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

Citation: *G. H. v. Minister of Employment and Social Development*, 2017 SSTADIS 177

Tribunal File Number: AD-16-462

BETWEEN:

G. H.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: April 25, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] This is an application for leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated January 5, 2016, which determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that his disability was not "severe" by the end of his minimum qualifying period on December 31, 2012.

ISSUE

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

ANALYSIS

[3] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to 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.

[4] Before granting leave, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[5] The Applicant submits that the General Division erred in law and based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it. In particular, the Applicant alleges that the General Division erred as follows:

- in finding that his treatment remained conservative;
- in concluding that his injuries could not be severe because of the amount and strength of pain medication he consumes;
- in relying on the opinions of medical practitioners who had been retained by parties with interests adverse to his own, and who saw the Applicant only once, rather than relying on the medical opinions of the Applicant's own treating health caregivers. The Applicant suggests that the General Division failed to provide any explanation why certain expert opinions were preferred over others;
- in failing to recognize how his physical limitations impact his capacity and focusing instead on his "transferable skills and management experience";
- in finding that he even has "management experience" and skills when there is no evidence to support such a finding, and thereby suggesting that he could pursue management work of a sedentary nature;
- in finding that his ability to "manage or care for five large dogs, a fish pond and work on his hobby farm" reflected that he could be reliable, when he claims that he is unreliable due to the unpredictability of his pain levels. He also claims that he requires assistance from others, and that he undertakes these activities at his own pace; and
- in failing to apply a "real world" analysis pursuant to *Villani v. Canada (Attorney General)*, 2001 FCA 248.

Conservative treatment

[6] The Applicant submits that the General Division erred in finding that his treatment remained conservative. In fact, this statement represents the Respondent's submissions, set out at paragraph 41. In any event, the Applicant does not suggest that he had pursued more active forms of treatment, other than to say that he discontinued physiotherapy, massage therapy and chiropractic treatment, as he found them ineffectual. As the statement regarding the Applicant's treatment does not represent a finding made by the General Division upon which it based its decision, I am not satisfied that the appeal has a reasonable chance of success on this ground.

Use of medication

[7] The Applicant argues that the General Division erred in finding that his disability cannot be severe, in part, because of the amount and strength of pain medication he consumes. The Applicant argues that the amount and strength of pain medication was an irrelevant consideration to the issue of the severity of his disability. He suggests that even if he had taken stronger doses of pain relief medication, his injuries would be no less debilitating, although he did not provide any evidence to support this allegation.

[8] At paragraph 45, the member noted that the Applicant's only pain medication has been Tylenol #3 and Advil. She also noted that no one has prescribed stronger pain medication. At paragraph 55, the member also noted that, despite increasing pain, the Applicant "only intermittently takes pain killers. He has not required stronger medication and the dosage of his medication has not changed."

[9] Treatment options for an individual with pain can include pain relief medication. Physicians typically prescribe or recommend pain relief medication to alleviate some of the pain and symptoms that a patient might experience. Often, health caregivers either prescribe or recommend trials of higher dosages and different types of pain relief medications, with the expectation or hope that they might relieve some of the pain or symptomology. The medical records suggest that the Applicant's health caregivers did not recommend that he undergo a trial of stronger or other pain relief medication, other than Flexeril in April 2010

(GD6-62 / 155), and from this, the General Division member concluded that his physicians considered that stronger or other pain relief medication was unnecessary. The Applicant has not referred me to any authorities to suggest that this is a perverse conclusion.

[10] Had the Applicant's health caregivers recommended a certain medication and he had a reasonable explanation not to take it, that would have been another issue altogether, but generally the dosage and frequency of any medications taken can be used as a measure of the severity and duration of an applicant's pain levels, though it should not be the only basis upon which to determine the severity of an applicant's disability. In this regard, the General Division examined the Applicant's overall treatment regimen, the medical opinions and the Applicant's oral testimony. Given that the member considered several factors in assessing the Applicant's disability, I am not satisfied that the appeal has a reasonable chance of success on this particular ground.

Expert opinions

[11] The Applicant suggests that a decision-maker should not rely on, or should assign little weight to, the medical opinions of experts who have been retained by parties adverse in interest to a claimant. I see no basis to routinely dismiss the opinions of such experts, given the materiality of this evidence, unless there is some evidence of actual bias, which is not alleged here. In any event, as the Federal Court of Appeal has held, the assignment of weight is a matter for the "province of the trier of fact": *Simpson v. Canada (Attorney General)*, 2012 FCA 82. Similarly, I would defer to the General Division's assessment of the evidence. As the trier of fact, it is in the best position to assess the evidence before it and to determine the appropriate amount of weight to assign. The Appeal Division does not hear appeals on a *de novo* basis and is not in a position to assess the matter of weight. I am unable to conclude that the General Division should have placed more weight on, or given greater consideration to, the medical opinions of others.

[12] If the Applicant wanted to challenge the admissibility of some of the medical opinions, properly he should have done so before the General Division. This issue should not be raised for the first time before the Appeal Division.

[13] I note that, in some jurisdictions, including Ontario, experts owe duties to provide opinion evidence that is fair, objective and non-partisan, and these duties prevail over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged. It is clear that some of the medical opinions were prepared in the course of litigation. I cannot envision that experts provided opinions without regard to these duties to be fair, objective and impartial, even if their opinions are prepared outside the litigation context.

[14] The General Division noted that there was conflicting evidence regarding the Applicant's capacity for employment. The member outlined these opinions at paragraphs 47 and 48. On the one hand, there were several experts who were of the opinion that the Applicant retained some capacity, whereas, on the other hand, other experts, including his family physician, were of the opinion that he lacked the capacity to undertake any form of competitive employment. The Applicant argues that the General Division member failed to explain why she preferred some opinions over others. In fact, the General Division member explained why, for instance, she preferred the opinions of some experts over the family physician's opinion. At paragraph 50, for instance, she noted that the family physician was of the opinion that the Applicant's regular pain flare-ups were a barrier to consistent employment and a return to any type of employment. However, she found this contrary to the findings of other experts. She preferred their opinions as they "have experience in assessing suitability of individuals for vocational abilities." The General Division also looked to some of the activities in which the Applicant was engaged and assessed whether they were consistent with some of the limitations identified by some of the experts.

[15] I am not satisfied that the appeal has a reasonable chance of success on this ground.

Management experience and physical limitations

[16] The Applicant submits that the General Division erred in focusing on his skills and experience, rather than on how his physical limitations impact his capacity. The Applicant further submits that the General Division erred in finding that he even has management experience, and denies that there was any evidence to support such a finding.

[17] The General Division member defined the Applicant's management experience at paragraph 59, as working as a lead for several employers. At paragraph 52, the General Division member acknowledged that the Applicant's employment history has been predominantly in labour-related jobs, but noted that "in each reported job, he was promoted to supervisory positions (as a lead hand) and performed management and supervisory duties which included management of other employees and equipment." The member specifically referred to functional abilities evaluations, and in particular, the employment evaluation dated July 2013, prepared by Judith McNichol and Joanne Gram.

[18] The employability evaluation report (GD6-77 to 109) describes the Applicant's employment experience. At page 12 of the report, the evaluators noted that from 1983 to 1994, the Applicant worked for Canadian Canners (part of Nabisco brands) as a labourer and lead hand, where

> he was responsible for supervising 60 other employees in the plant, including seasonal workers. Primarily, this work involved walking around the plant throughout the day to supervise workers on the line, on machines, and in shipping and receiving areas ... [He] was further responsible for a degree of problem solving and decision making (i.e. if equipment malfunctioned) in this role, as well as planning related to break taking and station assignment etcetera … [He] was further responsible for completing some paperwork (i.e. performance evaluations, accident reports etc.), requiring intact concentration and communication skills.

[19] At pages 13 and 14 of the employability evaluation report, the evaluators noted that the Applicant held some supervisory duties when he was employed as a labourer and process operator by Hostess Frito-Lay from 1998 to 2001. The evaluators noted that, "in terms of supervisory duties, [the Applicant] monitored machine gauges and computers to verify specified processing conditions and made adjustments as indicated."

[20] At page 14 of the employability evaluation report, the evaluators noted that the Applicant had been employed by Kerry Canada Inc. as a labourer and process operator from 2001 to 2008. The evaluator noted that, as a lead packer, the Applicant was responsible for directing the work of the packers in the department.

[21] In the same report, the evaluators referred to a transferable skills analysis report that had been undertaken in May 2012 by Coleen O'Brien, a vocational consultant, at the request of his insurer. In filtering occupations, she was to consider that he had "2+ years' experience as a Supervisor in a food processing plant."

[22] In his medical-legal report dated September 26, 2011, Dr. R. Teasell, physiatrist, recorded that the Applicant reported that he had worked at Nabisco for five years, where he went from being a labourer to a supervisor (GD6-202).

[23] Given that the General Division member defined "management experience" and limited it largely to serving as a lead hand, there was certainly an evidentiary foundation upon which she could draw findings that the Applicant had some management or supervisory experience.

[24] The Applicant argues that the member focused on his transferable skills and management experience, virtually to the exclusion of his limitations, in assessing his capacity. The member discussed the Applicant's skills and management experience in paragraph 52, but also discussed the medical reports, some of which reviewed the Applicant's limitations. The member acknowledged that the Applicant has physical limitations and difficulties, and it was only after considering them and appreciating that they affect his capacity that she determined whether his skills and experience left him with any capacity to regularly pursue any substantially gainful occupation. It should be noted, however, that the member was somewhat skeptical that the Applicant was as severely physically limited as he claimed, as she found some of his activities, such as driving for upwards of 90 minutes at a time, contradictory. Overall, the member was prepared to find that the Applicant has difficulties with labour-related work due to his physical limitations and difficulties with "repetitive tasks and lifting overhead and restrictions which include difficulties with bending, twisting, lifting or sitting/standing for prolonged and just general problem with endurance." She found that, despite these physical limitations, he was still capable of performing non-physically demanding jobs.

[25] I am not satisfied that the appeal has a reasonable chance of success on the ground that the member erred in finding that he has some management experience.

Activities

[26] The Applicant argues that the General Division erred in suggesting that he would be a reliable employee, on the basis that he is able to "manage or care for five large dogs, a fish pond and work on his hobby farm." He claims that he is unreliable due to the unpredictability of his pain levels. He also claims that he requires assistance from others, and that he undertakes these activities at his own pace.

[27] The General Division wrote, "It has been stated that the [Applicant] would not be successful in consistently managing any type of work and that he would be an unreliable employee."

[28] The Federal Court of Appeal has held that a decision-maker must consider the medical evidence, as well as an applicant's activities, as these "cast light on his capacity": *McDonald v. Canada (Attorney General)*, 2013 FCA 37.

[29] Apart from noting the Applicant's activities, the member also noted two other significant considerations: (1) vocational options that had been identified for him and (2) Dr. Bentley's 2013 medical opinion that the Applicant's pain symptoms and physical restrictions would not preclude the Applicant from engaging in reasonably suited employment. It is clear that the member concluded that the Applicant would be able to consistently manage work and, at the same time, be reliable, otherwise the vocational options would not have been identified and Dr. Bentley would not have arrived at such an opinion. On this basis, I am not satisfied that the appeal has a reasonable chance of success.

Villani

[30] The Applicant argues that the General Division failed to apply a "real world" analysis. He argues that the member failed to

> […] apprehend the practical and real world effects of [his] injuries and limitations upon his ability to obtain and engage in gainful employment. [The Applicant] does not live in an "abstract and theoretical world", in which employers readily hire 50 year old former labourers who may or may not be physically capable of coming to work on any given day, due to their physical and psychological disabilities. Although the Tribunal's

> misapprehension was rooted in erroneous findings of fact, they amount an error in law, by failing to consider [the Applicant's] real world ability to pursue, secure and keep a form of gainful employment, as noted in the decision of the Ontario [*sic*] Court of Appeal in *Villani v. Canada.*

[31] In *Villani*, the Federal Court of Appeal set out guiding principles as to how disability under the *Canada Pension Plan* should be defined, and how to conduct a disability assessment. The Federal Court of Appeal indicated that the particular circumstances of an applicant, such as his age, education level, language proficiency and past work and life experience must also be considered in assessing the severity of an applicant's disability.

[32] *Villani* requires that a decision-maker adopt a "real world" approach, i.e. that he take into account an applicant's particular circumstances, such as his age, education level, language proficiency and past work and life experience, when assessing whether an applicant is incapable regularly of pursuing any substantially gainful occupation. The Federal Court of Appeal also stated that the assessment of an applicant's circumstances is a question of judgment with which one should be reluctant to interfere.

[33] At paragraphs 43 and 46, the General Division acknowledged that the severe criterion must be assessed in a "real world" context, and that when deciding whether a person's disability is severe, one had to consider an applicant's personal circumstances such as those enumerated by the Federal Court of Appeal. At paragraph 61, the member indicated that she had indeed taken the *Villani* factors into consideration in her severity assessment. I note, for instance, that throughout much of her analysis, the member noted the Applicant's past work experience, training and skillset and, to a lesser extent, his education. At paragraph 59, the member also considered the Applicant's proficiency in the English language, and the fact that he is computer literate. She considered these personal factors relevant to the question of the Applicant's capacity, particularly from a vocational perspective. Given this, I am not satisfied that the General Division failed to conduct a "real world" analysis, and, as the Federal Court of Appeal cautioned against, I see no reason to interference with the member's *Villani* assessment.

CONCLUSION

[34] The application for leave to appeal is refused.

Janet Lew
Member, Appeal Division