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

Citation: *J. V. v. Minister of Employment and Social Development*, 2016 SSTADIS 435

Tribunal File Number: AD-16-541

BETWEEN:

J. V.

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: Janet Lew

Date of Decision: November 10, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated January 27, 2016, which determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan,* as it found that her disability was not "severe" by the end of her minimum qualifying period on December 31, 2013. The Applicant filed an application requesting leave to appeal on April 8, 2016, alleging several grounds of appeal.

ISSUE

[2] Does the appeal have a reasonable chance of success?

ANALYSIS

[3] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to 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.

[4] Before granting leave, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

i. Errors of law

Garrett

[5] The Applicant submits that the General Division failed to apply *Garrett v. Canada (Minister of Human Resources Development),* 2005 FCA 84, in that it did not discuss the Applicant's *"Villani* factors in context with real world employability and the Appellant's conditions".

[6] The Applicant argues that, although the member cited *Villani*, he failed to discuss how her impairments, including fatigue which required daily naps, and anxiety which prevented her from leaving her house on a regular basis, would make her unemployable in a real world situation.

[7] The General Division discussed the Applicant's alleged impairments, including fatigue, but was not persuaded that the Applicant experienced the extent of exhaustion described by her, and therefore, found that it played little or no role in her capacity regularly of pursuing any substantially gainful occupation on or before her minimum qualifying period. Similarly, the General Division characterized the Applicant's fear as embarrassment and there was no independent corroborating objective medical evidence of fear or anxiety to support a finding that it interfered with her capacity regularly of pursuing any substantially gainful occupation on or before her minimum qualifying period. As the Federal Court of Appeal indicated in *Villani,* at paragraph 50, apart from considering an applicant's circumstances, medical evidence will still be needed.

[8] After concluding that there was insufficient medical evidence to support a finding that the Applicant suffered from a severe and prolonged disability, the General Division then proceeded to assess the severity of the Applicant's disability in a "real world context". The General Division set out the *Villani* test at paragraph 33 and then addressed the Applicant's personal characteristics. At paragraph 34, the General Division wrote:

> [34] The Appellant was only 39 years of age at the time of the MQP. She has the capacity to retrain as evidenced by her ability to obtain her GED and a college course in Excel. She has no barriers in communicating well in English. She has some administrative skills obtained in organizing her roller

> derby team and competitions. Given her age, level of education, language proficiency and work experience the Appellant does not suffer from a severe disability as defined in the CPP in a real world context.

[9] The Federal Court of Appeal indicated that one should be reluctant to interfere with the assessment of the applicant's circumstances, as it involves a question of judgment. I see no reason, given the facts before me, to interfere with the assessment of the General Division in this matter.

Bungay

[10] The Applicant submits that the General Division member failed to consider the totality of the medical evidence before it, particularly her fatigue requiring daily naps to remain functional, anxiety and "absent periods".

[11] The evidence regarding the Applicant's napping is set out at paragraphs 14 and 17. The Applicant testified that she naps every day and would have to find an employer who would allow here to nap in the afternoon. Further, there are entries in the clinical records dated May 1, 2014 and May 23, 2014 which record the Applicant's daily naps. The entry of May 1, 2014 indicates that this "napping behaviour is new" to the Applicant. I could find no reference in the documentary records that napping, or fatigue on its own, were issues on or before the minimum qualifying period.

[12] Any fatigue appears to relate to the Applicant's seizures. The entry for the clinical records of July 5, 2013 indicates that the Applicant experienced "some fatigue after these episodes", i.e. after her seizures. The General Division addressed the Applicant's fatigue, describing it as "exhaustion", at paragraph 30, in the context of the seizures. In this regard, the General Division did not fail to consider the Applicant's fatigue, even if it chose to describe it as "exhaustion".

[13] While the Applicant might have exhibited some fear over leaving her home and having another seizure, it does not appear that it was mentioned as a possible concern until after the end of the minimum qualifying period. Although she alleged that she had become extremely anxious and fearful about leaving her home, there does not appear to be any documentary evidence to support the severity of the anxiety which she alleges. There is no

evidence to suggest that the anxiety rose to such a level that the Applicant required any treatment such as anti-anxiety medications, counselling or referral to a mental health specialist such as psychologist or psychiatrist.

[14] The General Division set out the evidence regarding the Applicant's "absent periods" at paragraph 13. The General Division wrote that the Applicant reported that she now experiences "absent seizures" which she described as "being gone". They reportedly lasted from 3 to 60 seconds, or 20 minutes, and could occur at any time. The Applicant reportedly experienced from 5 to 500 per day of these "absent seizures". The General Division discussed the absent seizures at paragraphs 29, 30 and 31 of its analysis. Ultimately, the General Division found that there was no documentary evidence to corroborate the Applicant's oral testimony regarding the frequency and duration of these "absent seizures". In this regard, the General Division did not fail to consider the "absent periods".

[15] I am not satisfied that the appeal has a reasonable chance of success on the ground that the General Division failed to consider the totality of the evidence before it.

Kambo

[16] The Applicant submits that the General Division incorrectly applied *Kambo v. Minister of Human Resources Development*, 2005 FCA 353, in that it failed to measure whether her non-compliance with treatment recommendations was reasonable. The Applicant contends that the General Division erred in finding that she was in a similar fact situation to Ms. Kambo, who was found to have unreasonably failed to increase her physical exercise and activities, despite consistently receiving medical advice in this regard. The Applicant argues that, unlike Ms. Kambo, her physicians did not determine that her non-compliance was unreasonable. The Applicant argues that her non- compliance in taking Tegretol was not unreasonable, as she often forgets to take her medication and is of limited financial means.

[17] The General Division however did not focus on her non-compliance with taking Tegretol. At paragraph 31, the member wrote:

> [31] Appellants have a personal responsibility to cooperate in their health care (*Kambo v. MHRD, 2005 FCA*). Dr. Singh noted in his medical notes on more than one occasion he was concerned about the Appellant's compliance. In June 2014 he noted the Appellant did not do her blood test and he hoped she would comply in the future and warned her to comply. The Appellant complained of depression but wanted to hold off on medication (May 23, 2014). The Appellant testified she had obtained counselling twenty minutes from her house but found this too far and stopped attending. She testified she hates her Family Physician and only attends if necessary and is no longer seeing the Neurologist. The Tribunal finds the Appellant has not fulfilled her personal responsibility to cooperate in her health care.

[18] The General Division indicated that the Applicant wanted to hold off on taking medication, but this was in relation to her depression. It is apparent from the May 23, 2014 records that the Applicant wished to hold off on taking any anti-depressant medication at that time because she was exploring counselling as an option (GD3-44), but there is no indication that she re-visited this issue after she stopped attending counselling sessions.

[19] The General Division examined other areas where the Applicant was non-compliant with treatment recommendations. The Applicant has not indicated that there is any evidence to suggest that her non-compliance with these recommendations was within reason.

[20] I am not satisfied that the appeal has a reasonable chance of success on this ground.

ii. Erroneous finding of fact

[21] The Applicant argues that the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it, in concluding at paragraph 32 that the Applicant was "obtaining reasonable sleep awakening refreshed", which originated from an entry dated May 1, 2014 (GD3-43) in the family physician's clinical records. The Applicant argues that the General Division misconstrued the meaning of the entry, as the member quoted "only partial sentences". The sentence, in its entirety, reads, "P[atient] is sleeping a reasonable amount at

night (~9:30pm-6am) and awakes feeling quite refreshed, but has been requiring an early afternoon nap of ~1 hour in order to make it through the rest of the day. This napping behavior is new to her".

[22] Furthermore, the Applicant argues that the General Division disregarded other evidence regarding her sleeping habits, when three weeks later, her family physician wrote in the entry of May 23, 2014 that, "Reports napping daily and that this has become essential to her functioning" (GD3-44).

[23] By way of background, the Applicant's visit of May 1, 2014 to her family physician was in connection with the Applicant's recent depression. The Applicant described some of her symptoms to her family physician. Dr. Sun indicated that the diagnosis of epilepsy in October "contributed significantly to recent depression", although she also noted that the Applicant has a history of depression (GD3-43 to GD3- 44). The follow-up visit with Dr. Sun on May 23, 2014 was in follow-up for the Applicant's depression although the Applicant also had concerns about her epilepsy medication (GD3-44).

[24] It is necessary to see the context in which the statement that the Applicant obtains "reasonable sleep awaking refreshed" was made by the General Division. Paragraph 32 reads as follows:

> [32] There must be sufficient objective medical evidence to indicate the Appellant suffers from a severe and prolonged disability as defined in the CPP. The medical evidence must relate to the date of the MQP. The medical evidence indicates the Appellant had not suffered from a grand mal seizure since taking medication and in May 2014 her medical condition was controlled to the point the Neurologist supported the return of her driver's license. The medical imaging conducted on the Appellant indicated normal head scans. A medical note dated May 1, 2014 indicated the Appellant was obtaining reasonable sleep awaking refreshed. It further noted she "thinks" she is having night-time seizures being a handful in past few months. There are not any medical reports on file that would substantiate the evidence of the Appellant that she was suffering from absent seizures on a frequent daily basis. There are not any medical reports that would substantiate the Appellant is suffering from severe depression that would render her incapable regularly of pursuing any substantially gainful occupation. The only limitation noted in the medical reports is by the Family Physician that the Appellant is unable to continue as a school bus driver due to licensing concerns. The Tribunal finds

> there is insufficient objective medical evidence to prove a severe disability as defined in the CPP at the time of the MQP and continuously since.

[25] At paragraph 32, the General Division explained why it did not find the Appellant to be suffering from a severe and prolonged disability.

[26] One of the constituent parts of paragraph 58(1)(c) is that the General Division base its decision on an erroneous finding of fact. The General Division prefaced paragraph 32 of its decision by indicating that the medical evidence "must relate to the date of the MQP". The entry in the clinical records however is dated May 1, 2014, several months after the end of the minimum qualifying period had passed. Nonetheless, the General Division appears to have concluded that the Applicant did not suffer from a severe and prolonged disability, in part because she "was obtaining reasonable sleep awaking refreshed". Although the entry in the clinical records is dated May 1, 2014, it appears to have formed part of the bases upon which the General Division determined that the Applicant was not disabled.

[27] The General Division's statement is directly taken from the entry in the clinical records. The Applicant argues that the evidence has been misconstrued, as the member did not refer to the afternoon naps in his analysis. There was certainly evidence, including from the Applicant's own testimony, that she takes daily naps in the afternoon.

[28] The General Division was mindful of the Applicant's napping patterns, referring to them at paragraphs 14 and 17 in the evidence section, but the member did not address that evidence. At the same time, it did not reject or dismiss that evidence. One can only infer that the General Division simply did not regard the Applicant's daily napping as a feature which rendered her disabled or affected her ability regularly of pursuing any substantially gainful occupation. While that may be so, if the General Division misconstrued the evidence regarding the Applicant's sleeping habits, that may have resulted in an erroneous finding of fact. If evidence is misconstrued, it suggests that an inaccurate interpretation or construction has been given.

[29] The sentence, "P[atient] is sleeping a reasonable amount at night (~9:30pm-6am) and awakes feeling quite refreshed, but has been requiring an early afternoon nap of ~1 hour in order to make it through the rest of the day" (my emphasis) includes the conjunction

"but". The use of the conjunction "but" joins two independent clauses. The Applicant's submissions suggest that had the General Division referred to the second part of the sentence regarding her daily afternoon napping, this would have given a different meaning or construction to its statement regarding the Applicant's sleep and awakening refreshed.

[30] There may be an arguable case that use of the conjunction "but" may have modified the first part of the sentence, or at least shown some contrast between two independent clauses. If so, this seems to require that there be some nexus or connection between having a "reasonable sleep awaking refreshed" and being able to function throughout the day, or "mak[ing] it through the rest of the day" if a conjunction was required to bring some context to the issue of the Applicant's sleeping from 9:30 p.m. to 6 a.m. I am satisfied that there is an arguable case and that the appeal has a reasonable chance of success. The parties should provide submissions addressing the issue of whether the General Division misconstrued the evidence and if so, how that altered the meaning of the clause that the Applicant awoke feeling refreshed.

CONCLUSION

[31] The application for leave to appeal is allowed.

[32] This decision granting leave to appeal does not, in any way, prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division