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

Citation: *D. K. v. Minister of Employment and Social Development*, 2016 SSTADIS 422

Tribunal File Number: AD-16-761

BETWEEN:

D. K.

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 28, 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 15, 2016. The GD had earlier conducted a videoconference hearing 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), which ended December 31, 2012.

[2] On May 31, 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 his application requesting leave to appeal, the Applicant made the following submissions:

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

(b) He stopped working due to the injuries to his left wrist, arm and shoulder. Despite surgery, he continues to suffer from chronic pain, depression, and disturbed sleep. He is unable to lift objects or perform repetitive tasks and has

[1] *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC)
[2] *Fancy v. Canada (Attorney General),* 2010 FCA 63

difficulty with personal care and household maintenance. He has consulted specialists and taken numerous medications, to little effect. He continues to see his family physician but no improvement is expected. His treatment providers agree that the Applicant is permanently disabled and is unlikely to return to any gainful employment.

(c) The GD failed to consider a psychiatric report dated June 13, 2013, in which Dr. Panjwani found that the Applicant's psychological condition was likely precipitated by his workplace accident, given the temporal relationship between the onset of symptoms and injury. Dr. Panjwani assigned the Applicant a global assessment of functioning score of 40 and concluded that the Applicant was totally disabled to pursue any gainful occupation. His long-term prognosis remained guarded.

(d) 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 53 years old at the time of the hearing and has only a grade 10 education from India. He has never taken ESL classes and is not proficient in spoken or written English. He has only worked in labour-intensive jobs in which he was surrounded by co-workers who spoke languages related to Punjabi, his mother tongue. In a real world context, his chances of returning to any suitable occupation are much diminished.

ANALYSIS

Failure to Consider Totality of Evidence

[10] The Applicant alleges that the GD erred in failing to consider the totality of the impairments that rendered him disabled. The Applicant did not specify which impairments he believes the GD overlooked, but it is settled law that an administrative tribunal charged with

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

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 significant aspect of the Applicant's claimed conditions.

[11] 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, while relatively brief, suggests the GD meaningfully assessed the evidence before concluding that the Applicant had residual capacity to regularly pursue substantially gainful employment. In so doing, the GD noted the Applicant's WSIB retraining and his testimony that he could have continued to work at light duties after his injuries, had his plant not shut down. The GD also referred to medical records of Dr. Kim, the family doctor, and a March 2012 functional assessment evaluation report that found the Applicant was independent in driving and with his activities of daily living.

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

Failure to Recognize Severity of Applicant's Condition

[13] It must be said that a large portion of the Applicant's submissions is, in essence, a recapitulation of evidence and argument that was already presented to the GD. The Applicant alleges that the GD dismissed his appeal despite medical evidence indicating that his overall condition was "severe", according to the CPP criteria.

[14] However, outside of this broad allegation, 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, repetitive strain injuries to his left upper extremity secondary to depression, and whether they affected his capacity to regularly pursue substantially gainful employment during the MQP. In doing so, it took into account the Applicant's background, including his age, limited education and non-fluency in English, but found they were not significant impediments to his ability to retrain or perform alternate work.

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

[15] 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. It is not sufficient for an applicant to merely state his disagreement with the decision of the GD, nor is it sufficient for an applicant to express his continued conviction that his health conditions render him disabled within the meaning of the CPP.

[16] In the absence of a specific allegation of error, I find this claimed ground of appeal to be so broad that it amounts to a request to retry the entire claim. If he is requesting that I reconsider and reassess the evidence and substitute my decision for the GD's in his 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) of the DESDA, and whether any of them have a reasonable chance of success.

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

Dr. Panjwani's June 2013 Report

[18] The Applicant alleges that the GD erred in disregarding an essential psychiatric report, but I cannot agree. First, it is a truism that an administrative tribunal is deemed to have considered all the evidence before it, unless there is compelling evidence to the contrary. Second, the decision clearly indicates that the GD *did* consider the Panjwani report, with paragraph 41 containing a summary of its findings, including the "guarded" prognosis. Finally, the GD addresses the Applicant's psychological condition in its analysis, noting that Dr. Panjwani did not begin treatment until after the MQP.

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

Failure to Apply *Villani*

[20] In its decision, the GD summarized the Applicant's personal characteristics at paragraph 8 and referred to the correct test at paragraph 85. It further discussed his background in paragraph 86, before determining that his demonstrated capacity to work at light duties at his assembly plant meant that age, education and language ability were not impediments to his continued employment.

[21] 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.

[22] 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 his impairments, but also his personal profile. As the Applicant has failed to show that the GD misapplied *Villani*, I see no arguable case on this ground.

CONCLUSION

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

Member, Appeal Division