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

Citation: *R. H. v. Minister of Employment and Social Development*, 2016 SSTADIS 434

Tribunal File Number: AD-16-759

BETWEEN:

R. 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: November 8, 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 18, 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), which ended December 31, 2009.

[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 the application requesting leave to appeal, the Applicant's representative made the following submissions:

a) The GD based its decision on an erroneous finding of fact when it mischaracterized the Applicant's personal characteristics. First, she is 51 years of age and cannot be considered "young." Second, the mere fact that she can converse in English does not necessarily mean she would be able to acquire the necessary written language skills to work in a sedentary occupation. While the Applicant completed high school, she did so in her native language in her country of origin. These errors, combined with the fact that the Applicant has

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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

previously only performed heavy manual labour as a personal support worker, suggest that the GD member failed to properly consider *Villani* v. *Canada* (*A.G.*)[3] in its reasoning.

b) The GD based its decision on an erroneous finding of fact when it inferred that the Applicant had capacity to work from her completion of job search and job placement programs. Such programs are by their very nature not actual work but attempts to replicate an actual work setting. It should be noted that while the GD relied upon the Applicant's completion of programs under the WSIB to establish her capacity to work, that very same organization recognized that she only had the ability to perform 20 hours of work per week at minimum wage, which does not constitute substantially gainful employment.

c) The GD based its decision on an erroneous finding of fact when it indicated at paragraph 73 that there was no radiographic imaging to suggest a severe condition of the Applicant's right shoulder, neck or back. In doing so, the GD failed to acknowledge the WSIB's 2007 determination that the Applicant was subject to permanent restrictions, which precluded her from repetitive movement and above- the-shoulder work with her right arm, among other actions. Furthermore, the Applicant was examined by numerous orthopedic and pain specialists, including Dr. Kumbhare, Dr. Mah, Dr. Boucher, Dr. Upadyhe and Dr. Denkers, all of whom confirmed that her restrictions were necessary. The absence radiographic findings is an irrelevant consideration in light of the weight of evidence to the contrary from the Applicant's examining physicians.

d) The GD based its decision on an erroneous finding of fact when it noted, at paragraph 74, Dr. Dada's finding that the Applicant's condition had deteriorated after the MQP. However, Dr. Dada's earliest opinion in 2010, which found her shoulder function was poor, did not suggest that the Applicant had the capacity to work, only that her prognosis was "fair," which also carries a negative, as well as a positive, connotation.

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

e) The GD erred in selectively noting, at paragraph 75 of its decision, a comment walking on a regular basis. However, at no time did the report indicate that the Applicant had work capacity. It was an error of law to rely on a relatively optimistic part of the report but ignore its timing and overall findings. While the Applicant showed some improvement after she completed the pain management program in 2008, there was merely an expectation of further improvement after that. The record shows her condition did not in fact improve and she was subsequently diagnosed with depression and chronic pain disorder.

f) The GD erred in giving insufficient consideration to evidence that the Applicant had mental health issues to the extent that she was prescribed antidepressants. It is abundantly clear that the combination of depression and physical pain debilitated her from working.

g) The GD selectively considered the evidence while ignoring the entirety of it. There is no medical evidence which supports the position that the Applicant is capable of performing substantially gainful employment. At best, the medical evidence suggests that the Applicant may in the future be able to return to work. A prognosis is nothing more than educated guess or an expectation, and in any event, no physician has offered anything more hopeful than a less-than-positive prognosis of "fair."

ANALYSIS

Mischaracterization of Personal Factors and Failure to Apply *Villani*

[10] According to the *Villani* decision, the severe criterion must be assessed in a real world context. This means that when assessing a person's ability to work, the GD must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. In this case, the Applicant alleges that the GD based its decision on a mischaracterization of two *Villani* factors—her age and language skills.

[11] I agree this ground has at least a reasonable chance of success. In paragraph 70, the GD wrote:

> The Appellant is still a young woman and has a high school education. Although she had an interpreter present, the Tribunal observed that the Appellant was readily able to understand and respond to questions in the English language. She rarely referred to the interpreter.

[12] The Applicant refers to herself as 51 years old, but that is her current age, and the CPP requires an assessment of work capacity as of her eligibility period. Still, she was 44 at the end of her MQP, and it is arguable whether, as the GD found, that qualifies as "young" for a jobseeker in today's labour market. In addition, I agree that the Applicant's apparent fluency in English does not necessarily mean she has the capacity to acquire comparable proficiency in its written form.

[13] I see an arguable case that the GD drew inferences about the Applicant's personal characteristics that were unsupported by the evidence and, in so doing, misapplied the *Villani* principle.

Inference from Attendance at Job Placement Programs

[14] The Applicant objects to the GD's inference that she had capacity to work based on her completion of job search and job placement programs, noting that they are by their very nature not actual work but mere attempts to replicate work settings.

[15] My review of its reasons leaves no doubt that the GD based its decision, in part, on the Applicant's completion of the two WSIB-sponsored programs:

> [71] The Appellant demonstrated that she had the capacity for suitable work because she completed WSIB LMR programs and was able to participate in a 4 week job search training program and an 8 week job placement program. She chose not to participate in a job search and made no applications for employment.
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> [72] Although she was not able to return to the full time duties of her former job as a health care aid, she was open to working at her job in a modified work capacity. Her employer did not offer her that opportunity. As a result, she was provided an opportunity to retrain through the LMR program. As noted above, she successfully completed the program to

> become a Customer Service and Information Related Clerk. This suggests that she has the capacity to do some type of suitable work.

[16] That said, I do not believe the GD's inference was unfair, not least because it was only one of several factors it cited in explaining its reasoning. The Applicant did not deny that she completed the LMR programs, nor did she claim the GD overlooked allowances or other circumstances that explained how she managed the programs despite her claimed impairments. For its part, the GD did not suggest that the Applicant's completion of the LMR programs was definitive proof she was able to work, only that it was an indication of capacity for "suitable work"—which she had not pursued, as case law[4] suggests she was obligated to do.

[17] I recognize, as did the GD, that WSIB assessments determined the Applicant was capable of working no more than 20 hours of work per week at minimum wage, but it was open to the GD as trier of fact, having weighed the evidence, to determine that this was "substantially gainful" employment, and see no reason to interfere with its judgment on this matter.

Inference from Findings on Imaging Reports

[18] The Applicant alleges the GD erred in basing its decision on an absence of significant findings in the available imaging reports. In doing so, the GD gave inadequate consideration to the findings of her specialists, as well as the WSIB's assessment that she was subject to permanent restrictions.

[19] I see no reasonable chance of success for this ground. The Applicant has not alleged that the GD erred in in its interpretation of the imaging reports, only that it assigned them too much weight at the expense of what she believed were more significant items of evidence. 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. The GD made explicit reference in its reasons to reports from each of the medical specialists cited by the Applicant and noted the WSIB's finding that that she was subject to permanent restrictions (even though workers' compensation schemes follow criteria

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

that differ significantly from those of the CPP disability regime). In paragraphs 30 and 37, the GD referred to x-rays taken in April 2010 and January 2011, respectively, that appeared to show no significant pathology to the Applicant's right shoulder. Having examined the originals, I see no indication that the GD misrepresented those findings or that it unreasonably concluded there was no radiographic imaging to suggest a severe condition. 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.

[20] 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 (A.G.)*,[5] 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…

[21] The thrust of the Applicant's submissions is that I reconsider and reweigh selected documentary evidence and decide in her favour. However, 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. I see no arguable case that the GD gave insufficient consideration to certain items of evidence, nor that the absence of significant findings in the imaging reports was "irrelevant," as the Applicant would have it.

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

Dr. Dada's Reports

[22] In its decision, the GD noted that Dr. Dada's CPP Medical Report of April 2011 (in which he said he began treating the Applicant for her main medical condition in 2010) found her right shoulder function was "poor" yet deemed her prognosis "fair." It discounted Dr. Dada's January 2012 report, which found the Applicant "permanently unemployable" because it came more than two years after the end of the MQP. The Applicant denies the GD's implication that the two reports were inconsistent or that lesser weight should have been given to the later report.

[23] I see no arguable case on this ground. The Applicant has not alleged that the GD misrepresented the findings in either of Dr. Dada's reports, and I see nothing unreasonable in assigning weight to a medical opinion based on its proximity to the MQP. The Applicant is at pains to characterize "fair" as a negative prognosis, but I hardly think the GD's interpretation can be termed a "perverse" or "capricious" error that was "made without regard for the record." While I agree that the word connotes uncertainty, its use by Dr. Dada on a form specifically designed to elicit his opinion on the Applicant's work prospects, suggests he believed there was hope for recovery at the time.

Benefit from Pain Management Treatment

[24] The Applicant alleges the GD erred in law by selectively noting that she was socializing more and walking on a regular basis following pain management treatment in 2008, ignoring the fact that her assessors never found that she had work capacity.

[25] I have reviewed the report in question, written by an occupational therapist named Ian Bladon of the Chedoke Centre and dated June 27, 2008, and find it difficult to fault the GD for concluding that the Applicant's participation in the centre's pain management program did not benefit her. That said, I see a reasonable chance of success on this ground if the Applicant can show that the GD disregarded clear and compelling evidence that her condition deteriorated after a transitory improvement produced by her therapy.

[26] In addition, while it may be true, as the Applicant suggests, that her pain management assessors never found she had work capacity, it also appears to be true that in their several

reports they never ruled it out either. I ask the parties to direct their minds to this apparent point of ambiguity when the merits of this appeal are under consideration.

Mental Health Issues

[27] The Applicant alleges the GD gave insufficient consideration to her mental health issues, but I see no arguable case on this ground. My review of the GD's decision suggests that it paid due attention to the Applicant's submissions on this issue, noting at paragraph 24 testimony that she had never seen a mental health specialist and, at paragraph 25, the fact she was taking Effexor, an antidepressant. In my view, the GD was within its authority, as trier of fact, to make a reasonable inference from these findings that the Applicant's mental health was not a significant contributor to her impairment, such as it was.

Selective Consideration of Evidence

[28] The Applicant makes a general allegation that the GD selectively considered evidence to suit a desired outcome while ignoring the totality of the evidence, which she maintains demonstrated that she was capable of performing substantially gainful employment as of the MQP. Except as noted above, the Applicant did not specify what aspects of the record 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.[6] That said, I reviewed the GD's decision and found no indication that it ignored, or gave inadequate consideration to, any significant component of the Applicant's evidence or submissions.

[29] The GD's decision contains what appears to be a fairly 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 suggests the GD, for the most part, meaningfully assessed the evidence and had defensible reasons supporting its conclusion that the Applicant had residual capacity to regularly pursue substantially gainful employment. In so doing, the GD noted that there were no imaging results

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

to indicate severe right shoulder, neck or back pathology and, despite successfully completing customer service retraining, she had not undertaken a job search.

[30] I see no arguable case on this broadly argued ground.

CONCLUSION

[31] I am allowing leave to appeal on the grounds that the GD may have:

a) Misapplied the *Villani* principle by drawing inferences about the Applicant's personal characteristics that were unsupported by the evidence;

b) Selectively relied on evidence from the Applicant's pain management reports, ignoring the fact that her assessors never found that she had work capacity.

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

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

Member, Appeal Division