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

Citation: *K. P. v. Minister of Employment and Social Development,* 2016 SSTADIS 462

Tribunal File Number: AD-16-877

BETWEEN:

K. P.

Applicant

and

Minister of Employment and Social Development
(formerly 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 28, 2016

REASONS AND DECISION

DECISION

[1] Leave to appeal is granted.

INTRODUCTION

[2] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal dated April 15, 2016. The GD had earlier conducted a hearing by videoconference 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, 2014.

[3] On June 28, 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

[4] 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.

[5] 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.

[6] 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.

[7] 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]

[8] 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

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

SUBMISSIONS

[10] 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, including numerous reports indicating the Applicant was unable to work due to his medical conditions, in deciding that he 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 cannot work because of chronic pain and depression. As a result of these medical conditions, he experiences symptoms of restricted movement, pain,

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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.

numbness and weakness in his right shoulder and arm, stiffness in his neck, disturbed sleeping patterns and an inability to concentrate and persevere.

(c) In addition to his family physician, he has consulted specialists, including a psychiatrist, and they agree that he has a permanent disability and is unlikely to return to any gainful employment. He has taken medication with limited effect and has at all times shown a willingness to follow medical advice.

(d) The GD erred in failing to adequately consider selected medical evidence specifically:

- In a report dated May 27, 2013, a multidisciplinary team from the Mount Sinai Functional Pain Program (FPP) wrote that the Applicant attended the treatments until his progress plateaued. He was discharged following a psychological diagnosis of pain disorder.

- In a report dated January 13, 2016, Dilkhush Panjwani, a psychiatrist, wrote that he had been regularly seeing the Applicant for three years without any improvement in his condition.

(e) 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 54 years old at the time of the hearing and has a grade 12 education and a license to practice as a tool and die maker. His work experience consists exclusively of labour-intensive jobs. In a real world context, his chances of returning to any suitable occupation are poor.

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

ANALYSIS

Totality of Evidence

[11] The Applicant alleges that the GD erred in failing to consider the totality of the evidence before it. Other than two reports, which are discussed below, the Applicant did not specify what aspects of the record he 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.[4] That said, I have 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 arguments.

[12] The GD's decision contains a lengthy and what appears to be 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 meaningfully assessed the evidence and had defensible reasons supporting its conclusion that the Applicant had residual capacity to regularly pursue substantially gainful employment, despite his left index finger and right shoulder injuries. In so doing, the GD noted the Applicant had not shown a reasonable effort to follow appropriate medical advice, nor had he attempted any retraining or alternative work.

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

Severity of Condition

[14] A significant portion of the Applicant's submissions is, in essence, a restatement of evidence and argument that was already presented to the GD. The Applicant suggests that the GD dismissed his appeal despite medical evidence indicating that his overall condition was "severe," according to the CPP criteria, but he 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 the Applicant's claimed medical conditions—principally limitations to his right shoulder and left

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

hand, compounded by depression—and whether they affected his capacity to regularly pursue substantially gainful employment during the MQP.

[15] 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 the Applicant is requesting that I reconsider and reassess the evidence and substitute my decision for the GD's in her 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.

[16] I see no reasonable chance of success on this ground.

Medical Treatment

[17] The Applicant also submits that he has received extensive treatment to limited effect and always followed medical advice. Again, I find this submission amounts to re-argument of evidence that was already before the GD and see no arguable case on this ground.

Psychiatric and Functional Pain Reports

[18] The Applicant submits that the GD disregarded important elements of the report from Mount Sinai FPP, specifically the fact that he was diagnosed with a pain disorder and his treatment was suspended because his progress plateaued.

[19] I see no arguable case on this ground. It is true that the GD drew an adverse inference from the Applicant's purported non-compliance with treatment recommendations, writing in paragraph 72 of its decision:

> Further, the Tribunal determined that the Appellant did not follow medical advice at the Mount Sinai Function and Pain Program and was consequently released from this program. While it is accepted that the Appellant's chronic regional pain condition is ongoing, the Tribunal determined that there were several references in the medical documentation to the Appellant not following medical advice with regards to rehabilitation of his right shoulder. For example, the FPP program report stated that although the staff instructed the Appellant to complete the necessary exercises to strengthen his right arm, the Appellant would refuse and take pain medication. Further, the FPP report stated that functional abilities could not be gauged due to the Appellant's self-limitations and guarding patterns.

[20] Here, it is evident that the GD was well aware of the Applicant's pain disorder, and its finding of non-compliance was reasoned and supported by evidence. The GD's analysis acknowledged that the Applicant's recovery had come to a halt but blamed the lack of progress on his own refusal to undertake medically indicated exercise regimes.

[21] The Applicant also alleges that the GD disregarded the longevity of his treatment by Dr. Panjwani. Again, I see no arguable case here, as the GD wrote in paragraph 73 that it "accepted" that the Applicant had been receiving treatment from the psychiatrist since August 2013, but doubted the severity of his depression for defensible reasons—his medications remained unaltered and the FPP report had found no psychological barriers to his returning to work.

Villani

[22] The Applicant alleges the GD failed to consider the severity of his disabling conditions in a "real world" context, and I see a reasonable chance of success on this ground. While the GD's decision correctly cited the legal test from *Villani*, its subsequent analysis suggests that it may not have taken a hard look at whether this particular individual was employable in the labour market given his mix of medical conditions. Although the GD noted the Applicant's age, education and work history in the sections summarizing the oral and documentary evidence, I saw no consideration in the analysis of how someone with his profile was likely to fare in the competitive labour market.

CONCLUSION

[23] I am allowing leave to appeal on the sole ground that the GD may have erred in law by failing to apply the "real world" test set out in *Villani*.

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

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

Member, Appeal Division