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

Citation: *M. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 168

Tribunal File Number: AD-16-1167

BETWEEN:

M. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: April 19, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal dated September 14, 2016. The General Division had earlier conducted a hearing by teleconference and determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP), because her disability was not "severe" prior to the minimum qualifying period (MQP), which ended on December 31, 2012.

[2] On October 31, 2016, within the specified time limitation, the Applicant's representative submitted to the Appeal Division 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

[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 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]

[7] 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

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

SUBMISSIONS

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

(a) The General Division based its decision on an erroneous finding of fact that it made in a perverse, capricious manner without regard for the material before it. There was overwhelming medical documentation to support a finding of severe and prolonged disability at the time of the MQP.

(b) Neither the Respondent nor the General Division could point to a single medical doctor who stated that the Applicant could work. None of the available medical evidence suggested that she was capable of undergoing retraining for an alternative position.

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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.

(c) The General Division did not appropriately weigh the medical evidence. As was held in *Moore v. MHRD*,[3] proof of an alleged disability beyond a reasonable doubt is not required. All that is required is a balance of probabilities. Given the overwhelming medical evidence of the Applicant's incapacity, it appears that the General Division held her to a higher evidentiary standard and therefore erred in law.

(d) The General Division erred in law by disregarding the principles of *Villani v. Canada*[4] and *Luduc v. MNHW*,[5] which require a "real world" consideration of a disability claimant's personal characteristics, including age, education, language skills, work record and life experience. In this case, the Applicant has worked almost her entire life as a cashier and has few office or computer skills that could be used in a non-labour intensive environment. She has physical restrictions that prevent her from offering reliable performance and is dependent on pain medications that affect her cognitive functioning. As such, she would be a poor candidate for a sedentary position.

(e) The General Division erred in law by disregarding *Martin v. Nova Scotia* and related cases,[6] which have recognized chronic pain as a genuine and compensable condition whose existence and severity may not be supported by objective findings. As such, the main evidence that must be relied on is subjective evidence or the claimant's verbal description of her pain.

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[3] *Moore v. Minister of Human Resources Development* (September 10, 2001).
[4] *Villani v. Canada (Attorney General)*, 2001 FCA 248.
[5] *Leduc v. Minister of National Health and Welfare* (January 29, 1988), CP 1376 (PAB).
[6] *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504; *Hunter v. Minister of Social Development* (February 6, 2007) CP 23431 (PAB); *G.B. v. Minister of Human Resources and Social Development* (May 27, 2010) CP 26475 (PAB).

ANALYSIS

Severe and Prolonged

[10] For the most part, the Applicant's submissions on these grounds amount to a recapitulation of evidence and arguments that, from what I was able to determine, were already presented to the General Division. In essence, the Applicant argues that the General Division gave inadequate consideration to evidence that she felt proved she was suffering from a severe and prolonged disability as of the hearing date.

[11] An administrative tribunal is presumed to have considered all the evidence before it, and in this case, the General Division made its decision after conducting what appears to be a thorough survey of the evidentiary record. While the Applicant may not agree with the General Division'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 chooses to accept or disregard, and decide on its weight.

[12] 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*,[7] the appellant's counsel identified a number of medical reports, which she said that the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the application for judicial review, the Federal Court of Appeal held:

> First, a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence. Second, 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 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…

[13] The thrust of the Applicant's submissions is that I reconsider and reassess the evidence and decide in her 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 factual error, I do not think there is an arguable case that the

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

General Division gave insufficient consideration to evidence that the Applicant's disability was severe and prolonged.

Burden of Proof

[14] The Applicant's representative alleges that the General Division could not point to a single medical doctor who stated that the Applicant was capable of alternative work or retraining. However, I will note that none of the Applicant's treatment providers said she was *incapable* of these things either and, in any case, the case law is clear that the onus rests with persons seeking to obtain a benefit under the CPP to establish that their disability comes within the statutory definition of severe and prolonged.[8] It is not the job of the Respondent or the General Division to prove that the Applicant is not entitled to the CPP disability benefit; the burden rests with the Applicant to prove that she *is* entitled to it.

[15] The Applicant has not persuaded me that she has a reasonable chance of success on this ground.

Standard of Proof

[16] The Applicant alleges that the General Division did not appropriately weigh the medical evidence and in effect applied a higher standard of proof than the requisite balance of probabilities.

[17] I do not see a reasonable chance of success on this ground. In *F.H. v. McDougall*,[9] the Supreme Court of Canada determined that the failure of a trial judge to apply the correct standard of proof in assessing evidence constituted an error of law. Such a failure might be manifested in an express misstatement of the standard of proof, in which case it would be presumed that the incorrect standard was applied. Alternatively, where the trial judge expressly stated the correct standard of proof, or was silent on the matter, it would be presumed that the correct standard was applied.

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[8] *Kent v. Canada (Attorney General)*, 2004 FCA 420 (CanLII).
[9] *F.H. v. McDougall*, [2008] 3 SCR 41, 2008 SCC 53 (CanLII).

[18] The same principle applies to an administrative tribunal. I note that the General Division referred to the correct standard at least three times in its decision: In paragraph 7, it stated: “In this case, the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before the date of the MQP.” In paragraph 28, and again in paragraph 36, it declared that it was assessing the severity of the Applicant’s disability on a “balance of probabilities.”

[19] This, of course, does not necessarily mean that the General Division, in fact, applied the correct standard, but it does create a presumption that it did. The Applicant suggests that this presumption is rebutted given the “overwhelming” evidence that her disability was severe and prolonged, but this submission is no more than a variant of arguments previously presented to the General Division. As mentioned, the Appeal Division’s mandate is to adjudicate specific errors committed by the General Division, not to relitigate the evidence. In this case, it is clear that the General Division was cognizant of the correct standard, actively analyzing the evidence, weighing the Appellant’s submissions against the Respondent’s and considering both the strengths and weaknesses of their respective cases. I saw no indication that the General Division rejected the Applicant’s claim on the basis of “reasonable” doubt, but rather applied the correct standard by finding a preponderance of doubt.

Failure to Apply *Villani*

[20] The Applicant alleges the General Division erred in law by failing to consider the severity of her disabling conditions in a “real world” context in accordance with *Villani*.

[21] In its decision, the General Division noted the Applicant’s background and personal characteristics at paragraphs 8 and 9 and correctly summarized the test at paragraph 30. It acknowledged her age and limited transferrable skills but nevertheless found that she was likely capable of retraining for a more sedentary job than the ones she had previously held, even with her pain symptoms.

[22] The Applicant’s submissions on this ground are essentially a request to reassess the evidence as it pertains to the Applicant’s personal characteristics. I note 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.

[23] I see no reason to overturn the assessment undertaken by the General Division, where it has noted the correct legal test and taken the Applicant's personal circumstances into account. As it has done so here, I find no arguable case on this ground.

Failure to Apply *Martin*

[24] The Applicant is correct in noting that chronic pain (and by extension, its variant fibromyalgia) has been recognized by the courts as a real condition, even if it is often unsupported by objective findings. However, if the Applicant is suggesting that *Martin* demands the reflexive acceptance of her subjective evidence of disability, I must disagree. *Martin* is a case involving equality rights, in which the Supreme Court of Canada ruled that chronic pain is a medical condition that can be genuinely disabling and, as such, found that its blanket exclusion from the Nova Scotia workers' compensation scheme infringed subsection 15(1) of the *Canadian Charter of Rights and Freedoms*. Even so, *Martin* contains no specifics on the question of *how* evidence of chronic pain is to be evaluated in assessing disability and, in particular, is silent on the question of the extent, if any, to which subjective evidence must be buttressed by objective evidence.

[25] In my view, it is not enough to simply disclose a diagnosis of chronic pain; a claimant for CPP disability must also furnish evidence—whether in the form of objective medical reports or subjective testimony—that their condition causes functional limitations that prevent them from working.[10] This approach is not inconsistent with *Martin*, which recognizes that a key issue for administrators of compensation schemes is determining when chronic pain crosses the threshold to permanent impairment.

[26] I am not bound by cases of the now-defunct Pension Appeals Board (PAB), the predecessor of the Appeal Division, and, in any event, I know of no precedent that endorses the

[10] *Minister of National Health and Welfare v. Densmore* (June 2, 1993), CP 2389 (PAB).

exclusive reliance on subjective evidence. Even *G.B. v. MHRSD*, a PAB case that the Applicant's representative highlighted in his submissions, allowed that a claimant's verbal description of his or her pain could be the "main" evidence, but it did not rule out reliance on other forms of evidence, if also available.

[27] In this case, I see no indication that the General Division disregarded the Applicant's diagnosis of fibromyalgia or complaints of chronic pain, but it did—correctly in my view—consider them together with the medical evidence, as well as the Applicant's own testimony about what she could, and could not, do. In emphasizing evidence, whether objective or subjective, that spoke to the Applicant's functionality and her efforts to cope with her symptoms, the General Division acknowledged the existence of her chronic pain while carrying out its duty to investigate how it affected her capacity to work. I see no arguable case that this constituted an error of law.

CONCLUSION

[28] The Applicant has not identified grounds under subsection 58(1) that would have a reasonable chance of success on appeal. Thus, the application for leave to appeal is refused.

Member, Appeal Division