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

Citation: *C. C. v. Minister of Employment and Social Development*, 2016 SSTADIS 490

Tribunal File Number: AD-16-983

BETWEEN:

C. C.

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: December 18, 2016

Canada

REASONS AND DECISION

DECISION

[1] Leave to appeal is refused.

INTRODUCTION

[2] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal dated April 29, 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* as it found that his disability was not "severe" prior to the minimum qualifying period, which ended December 31, 2014.

[3] On July 28, 2016, within the specified time limitation, the Applicant filed an application requesting leave to appeal, advancing numerous grounds of 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 Appeal Division (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(1) of the DESDA sets out that 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] Subsection 58(2) of the DESDA provides that, "Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[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] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted.

ISSUE

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

SUBMISSIONS

[10] The Applicant made the following submissions:

(a) The GD failed to properly consider or give due weight to the following medical reports:

- Letter of Dr. Jaswinder Dhillon dated November 6, 2015;
- Letter of Dr. Jonathan Briskin dated January 8, 2016.

(b) The GD failed to properly consider or give due weight to the following evidence:

- The fact that the Applicant was unlikely to see any improvement in his functional ability, as the treatment goals of his doctors were geared towards the mitigation of his pain;

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

- His testimony about his ongoing sleep difficulties;
- His testimony about his ongoing difficulties as a result of consuming high levels of narcotic medication, including hydromorphone.

(c) The GD criticized the Applicant's work for a temporary placement agency as unsuitable, but failed to recognize that it was a last resort. Despite his best efforts, he was unable to do the menial, entry-level employment offered to him by the agency. The evidence before the GD was that the agency stopped calling the Applicant because he was unable to do the jobs offered to him.

(d) The GD gave undue weight to the fact that the Applicant is attending college, without considering his struggles with the program. The fact that someone is attempting to work or attend school is commendable and should not preclude them from entitlement to disability benefits.[3] The evidence before the GD indicated that the Applicant is now in his fourth year of attempting to complete a two-year program. The Applicant testified that taking even 18 hours of computer programming classes per week left him with significant pain and fatigue. The GD misunderstood or misinterpreted the Applicant's college transcripts, which clearly showed he had failed or withdrawn from several courses. While the GD stated that the Applicant was "well on his way to completing a college program," no reasonable interpretation of the evidence would lead to such a conclusion. To date, he has obtained 54 credits and needs 88 credits to graduate. He is taking summer courses and plans on taking fall courses at Sheridan College. In order to graduate he would need 34 credits in six months. While the Applicant did say it was theoretically possible that he would be able to graduate from his program at the end of 2016, in practical terms this is highly unlikely, if not impossible.

(e) While the GD acknowledged the Applicant was compliant with treatment recommendations, it relied on minor inconsistencies in what he related to his family doctor to impugn his credibility. There was no evidence before the GD that the Applicant lacked motivation to pursue to treatment, therapy, retraining, education, or other forms of employment following his disabling condition.

[3] *W. L. and Minister of Employment and Social Development* 2015 SSDAD 501(April 20, 2015).

(f) The GD erred in law by misinterpreting or failing to apply the principles enunciated in *Villani v. Canada* (A.G.),[4] specifically it failed to properly consider the Applicant's functional ability and employability when determining whether, in a "real world" context, he was employable. The GD failed to appreciate that the Applicant's marketability is diminished by his college transcripts, which will show it took him more than four years to complete a two-year college degree.

ANALYSIS

Failure to Consider Medical Reports

[11] The Applicant alleges that the GD erred in giving inadequate consideration to the reports of Dr. Briskin and Dr. Dhillon, and he included with his submissions a lengthy quotation from the former and a summary of the conclusions from the latter.

[12] Having reviewed the GD's decision against these reports, I am not persuaded that the Applicant has a reasonable chance of success on this ground. The GD summarized the Briskin and Dhillon reports in paragraphs 30 and 43 of the decision, respectively (including many of the details referenced in the application for leave), and drew on them in analyzing the severity of the Applicant's claimed disability. 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.

[13] 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—the predecessor to the AD—ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the application for judicial review, the Federal Court of Appeal held: "…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

[4] *Villani v. Canada* (AG) 2001 FCA 248.
[5] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

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."

[14] The thrust of the Applicant's submissions is that I reconsider and reassess selected documentary evidence and decide in his favour. 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. In the absence of any specific allegation of error, I do not think there is an arguable case that the GD gave insufficient consideration to the medical reports listed by the Applicant.

Failure to Consider Other Evidence

[15] The Applicant suggests that the GD disregarded the fact that his doctors focused on ameliorating pain and were thus unlikely to produce any improvement in his functional ability. First, the Applicant's assumption that reducing pain has little connection to improving function may not bear scrutiny. Second, the GD's summaries of the medical evidence suggest that the Applicant's treatment providers attempted a number of therapeutic strategies, including physiotherapy and cognitive behavioural therapy, as well as pain management via medication. In the end, the GD found that the Applicant retained residual capacity despite his reliance on painkillers, and it was within its jurisdiction as trier of fact to do so.

[16] The Applicant also suggests that the GD gave too little weight to his testimony about his ongoing difficulties with sleeping. Again, the GD has the authority to assign weight to evidence as it sees fit, but I also observe that the decision referred to the Applicant's wakefulness at several junctures, relaying his statements that pain keeps him up at night (paragraph 40) and that medication helped him sleep and concentrate, although it did not alter his pain levels (paragraph 50).

[17] Finally, the Applicant alleges the GD failed to consider his testimony about his ongoing difficulties as a result of consuming high level narcotic medication, including hydromorphone. My review of the decision suggests no arguable case on this ground. The decision indicates that the GD was well aware of the Applicant's use of hydromorphone (also known as Hydromorph- Contin), documenting it in paragraphs 11, 14, 16 and 32. The GD also noted the Applicant's testimony in paragraph 49 that he had taken hydromorphone for

his pain, but stopped because of stomach problems and nausea. In paragraph 56, the GD wrote that the Applicant has "taken opioid painkillers while under the care of Dr. Dhillon, but now uses only Lyrica, and self- medicates with cannabis and alcohol." As it appears the Applicant stopped taking narcotic painkillers, his difficulties with them cannot be said to be "ongoing."

[18] I see no reasonable chance of success on any of the grounds claimed under this heading.

Temporary Placement Agency

[19] The Applicant alleges that the GD criticized his series of temporary jobs placement agency as unsuitable but failed to recognize they were a last resort. Despite his best efforts, he was unable to do the menial, entry level employment offered to him, and the agency stopped calling.

[20] The GD summarized the Applicant's evidence on this matter in paragraph 46 of the decision:

> The Appellant testified that his three most recent jobs were obtained through a "temp" agency. In the summer of 2014, he spent two to three weeks washing dishes at a restaurant, mostly on weekends. Then he worked at a "hatchery" where chickens were raised, sweeping floors for a couple of weeks on and off. In the summer of 2015, he spent two to three weeks packing donuts and sweeping floors at a commercial bakery. In every case, his employment was terminated at the request of the employer because his limitations meant that he was unable to do the work.

[21] In paragraph 63, the GD assessed this evidence in the context of applicable case law:

> The Federal Court of Appeal has held that, where there is evidence of work capacity, a person must show that their efforts at obtaining and maintaining employment have been unsuccessful by reason of their health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117, at para. 3). The Appellant submitted that his failed employment efforts in 2014-2015 demonstrated an incapacity for all work. The Tribunal notes, however, that his various jobs during this period all involved a certain amount of physical activity. While he may be unable to do physical work because of his health condition, this does not mean that he lacks the capacity for all work.

[22] These paragraphs persuade me that the Applicant has no arguable case that he was denied an opportunity to portray his association with the temp agency as a last resort. The

Applicant has not identified how his testimony on the subject was misrepresented, and I note that the GD faithfully relayed in its decision his evidence that his employment was repeatedly terminated because his limitations prevented him from performing his duties. Moreover, having weighed the evidence, the GD was within its right to discount the Applicant's testimony in favour of alternative evidence, which it appears to have done for defensible reasons.

School Attendance

[23] The Applicant alleges that the GD gave inadequate consideration to the fact that he is struggling with his computer programming classes, and it will have taken him more than four years to complete a two-year program. He testified that taking even 18 hours of computer programming classes per week left him with significant pain and fatigue. The Applicant further alleges that the GD misunderstood or misinterpreted his college transcripts, which clearly showed he had failed or withdrawn from several courses. No reasonable interpretation of the evidence could lead to a conclusion that he was "well on his way" to completing college.

[24] My review of the decision suggests that this argument has no reasonable chance of success on appeal. In paragraphs 47 and 48, the GD summarized the Applicant's college transcripts, noting course withdrawals and failures over seven terms from Winter 2013 to Fall 2015. I see no indication that the GD "misunderstood or misinterpreted" these documents, and it appears the GD questioned the Applicant about the reasons for his withdrawals, finding that some of them were prompted by financial, rather than medical, difficulties.

[25] While the GD did not explicitly refer to the planned duration of the program, it did record the Applicant's testimony that he was studying for approximately 18 hours per week and was looking forward to a job after graduation with a managed service company that would require daily eight-hour shifts. It also found that the Applicant had completed 16 courses and 54 points toward completion of his program. On the basis of this evidence, the GD was lead, after two paragraphs (64 and 65) of considered analysis, to conclude he was "on track" to complete his program. In the absence of any substantiated error of fact, I would not interfere with the GD's conclusion that the Appellant's effort to retrain demonstrated work capacity, where that judgment falls within a range of acceptable outcomes.

Compliance with Treatment Recommendations

[26] The Applicant submits that there was no evidence that the Applicant did anything but follow the advice of his doctors and alleges the GD unfairly undermined his credibility by focusing on minor inconsistencies in the histories he gave to his family doctor.

[27] Again, I see no arguable case on this ground. The GD acknowledged that the Applicant complied with all reasonable treatment recommendations and attempted several avenues of therapy. The Applicant did not deny that there were inconsistencies (as noted by the GD at paragraph 66 and 67 of its decision) in Dr. Dhillon's clinical notes but called them "minor" and inconsequential in determining credibility. However, I note that the GD identified discrepancies between what the Applicant was telling his doctor what he was actually doing—an issue of particular relevance in a disability proceeding. Moreover, continuing a theme that has run throughout this decision, the question of how much weight to give an item of evidence, or a logical inference arising from that evidence, is properly a matter for the trier of fact.

Villani

[28] In its decision, the GD summarized the Applicant's history at paragraphs 9 and 11 and in paragraph 68 discussed his realistic employment prospects given his age, level of education, language proficiency and past work and life experience:

> In the present case, the Tribunal notes that the Appellant is still in his forties, is English-speaking, and is well on his way to completing a college program. Moreover, this is not a case where an appellant has done factory work all his life, given that he worked in the area of "office technical support" for a major Canadian company from 2009 to 2011. Although he submitted that he was unlikely to find a job after completing his program, he also testified that he has a job waiting for him upon graduation. There is no credible information before the Tribunal that the Appellant would be unable to perform sedentary work.

[29] Contrary to the submissions in the leave application, I see in this passage a genuine attempt to assess the Applicant's employability while taking his academic struggles into account. 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.

[30] 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 background and personal characteristics. As the Applicant has failed to show that the GD misapplied *Villani*, I see no arguable case on this ground.

CONCLUSION

[31] As the Applicant has not presented an arguable case on any ground, the application for leave to appeal is refused.

Member, Appeal Division