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

Citation: *C. G. v. Minister of Employment and Social Development*, 2017 SSTADIS 146

Tribunal File Number: AD-16-411

BETWEEN:

C. G.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Meredith Porter

Date of Decision: April 5, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On January 19, 2016, 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 March 9, 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 "[l]eave 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.

SUBMISSIONS

[6] The Applicant submitted that:

i. The General Division erred in law by failing to apply the decision of the Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur* [2003] 2 S.C.R. 504, 2003 SCC 54 (CanLII), which determined that chronic pain patients are suffering and in distress, and that the "disability they experience is real". The General Division failed to consider the medical evidence supporting the Applicant's diagnosis of chronic pain syndrome in determining a disability;

ii. The General Division erred in law; when it cited *Villani v. Canada (Attorney General)* [2002] 1 FCR 130, 2001 FCA 248 (CanLII), it failed to provide an in-depth analysis of the real-world factors and failed to demonstrate that the hypothetical occupations that it had considered were not divorced from the

Applicant's particular circumstances pursuant to *Garrett v. Canada (Minister of Human Resources Development)*, 2005 FCA 84 (CanLII);

iii. The General Division erred in law by failing to apply *Bungay v. Canada (Attorney General)*, 2011 FCA 47 (CanLII), which requires that the *Villani* factors be considered in the context of both the Applicant's "background" and in the context of the Applicant's "medical condition". The General Division failed to consider the totality of the Applicant's medical condition on his ability to obtain gainful employment; and

iv. The General Division made an erroneous finding of fact in a perverse or capricious manner by failing to consider post–minimum-qualifying-period (MQP) medical reports that indicate that, although at the time of the Applicant's MQP date the prognosis had been that the medical condition(s) would improve, the medical conditions did not improve and the Applicant remains unemployable.

ANALYSIS

Application of *Nova Scotia v. Martin; Nova Scotia v. Laseur*

[7] The Applicant asserts that the General Division failed to properly consider the medical evidence contained in the record before the General Division with respect to the Applicant's health condition and, particularly, that chronic pain syndrome has been considered a disability by the Supreme Court in *Nova Scotia v. Martin; Nova Scotia v. Laseur*. Furthermore, the General Division ought to have considered the impact of the Applicant's disabling, chronic pain on his ability to work in a real-world situation.

[8] The Appeal Division notes that *Nova Scotia v. Martin; Nova Scotia v. Laseur* pertains to the entitlement to workers' compensation benefits as opposed to disability pension entitlement under the CPP. Workers' compensation entitlement is determined pursuant to a different statutory scheme and adjudicative framework than disability pension under the CPP. Although the court in *Nova Scotia v. Martin; Nova Scotia v. Laseur* referred to chronic pain syndrome as a "disability" that is real, the adjudicative framework for determining disability under the CPP is not based simply on the diagnosis of a health condition itself (see *Klabouch v. Canada (Social Development)*, 2008 FCA 33 (CanLII)). Otherwise, for example, all sufferers of chronic pain would be entitled to disability pension payments once a diagnosis was made.

[9] The test for determining disability under the CPP has been articulated by the Federal Court of Appeal in *Villani v. Canada (Attorney General)*, [2002] 1 FCR 130, 2001 FCA 248 (CanLII):

> [50] This restatement of the approach to the definition of disability does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation". Medical evidence will still be needed as will evidence of employment efforts and possibilities.

[10] The Federal Court of Appeal in *Villani* also clarified, at paragraph 42, that "[t]he test for severity is not that a disability be 'total'. Furthermore, at paragraph 44:

> […] The proper test for severity is one that treats each word in the definition as contributing something to the statutory requirement. Those words, read together, suggest that the severity test involves as aspect of employability.

[11] The Federal Court of Appeal further articulated the *Villani* principles in *Inclima v. Canada (Attorney General)*, 2003 FCA 117 (CanLII), stating that, where there is evidence of work capacity, applicants seeking to demonstrate that they suffer from a severe disability under the CPP must adduce evidence of a serious health problem and must also show that efforts to obtain and maintain employment have failed because of that health problem. It is not an applicant's inability to do his or her particular job that matters, but any 'gainful employment' at all (*Klabouch v. Canada (Social Development)*, 2008 FCA 33 (CanLII)).

[12] On reading the General Division's decision, at paragraph 39 to 41, I see that the General Division considers both the medical evidence and the Applicant's evidence in the context of the legal test for determining disability under the CPP. The General Division preferred the evidence of Dr. Ballyk, and it provides reasons for doing so. Dr. Ballyk found that, at the time leading up to the Applicant's MQP date, the Applicant's electromyogram and nerve conduction studies had shown no nerve damage, and his pain had been anticipated to subside. The General Division preferred this evidence to the opinions of other health professionals as it had been based on neurological testing, MRI and ultrasound studies. The General Division is allowed to prefer certain evidence, but it must provide reasons for doing so (subsection 54(2) of the DESD Act).

[13] In addition to considering medical evidence, the General Division addressed the issue of work capacity and employability. The General Division notes that, while the Applicant may have been unable to return to his chosen occupation as a house framer as a result of his health condition, the medical evidence which articulates the Applicant's physical state reflects some work capacity. The Applicant confirmed that he had also considered alternative work, but he decided that his arm movement and neck movement were too restricted to engage in any occupation. The General Division correctly determined (based on the medical evidence detailing his physical condition) that a disability pension was not payable because, despite the existence of a health condition there was no evidence that efforts had been made to obtain employment within the Applicant's limitations.

[14] This ground of appeal does not have a reasonable chance of success, and leave cannot be granted on this ground.

Application of *Garrett v. Canada (MHRD)*

[15] The Applicant submits that the General Division cited the "real world" factors as set out in *Villani*, but failed to apply them in a real-world context with respect to the Applicant's health circumstances and employability. The Applicant relies on *Garrett* in which the Federal Court of Appeal determined that, in addition to the Applicant's primary health condition, the *Villani* factors should be considered in a "real world" context regarding the reality of an applicant's employability and that any hypothetical occupations that a decision-maker considers cannot be divorced from the reality of the applicant's health condition and any aggravating factors:

> [3] In the present case, the majority failed to cite the *Villani* decision or conduct their analysis in accordance with its principles. This is an error of law. In particular, the majority failed to mention evidence that the applicant's mobility problems were aggravated by fatigue and that she would have to alternate sitting and standing; factors which could effectively make her performance of a sedentary office or related job problematic. This is the 'real world' context of the analysis required by *Villani*.

[16] At paragraphs 35 to 40 of the General Division's decision, the Applicant's physical impairments are both set out and analysed in the context of the *Villani* factors. Leave was not granted on this issue. However, the General Division specifically notes, in paragraph 35, that "[the Applicant] experiences migraine headaches associated with the shoulder and neck pain. Taking pain medication causes cognitive impairment." The Applicant submits that the General Division, in finding evidence of work capacity based only on the Applicant's physical impairments resulting from his health condition, committed an error of law in failing to consider any impact that the described cognitive impairment and fatigue has on the Applicant's real-world employability (*Garrett*).

[17] If proven on its merit, this is a ground of appeal that has a reasonable chance of success. Leave is granted on this ground.

[18] The Applicant has cited other grounds, which may be inter-related to the ground on which I am prepared to grant leave to appeal. As leave to appeal has been granted, it is unnecessary for me to address each ground.

CONCLUSION

[19] The Application is granted. The parties are invited to provide additional submissions within the prescribed 45-day timeframe.

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

Meredith Porter
Member, Appeal Division