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

Citation: *A. D. v. Minister of Employment and Social Development*, 2017 SSTADIS 95

Tribunal File Number: AD-16-1173

BETWEEN:

A. D.

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: March 10, 2017

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal (Tribunal) dated July 14, 2016. The General Division had earlier conducted a hearing by teleconference and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan* (CPP), because it found that his disability was not severe during his minimum qualifying period (MQP), which was due to end on December 31, 2016.

[2] On September 30, 2016, within the specified time limitation, the Applicant submitted to the Appeal Division an application requesting leave to appeal. For this application to succeed, I must be satisfied that 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* (DESDA), an appeal to the Appeal Division may be brought only if leave to appeal is granted, and the Appeal Division must either grant or refuse leave to appeal.

[4] 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.

[5] 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 made in a perverse or capricious manner or without regard for the material before it.

[6] Some arguable ground upon which the proposed appeal may 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]

[7] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for an 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

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

SUBMISSIONS

[9] In a schedule accompanying the application requesting leave to appeal, the Applicant's representative made the following submissions:

(a) The General Division did not consider the medical evidence in its totality:

> With regard to demonstrating capacity under section (25) and (15) of the decision the Appellant "stated that he did not need any help doing any of his daily activities and often able to do some of the more physical chores, like cutting of the grass, with the help of his daughter." Activities of daily living are not always a good measure of work capacity as dressing and bathing can easily be self-paced and the Appellant is able to take frequent breaks as needed.

The Applicant further submits that cutting grass is not demonstrative of capacity for substantially gainful employment, this task might occur only twice a month and take on average one hour, depending on the size of lawn. In a real-world

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

context, an employer, such as a lawn-maintenance company, would not allow for such flexibility and accommodation.

(b) In his report of January 28, 2014, Dr. William Aspy wrote that surgery to reverse the Applicant's colostomy was not planned, although he allowed that it was possible before the end of the year. In the same report, Dr. Aspy wrote that the long-term prognosis was good, but the Applicant submits that this statement was overly optimistic. As documented in paragraphs 12 and 22 of the General Division's decision, the reversal surgery was later deemed not to be a viable option, and Dr. Aspy updated and revised his prognosis in his June 8, 2016 report to state that the Applicant would be "unable to return to his employment as a custodian, and is also unable to work at other similar jobs…"

(c) In paragraph 23 of its decision, the General Division noted that Dr. David Robertson, general surgeon, had been supportive of the Applicant "retraining for non-labour jobs." However, the Applicant maintains that he was never given an option to retrain; neither his employer nor insurance company offered it, although he would have consented, had he been offered it. Dr. Robertson's report (GD3-5), dated November 15, 2013, came after the Applicant's first surgery of June 12, 2013, and before the realization that any future colonic resection surgery would not be possible. Therefore, this opinion was outdated and worthy of little weight.

(d) The General Division erred by failing to consider how the Applicant's personal characteristics, such as his education and employment experience, combined with his incapacity to carry on daily activities, prevent him from pursuing light or sedentary employment. The Applicant has no computer skills and has experience only in physically oriented mechanical or custodial positions. His transferable skills are limited. It is interesting to note that the General Division, in paragraph 20 of its decision, called the Applicant's age (65 as of the hearing date) a "barrier," which might limit this ability to find alternative work, yet it did not explain how any other physical work suited to his transferable skills would be possible.

[10] In a letter dated October 12, 2016, the Applicant's representative enclosed Dr. Robertson's handwritten response to the questionnaire sent to his attention earlier in the month.

ANALYSIS

Activities of Daily Living

[11] The Applicant takes issue with paragraph 25 of the decision, in which the General Division wrote:

> [25] The Tribunal is also influenced by the Appellant's testimony whereby the Appellant stated that he did not need any help doing any of his daily activities and often able to do some of the more physical chores, like cutting of the grass, with the help of his daughter.

[12] I note that the Applicant is not claiming that the General Division misrepresented his testimony on this point, only that it gave it more weight than he would have preferred or failed to place it in the context he deemed appropriate. It is a well-established principle of administrative law[3] that a review tribunal charged with finding fact is entitled to sort through the relevant evidence and determine what it chooses to accept or disregard, before deciding on its weight and ultimately coming to a decision based on a reasonable analysis. It was open to the Applicant to qualify evidence of his functionality at the hearing and, if he failed to do so, he cannot now introduce new evidence or argument before the Appeal Division. It would have been one thing had the General Division based its decision solely on whether the Applicant could mow his lawn, but that was only one of several factors that went into it reasoning. Hence, I can see no arguable case that the General Division erred in its assessment of the Applicant's testimony on the subject of his activities of daily living.

Colostomy Reversal Surgery

[13] The heart of the Applicant's submissions is his claim that the General Division failed to adequately take into account the fact that his colostomy was irreversible. It is true that Dr. Aspy offered a distinctly optimistic prognosis in his January 2014 report, and it was clear from the same report that surgery to reverse the colostomy was under consideration at the time, even if a

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

firm date for the procedure had not yet been scheduled. It is equally true that the General Division based, at least in part, its decision to deny the Applicant benefits on Dr. Aspy's first report:

> [26] In reviewing the medical evidence presented the Tribunal is influence by the medical report from the Appellant's family physician which indicated that the Appellant's prognosis was good (long term) and that he was stable. Given this prognosis and the evidence that the surgery was successful the Tribunal is unable to find that the Appellant could not be employed is [*sic*] some substantially gainful occupation.

[14] There is no question that the General Division was at some level aware of that a medical re-evaluation later ruled out the reversal surgery:

> [22] The Appellant was admitted to hospital for an ischemic bowel. The medical evidence indicates that the Appellant had bowel resection surgery and due to this surgery was required to use a colostomy. The Appellant's surgeon indicated that after a time the Appellant would have the colostomy removed however it was discovered some time after the surgery that removal of the colostomy would be dangerous due to the potential for a life ending blood clot.

[15] However, I agree with the Applicant that there is an argument the General Division may not have fully appreciated the implications of this change in circumstances. On the face of it, it is puzzling that the General Division chose to highlight Dr. Aspy's "good" prognosis knowing that one of the factors underlying it was no longer operative. It also seems anomalous that the General Division's analysis relied on Dr. Aspy's January 2014 report but did not attempt to reconcile it with his second report, from June 2016 (written after it had become clear that the colostomy was permanent), ruling out continued employment. In sum, I see a reasonable chance of success on this ground if the Applicant can show that the General Division in effect disregarded a material fact in a "perverse or capricious manner or without regard for the material."

Dr. Robertson's Report

[16] As it had done with Dr. Aspy's first report, the General Division relied on Dr. Robertson's November 2013 report, even though there is an arguable case it was rendered obsolete by subsequent events. In paragraph 23 of its decision, the General Division noted that Dr. Robertson had found the Applicant fit for retraining, but it did not mention that the same

report (prepared pursuant to a claim for private long-term disability benefits) specifically contemplated a future colonic rescission—something that ultimately never happened. The General Division appeared to draw an adverse inference from the fact that the Applicant had never retrained or attempted alternative employment; however, I think there is an arguable case that the General Division did not adequately consider whether the Applicant was realistically capable of these options—even assuming they were offered to him—given the permanence of his colostomy.

Applicant Profile

[17] Although the Applicant's representative did not cite precedent, one of his allegations is to the effect that the General Division erred in law by misapplying the provisions set out in *Villani v. Canada*,[4] which require the severity of a claimant's disability to be assessed in a real-world context that takes into account his or her employability in the labour market. This requirement means that when deciding whether a claimant's disability is severe under paragraph 42(2)(*a*) of the CPP, the decision-maker must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.

[18] Having reviewed the decision against the record, I see an arguable case here. Although the General Division's decision correctly cited *Villani*, its analysis of the Applicant's background and its impact on his employability left some questions unanswered. For example, in paragraph 20, the General Division acknowledged that the Applicant had worked only in jobs (as a mason and janitor) requiring physical labour since his arrival from Italy more than 40 years ago, yet it also found that he had transferable skills that would assist him in finding employment, even with his physical limitations. As well, the General Division noted that, at 65, the Applicant was "nearing the completion of his work career" and acknowledged that his age "would be a barrier to many employers," yet it nonetheless found he was capable of substantially gainful work.

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

New Document

[19] The Applicant's request for leave was accompanied by a medical report that was prepared after the hearing before the General Division and the issuance of its decision. An appeal to the Appeal Division is not ordinarily an occasion on which additional evidence can be considered, given the constraints of subsection 58(1) of the DESDA, which do not give the Appeal Division any authority to make a decision based on the merits of the case. Once a hearing is concluded, there is a very limited basis upon which any new or additional information can be raised. An applicant could consider making an application to the General Division to rescind or amend its decision. However, an applicant would need to comply with the requirements set out in section 66 of the DESDA, as well as sections 45 and 46 of the *Social Security Tribunal Regulations*. Not only are there strict deadlines and requirements that must be met to succeed in an application to rescind or amend, but an applicant would also need to demonstrate that any new facts are material and that they could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

CONCLUSION

[20] I am granting leave to appeal on the grounds that the General Division may have: (i) based its decision on an erroneous finding of fact by failing to adequately take into account the irreversibility of the Applicant's colostomy; (ii) based its decision on an erroneous finding of fact by inadequately considering whether the Applicant was capable of retraining or pursuing alternative employment; and (iii) erred in fact and law by misapplying the principles from *Villani.*

[21] I invite the parties to provide submissions on whether a further hearing is required and, if so, what form of hearing is appropriate (i.e. whether it should be done by teleconference, videoconference, other means of telecommunication, in-person, or by written questions and answers).

[22] The parties are also free to make submissions on what remedies, if any, they believe are appropriate in this case.

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

Member, Appeal Division