disability while giving adequate consideration to the reasons KPMG terminated her employment.

[17] I invite the parties to provide submissions on whether a further hearing is required and, if so, what the type of hearing is appropriate.

Member, Appeal Division