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

Citation: *R. T. v. Minister of Employment and Social Development*, 2016 SSTADIS 453

Tribunal File Number: AD-16-287

BETWEEN:

R. T.

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 23, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated November 12, 2015, 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, 2014. The Applicant filed an application requesting leave to appeal on February 10, 2016, invoking 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. Natural justice

[5] Natural justice is concerned with ensuring that an appellant has a fair and reasonable opportunity to present his or her case, and that the decision rendered is free of any bias or the reasonable apprehension or appearance of bias. It relates to issues of procedural fairness before the General Division.

[6] The Applicant asserts that the General Division breached principles of natural justice but did not explain how she might have been denied natural justice or the opportunity to fairly present her case, or how any bias or prejudice might have arisen. The Applicant has not provided any evidence that the General Division deprived her of an opportunity to fully and fairly present her case. I am not satisfied that the appeal has a reasonable chance of success on this ground.

ii. Errors of law Case authorities

[7] The Applicant submits that the General Division failed to consider and apply the legal authorities which she provided and was relying upon. These include decisions of the Federal Court of Appeal and the Pension Appeals Board. The Applicant submits that the General Division should have considered and applied the following decisions of the Federal Court of Appeal: (1) *Kent v. Canada (Attorney General),*2004 FCA 420 and (2) *Villani v. Canada (Attorney General),* 2001 FCA 248.

[8] I note however that the Supreme Court of Canada has determined that it is unnecessary for a decision-maker to write exhaustive reasons addressing all the issues and jurisprudence before it. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 (CanLII), the Supreme Court of Canada remarked that:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No.*

> *333 v. Nipawin District Staff Nurses Assn.*, 1973 CanLII 191 (SCC), [1975] 1 S.C.R. 382, at p. 391).

[9] The Applicant relied on several decisions for the same issues. For instance, the Applicant cited *Kent, Chandler v. Minister of Human Resources Development* (October 22, 1996), CP04040 (PAB) and *Minister of Human Resources Development v. Bennett* (July 9, 1997), CP04757 (PAB) for the same legal proposition. If the issue is central to a decision, the decision-maker should address the issue, and should also explain why he or she distinguished any leading authorities, if in fact that is what he or she did.

[10] When multiple decisions address the same issue, it becomes unnecessary for the decision-maker to address each decision, particularly if they are lacking in any precedential value. This describes decisions of the Pension Appeals Board, which are not binding on the General Division, although they may be highly persuasive.

[11] The Applicant notes that in *Kent*, the claimant suffered from fibromyalgia, chronic fatigue and depression. The Applicant suggests that the General Division should have considered paragraph 18 of that decision, where Sharlow J.A. wrote:

> [18] … As to whether she had a disability that met the statutory test, the Review Tribunal concluded as follows (at page 7 of the August 22, 2002 decision):
>
> > The Tribunal finds that the medical condition of the Appellant has given rise to a severe disability in the sense that she suffers from a disability such that no reasonable employer, being aware of the Appellant's functional limitations, her inability to be reliable or regularly show up for work, because of the chronic fatigue, fibromyalgia and depression, would offer her regular substantially gainful employment. As well, these conditions have not improved since she originally went off work in October 1994 and are not likely to do so, despite regular treatment.
> >
> > The Tribunal finds that the Appellant's disability is both severe and prolonged as those words are defined in the CPP.

[12] The Federal Court of Appeal wrote that this conclusion reflected the “real world” approach to the severity test for disability.

[13] I have listened to portions of the audio recording, particularly the closing submissions, and do not see that there were any oral submissions made in respect of *Kent*. The written submissions appear at page GD10-20 of the hearing file. In her submissions to the General Division, the Applicant argued that *Kent* provides a useful interpretation of "regularly of pursuing". She argues, in other words, that the General Division should have been bound by the interpretation which the Review Tribunal had articulated, and which the Federal Court of Appeal accepted as reflecting the "real world" approach to the severity test for disability. There is no indication however that the General Division member did not follow this approach or that it did not accept this interpretation. It seems, for the most part, that the Applicant relies on *Kent* for what she regards as the factual similarities between her situation and that of Ms. Kent, i.e. that because she also has limitations and is unable to be reliable or regularly show up for work due to chronic fatigue, fibromyalgia and depression, that she too ought to be found severely disabled. The General Division was not required to undertake a comparative analysis, provided that it conducted an analysis based on the facts before it. In this particular instance, the member undertook his own assessment and came to a determination, based on the facts before him.

[14] The Applicant relied on *Chandler* and *Minister of Human Resources Development v. Bennett* (July 9, 1997), CP04757 (PAB), but the Applicant relied on them for the same issue as in *Kent.* As I have indicated above, it is unnecessary for a decision- maker to address every decision referred to by a claimant.

[15] The Applicant raises the issue of *Villani* as a separate ground of appeal. I will consider the matter separately, below.

[16] The Applicant also relied on *Leduc v. Minister of National Health and Welfare* (January 29, 1988), CP01376 (PAB) and *Barlow v. Minister of Human Resources Development* (September 3, 1999), CP07017 (PAB), noting that the Federal Court of Appeal had cited the decision in *Villani*. As the Federal Court of Appeal considered the same issue which the Pension Appeals Board addressed in *Leduc* and in *Barlow,* it was unnecessary for the General Division to address both decisions.

[17] The Applicant also relied on *Minister of Human Resources Development v. Chase* (November 5, 1998), CP06540 (PAB), for the proposition that the subjective experiences of an applicant is an important consideration for a decision-maker, when assessing the severity of his disability. The General Division did not dismiss the Applicant's evidence in this regard. At paragraph 32, the General Division wrote that "Her testimony and the medical evidence provided makes it clear that she suffers from a variety of conditions that cause pain to her back, shoulders, neck and hips that would be aggravated by physical work".

[18] The Applicant also relied on *Mazza v. Minister of Human Resources Development,* (January 31, 2002), CP17107 (PAB) for the proposition that less demanding jobs at between two and four hours per day cannot be classified as substantially gainful employment. The General Division however did not make any findings, one way or the other, whether certain employment of any duration constituted a substantially gainful occupation. The General Division did not address the issue as to whether less demanding jobs at between two and four hours per day could be classified as substantially gainful.

[19] The Applicant also relied on *Wilding v. Minister of Human Resources Development* (November 28, 2003), CP20505 (PAB), as she found it factually similar to her own circumstances. As I have indicated above, the General Division is not required to refer to all of the authorities before it, particularly where the decision relied upon by the Applicant had no precedential value and was being relied upon for its factual similarities, nor is it required to undertake a comparative analysis, provided that it conducts an analysis based on the facts before it.

[20] I am not satisfied that the appeal has a reasonable chance of success on the ground that the General Division erred when it did not refer to all of the authorities referred to and relied upon by the Applicant.

Villani

[21] The Applicant submits that the General Division member failed to apply *Villani,* by failing to consider the "real world" context around the end of the Applicant's minimum qualifying period.

[22] The General Division indicated at paragraph 31 of its analysis that it was guided by the principles set out in *Villani.* Yet, it is not apparent that the General Division considered and undertook any analysis of the Applicant's personal characteristics in a "real world context". As such, I am satisfied that the appeal has a reasonable chance of success on this ground.

Minimum qualifying period

[23] The Applicant submits that the General Division erred in failing to properly assess whether she had sustained a severe and prolonged disability on or before the end of the actual minimum qualifying period of December 31, 2014 and, instead, focused on whether she had been able to return to her usual employment in or around September 2013.

[24] The Applicant appears to suggest that the General Division did not examine whether she had a severe and prolonged disability and ought not to have focused on her efforts at seeking and obtaining employment, but the member only turned to this issue regarding her efforts at seeking employment, after accepting that she suffers from a variety of conditions that would be aggravated by physical work, and after determining that she exhibited some work capacity.

[25] The General Division identified the test which the Applicant was required to meet, stating at both paragraphs 7 and 30 that the Applicant had to prove that she had a severe and prolonged disability on or before December 31, 2014. The member concluded his analysis by restating the primary issue before it, whether the Applicant was incapable regularly of pursuing any substantially gainful occupation on or before December 31, 2014. Clearly, the General Division was mindful of the primary issue before it and proceeded to conduct its analysis accordingly. The analysis is not restricted to a consideration of the medical evidence alone, as the Applicant suggests. As the Federal Court of Appeal stipulated in *Villani,* at paragraph 50, "Medical evidence will still be needed as will evidence of employment efforts and possibilities".

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

Substantially gainful occupation

[27] The Applicant submits that the General Division erred in concluding that the Applicant was capable of substantially gainful employment without actually completing the appropriate and required inquiry as to whether the Applicant was capable of regularly pursuing substantially gainful employment.

[28] The Applicant submits that the General Division should have relied on the fact that she had been unable to obtain employment that she might be capable of on a regular basis, and on the fact too that she was unable to retrain in order to obtain a substantially gainful employment.

[29] The General Division addressed the issue of whether the Applicant was capable regularly of pursuing any substantially gainful occupation at paragraphs 33 and 34. The General Division explained how it concluded that the Applicant had the requisite capacity. The member relied on the medical opinion of the physiatrist, Dr. Samuel Wong, and on the vocational assessment. Hence, it cannot be said that the General Division did not undertake the "appropriate and required enquiry". Essentially the Applicant suggests that the General Division should have placed greater weight on other considerations, but that calls for a reassessment. As the Federal Court held in *Tracey*, it is not the role of the Appeal Division to reassess the evidence altogether or reweigh the factors considered by the General Division. Rather, its role on an application for leave to appeal is to determine whether the General Division erred in law, made an erroneous finding of fact or failed to observe a principle of natural justice, as set out under subsection 58(1) of the DESDA. Subsection 58(1) of the DEDSA does not contemplate a reassessment.

Weight of evidence

[30] The Applicant argues that the General Division failed to give appropriate weight or even acknowledge the fact that the Respondent had made a predetermined intentional decision not to attend the hearing before the General Division. The Applicant argues that the General Division erred by "presenting submissions … on behalf of the respondent" without acknowledging the fact that the Respondent did not attend the proceedings.

[31] The Applicant further argues that the General Division failed to give proper weight to the abundance of objective, probative and significant medical evidence which confirmed that the Applicant suffered from a severe and prolonged disability which rendered her incapable of regularly pursuing any substantially gainful employment.

[32] The issue of the weight to be ascribed to evidence does not fall within any of the enumerated grounds of appeal under subsection 58(1) of the DESDA. The Federal Court of Appeal has declined to interfere with a decision-maker's assignment of weight to the evidence, holding that weighing evidence is a matter for "the province of the trier of fact": *Simpson v. Canada (Attorney General)*, 2012 FCA 82. Similarly, I would defer to the General Division's assessment of the evidence. As the trier of fact, it is in the best position to assess the evidence before it and to determine the appropriate amount of weight to assign. The Appeal Division does not hear appeals on a *de novo* basis and is not in a position to assess the matter of weight. I am therefore not satisfied that the appeal has a reasonable chance of success. I cannot conclude that the General Division should have placed more weight or given greater consideration to certain medical reports.

[33] Furthermore, I see no relevance in the fact that the Respondent chose not to attend the hearing before the General Division. While it might have been advantageous for the Respondent to attend the proceedings to present its own case and at the same time challenge any evidence given or adduced by the Applicant, the Respondent was under no duty to attend and could instead choose to rely on its written submissions.

[34] The Applicant alleges that the General Division failed to acknowledge that the Respondent did not attend the proceedings. However, the General Division listed the parties in attendance, at the beginning of the decision.

iii. Erroneous findings of fact

Surgery

[35] The Applicant contends 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 for the material before it, at paragraph 18. The member stated that the Applicant had right

shoulder surgery in 2012, when the medical evidence indicates that she had had surgery on July 7, 2014.

[36] At paragraph 14, in the evidence section of the decision, the General Division noted that the Applicant had undergone a right shoulder arthroscopy endoscopic surgery. At paragraph 18, the General Division wrote that the Applicant had testified that she had shoulder surgery in 2012 for a torn labrum, from which she was still recovering at that time.

[37] The records indicate that the Applicant had undergone surgery in 2012, but it was unrelated to her right shoulder. However, paragraph 12 represents the General Division's summary of its understanding of the evidence, as opposed to any actual findings of fact the member might have made. Notwithstanding the fact that there was no documentary evidence to support the member's understanding that the Applicant had undergone right shoulder surgery in 2012, I am not satisfied that the appeal has a reasonable chance of success on this ground, as the General Division did not base its decision on whether the Applicant had had right shoulder surgery in 2012 or in 2014. Indeed, the member made no mention in his analysis that the Applicant had undergone any interventions.

Attempts to seek and obtain employment

[38] The Applicant claims that the General Division based its decision on another erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, in concluding that she had not attempted to seek substantially gainful employment, when there was evidence that she had in fact attempted to seek and obtain employment.

[39] The General Division acknowledged the Applicant's testimony that she had "checked some on line sites on her cell phone for work", but the Applicant indicated none of them were suitable. She was unable to provide the General Division with any details about these prospective positions or explain why they were unsuitable.

[40] Despite the Applicant's extensive submissions before me, she did not indicate where in the hearing file or the audio recording of the proceedings before the General Division there is any evidence of her attempts to seek and obtain employment. There are

several hundreds of pages of records (some of which are duplicative) and approximately two hours of audio recording. At most, the Applicant indicated that she sought employment on the internet on her phone, but I have been unable to readily locate any corroborating evidence of this in the documentary record. In fact, there is no mention or any reference in the medical records that the Applicant sought employment on the internet. Indeed, the records suggest that the Applicant was unprepared to pursue any employment, largely because she felt she would be unable to cope. For instance, Dr. Wong wrote in his consultation report dated November 14, 2013, that he was of the opinion that the modified work provided to her by her employer was "within her means to perform", however she was "extremely reluctant to return to any type of work" (GD12-16).

[41] The employer had offered a modified work schedule with modified duties in September 2013, at GD13-102 to GD13-103 / GD14-100. The employer indicated that modified work had been offered in November 2012, but the Applicant had declined. The employer also indicated that the modified work offer was based on the suggested standard restrictions provided by the Workplace Safety & Insurance Board as well as her physician's medical report. The Applicant responded on October 1, 2013 that she could not accept the modified work offer due to doctors' orders.

[42] The family physician's medical records indicate that on April 9, 2013, the Applicant felt she would be unable to cope at all in the work environment (GD13-25 and GD14-24). There are other examples in the medical records where the Applicant reported that she felt unable to cope in a work environment.

[43] The medical records seem to belie the Applicant's assertions that she had been seeking employment. As the Applicant has not referred me to any of the evidence before the General Division, other than her oral testimony, to support her claims that she had been seeking employment, I am not satisfied that the appeal has a reasonable chance of success on the ground that the General Division based its decision on an erroneous finding of fact that it made without regard for the evidence before it, concerning her efforts to look for work. The General Division was mindful of the Applicant's oral testimony. It was open to

the General Division to reject this evidence, in light of the documentary record and the Applicant's inability to provide any supporting particulars of her online searches.

CONCLUSION

[44] The application for leave to appeal is allowed in respect only of the issue as to whether the General Division failed to apply *Villani* and consider the "real world" context.

[45] 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