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

Citation: *V. P. v. Minister of Employment and Social Development*, 2017 SSTADIS 71

Tribunal File Number: AD-16-368

BETWEEN:

V. P.

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: Meredith Porter

Date of Decision: February 27, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On November 27, 2015, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable. The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on February 29, 2016.

ISSUE

[2] The member must decide whether 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* (DESD Act), "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal."

[4] Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[5] According to subsection 58(1) of the DESD Act, 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] The Applicant must demonstrate that he has a reasonable chance of success on one of the enumerated grounds in section 58 of the DESD Act. A reasonable chance of success has

been determined to equate to an arguable case (see *Canada (Attorney General) v. O'keefe*, 2016 FC 503.

SUBMISSIONS

[7] The Applicant submitted that the General Division had based its decision on an erroneous finding of fact and specifically:

a) had not properly considered or had not attributed proper weight to certain medical reports regarding the Applicant's health conditions.

[8] The Applicant submitted that the General Division had based its decision on an error of law and specifically:

b) had made findings based on the General Division's opinion, as opposed to objective medical evidence before it (see *Inclima* v. *Canada (Attorney General)*, 2003 FCA 117; and *Warren v. Canada (Attorney General*), 2008 FCA 377);

c) had failed to consider the "real world" approach set out in *Villani v. Canada (Attorney General)*, 2001 FCA 248; and

d) had improperly applied the principles set out in *Inclima, supra* with respect to the requirement that the Applicant demonstrate compliance with treatment recommendations of attending physicians and other health care professionals.

ANALYSIS

Error of Fact

[9] The Applicant suggests that the General Division failed to properly consider or failed to attribute appropriate weight to certain medical reports that the Applicant had filed regarding his health conditions. The Applicant argues that there is "ample evidence", in the medical reports filed in support of the Applicant's application for a disability pension, indicating his condition is "severe and prolonged" according to the criteria governing CPP disability. The Applicant argues that his medical condition was "severe and prolonged" in 2010 when he stopped working. Furthermore, he argues that, despite certain medical evidence in 2011 to 2013 that his condition had improved, until his MQP date, he remained disabled according to criteria governing CPP disability.

[10] The Applicant appears to be asking the Appeal Division to reconsider the evidence and substitute its decision for the General Division's decision. As set out above in paragraph [5], the grounds for which the Appeal Division may grant leave to appeal do not include a reconsideration of evidence that the General Division has already considered. The General Division has discretion to consider evidence before it and, where the General Division finds certain evidence more reliable than other evidence, it must give reasons for preferring that evidence. The General Division's decision in this case appears to do this. Paragraphs 8 to 30 of the decision provide a thorough summary of the Applicant's medical evidence, personal circumstances, and employment and educational history. The General Division proceeds to consider not only the evidence of the medical conditions for which the Applicant has been diagnosed, but also (and correctly) the medical evidence in the reports for how the diagnosed conditions affect the Applicant's day-to-day functioning and impact his capacity for employment (see *Klabouch v. Canada (MSD)*, 2008 FCA 33, and *Petrozza v. MSD* (October 27, 2004), CP 12106 (PAB)). The Appeal Division cannot see how the General Division's approach amounts to an erroneous finding of fact. The Applicant may disagree with the General Division's determination, but disagreement does not constitute an erroneous finding of fact contemplated in paragraph 58(1)(*c*) of the DESD Act.

[11] The Applicant's disagreement with the General Division's finding is not a ground for appeal enumerated in section 58 of the DESD Act. The Appeal Division does not have broad discretion in deciding leave pursuant to the DESD Act. It would be an improper exercise of the delegated authority granted to the Appeal Division to grant leave on grounds not included in section 58 of the DESD Act (see *Canada (Attorney General) v. O'keefe,* 2016 FC 503). As a result, leave cannot be granted on this ground.

Error of Law

[12] The Applicant submits that the General Division erred in law by failing to properly consider objective medical evidence provided in a report dated in 2014 from Dr. Klipitch, in which the Applicant's functional limitations are set out. The Applicant further argues that the General Division ignored the medical evidence and determined that the Applicant's functional limitations were not "significant."

[13] On reading the General Division's decision, I cannot find a point where such a determination is made. The General Division, at paragraph 35 of the decision, refers to Dr. Klipitch's report and notes all of the Applicant's functional limitations that Dr. Klipitch described. I do not see where the General Division has described those limitations as insignificant. The General Division, in determining whether the Applicant meets the "severe" criteria under the CPP, finds that, although the Applicant's functional limitations may preclude him from returning to his past employment, there is insufficient evidence to support a conclusion that his functional limitations preclude him regularly from pursuing any substantially gainful occupation in a different employment field within his functional limitations. It is the Applicant's burden to demonstrate a serious medical condition and provide evidence of efforts to work. Where efforts to work have been made, the Applicant must demonstrate that those efforts have failed because of the serious medical condition (see *Inclima*). Leave cannot be granted on this ground.

[14] The Applicant has submitted that the General Division erred in law by failing to properly apply the *Villani* principles. Specifically, the Applicant argues that the General Division failed to consider evidence that the Applicant was incapable "regularly" of pursuing "substantially" gainful employment. The Applicant bases this argument on a general reference to "information" contained in medical reports but, primarily, the Applicant's argument that the General Division erred in law regarding the application of *Villani* is based on the Applicant's oral evidence that he is incapable regularly of pursuing any substantially gainful occupation.

[15] The real world context set out in *Villani* does not refer to an applicant's subjective assessment of whether they could work in a "real world." The real world context in *Villani* means that certain factors should be kept in mind when determining the severity of a person's disability and their subsequent capacity for employment. These factors include the applicant's age, level of education, language proficiency, and past work and life experience. In this case, the General Division considered the relevant factors. The Applicant was relatively young at his MQP date, being 55 years old. He had completed high school and successfully worked for many years at the same job. There were no issues with his language proficiency. The Applicant argues that he has no additional educational or professional training, but employability is not limited to the Applicant's chosen field of employment (see *Doucette v. Canada (MHRD)*,

[2005] 2 FCR 44, 2004 FCA 292). The test is not whether the Applicant is unable to do his particular job, but any occupation at all (*Klabouch*). It is the Applicant's duty to adduce evidence that his efforts to work at any job have failed because of his health condition (*Inclima*).

[16] The Federal Court of Appeal in *Villani* also stated that, in addition to adducing evidence of a severe and prolonged disability that renders an applicant incapable regularly of pursuing any substantially gainful occupation, "medical evidence will still be needed **as will evidence of employment efforts and possibilities…**" [emphasis added]. The General Division based its decision on the lack of evidence of employment efforts and possibilities, as is required by case law. As a result, leave cannot be granted on this ground.

[17] The Applicant has also argued that the General Division incorrectly determined that he had failed to comply with treatment prescribed by attending physicians and health care professionals without a reasonable explanation for his non-compliance. The Federal Court in *Klabouch* stated that applicants must adduce evidence of their efforts to manage their medical condition.

[18] The General Division identified several circumstances where the Applicant had failed to provide evidence of compliance with treatment recommendations. The Applicant continued to smoke despite the negative impact on his health. Although the Applicant argues that smoking cessation is not a prescribed treatment but rather an addiction, one of his physicians had in fact recommended it, and no efforts to comply with this medical advice were adduced in the Applicant's evidence. The Applicant failed to comply with dietary recommendations. The Applicant argues that his decision not to proceed with recommended pain management injections was reasonable. This is the Applicant's subjective assessment of objective medical evidence and advice. As a result, his argument is unpersuasive.

[19] I see no arguable case for the grounds that the Applicant has claimed.

CONCLUSION

[20] The Application is refused.

Meredith Porter
Member, Appeal Division