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

Citation: *K. H. v. Minister of Employment and Social Development*, 2017 SSTADIS 158

Tribunal File Number: AD-16-785

BETWEEN:

K. H.

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 12, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On April 29, 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 to the Applicant. The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on June 3, 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 the General Division had failed to consider, or properly consider, several medical reports filed by the Applicant.

[7] Further, the Applicant submitted that the General Division had failed to properly apply the test for determining a severe and prolonged disability as set out in *Villani v. Canada (Attorney General)*, 2001 FCA 248.

ANALYSIS

[8] The Applicant, in the application requesting leave to appeal, references statements made by several attending medical practitioners between 2008 and 2014. All of the reports referred to were included in the materials before the General Division for consideration. It is not necessary for the General Division to reference all the evidence before it when providing its reasons (see *Simpson v. Canada (Attorney General)*, 2012 FCA 82). The Appeal Division notes that, in fact, the General Division referred to the reports it considered to be relevant and persuasive in the decision.

[9] The Applicant submitted that the General Division had failed to consider, or properly consider, the medical evidence before it. The argument appears to be that the General Division failed to assign proper weight to the medical evidence filed in support of the application for a disability pension under the CPP.

[10] The Applicant appears to be asking the Appeal Division to reconsider the evidence and substitute its decision for the decision of the General Division. 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 already considered by the General Division. The Appeal Division does not have broad discretion in deciding leave to appeal pursuant to the DESD Act. It would be an improper exercise of the delegated authority granted to the Appeal Division to grant leave to appeal on grounds not included in section 58 of the DESD Act (see *Canada (Attorney General) v. O'keefe,* 2016 FC 503).

[11] In addition to the lack of statutory authority for the Appeal Division to reassess evidence that was before the General Division, the Federal Court has indicated that requesting the Appeal Division to rehear matters that were already decided by the General Division is not a ground of appeal under the DESD Act. In *Marcia v. Canada (Attorney General)*, 2016 FC 1367, the Court stated:

> [37] […] The submissions before the Appeal Division did not point to any error that the General Division made under s. 58(2) which would make their decision to not grant leave unreasonable.
>
> [38] The following was the conclusion of the Appeal Division:
>
> > It is not sufficient for an Applicant to plead that the General Division member was mistaken in his or her conclusions and ask the Appeal Division for a different outcome. In order to have a reasonable chance of success, the Applicant must explain in some detail how in their view at least one reviewable error set out in the *Act* has been made. Having failed to do so, even after having been prompted to do so by the Tribunal, I find that this application for leave to appeal does not have a reasonable chance of success and must be refused.

[12] As a result, leave to appeal cannot be granted on this ground.

[13] The Applicant has argued that at least one physician reported that she "is not gainfully employable at this time". The Applicant argues that this medical opinion should be persuasive in determining a severe disability under the CPP. Although objective medical evidence is required for determining a disability under the CPP (*Villani*), certain medical evidence in the form of a physician's opinion that an applicant is not gainfully employable is not, on its own, sufficient evidence on which to determine disability under the CPP.

[14] The Applicant has also submitted that the oral evidence provided at the hearing supports a finding that no employer would hire the Applicant because of her health condition.

[15] The Appeal Division does not find that either of these arguments carries much weight. The test for a severe and prolonged disability under the CPP, as set out by the Federal Court of Appeal in *Villani*, is as follows:

> 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."

[16] The Federal Court of Appeal further articulated the *Villani* principles in *Inclima*, stating that 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 the applicant's inability to do his or her particular job that matters, but rather any "gainful employment" at all. (*Klabouch v. Canada (Social Development)*, 2008 FCA 33)

[17] On reading the decision of the General Division, it appears that the above legal framework was applied. The General Division recognized that the Applicant was 40 years old at the time she had applied for a CPP disability pension. She had completed grade 12 and was, at one time, certified as a dental assistant. She had held her job at Sears for 12 years and had received some accommodations from that employer as a result of her health condition. A lack of language proficiency did not exist. She is married, with two daughters.

[18] The General Division further considered the efforts made by the Applicant to find employment within her limitations, but there was no evidence that any efforts had been made. There did not appear to be any efforts to retrain either. In fact, the Applicant states that no employer would hire her, but there is no evidence to support this statement.

[19] As a result, no error on the part of the General Division appears to have been made with respect to the application of the law to the particular evidence in this case. Leave to appeal cannot be granted on this ground either.

CONCLUSION

[20] The Application is refused.

Meredith Porter
Member, Appeal Division