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

Citation: *B. V. v. Minister of Employment and Social Development,* 2017 SSTADIS 183

Tribunal File Number: AD-16-398

BETWEEN:

**B. V.**

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 26, 2017

Canada

## REASONS AND DECISION

### INTRODUCTION

[1] On December 3, 2015, 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 8, 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.

[6] A reasonable chance of success has been equated to an arguable case—*Canada (Attorney General) v. O'keefe*, 2016 FC 503 and *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

**SUBMISSIONS**

[7] The Applicant referred to paragraph 72 of the General Division decision where it is stated that "there were no chronic pain assessments in the file [...]." The Applicant submitted that this statement was incorrect as there were two chronic pain assessments contained in the file, one dated March 30, 2011, and one dated September 4, 2015.

[8] The Applicant further submitted that the General Division made an error of fact when it failed to acknowledge the evidence that the Applicant suffered from a severe and prolonged disability as stated in an independent orthopedic assessor's report dated September 4, 2015, which corroborated the Applicant's subjective evidence.

**ANALYSIS**

[9] The Applicant submitted copies of chronic pain assessments completed by Dr. Rivlin of the Elite Specialist Group, dated March 30, 2011, and September 4, 2015, as attachments to the application for leave to appeal. In a letter dated February 9, 2017, the Applicant confirms that these reports were not included in the evidence before the General Division.

[10] Subsection 58(1) of the DESD Act sets out the grounds of appeal to the Appeal Division and the submission of new evidence is not a ground on which leave to appeal can be granted (see *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100). As a result, the Appeal Division cannot consider the two new reports in its decision on whether to grant leave.

[11] Subsection 59(1) sets out the powers of the Appeal Division:

> The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

[12] For cases related to the CPP, paragraph 66 (1)(*b*) sets out when the Tribunal may rescind or amend a decision. The Tribunal may rescind or amend a General Division decision

in respect of any particular application if "a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence."

[13] If the Applicant wants to present the chronic pain assessments, which pre-date the General Division hearing, to rescind or amend the General Division decision, the Applicant must comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations*. This means that she must file an application to rescind or amend the decision with the General Division because according to subsection 66(4), only the division that made the decision is empowered to rescind or amend its decision based on new facts. In addition to filing an application, section 66 of the DESD Act requires the Applicant to demonstrate that the new fact is material and that it could not have been discovered at the time of the hearing with the exercise of reasonable diligence. In these circumstances, the Appeal Division does not have jurisdiction to rescind or amend a decision based on new facts.

[14] The Applicant has also submitted that the General Division failed to properly consider Dr. Getahun's report dated July 2015, which was completed at the request of the Applicant's legal representatives 3 ½ years post-minimum qualifying period (MQP). Dr. Getahun's report stated that, from an orthopedic perspective, the Applicant suffered from a severe and prolonged physical disability that limited her ability to walk for 30 minutes and to sit for 30 minutes at a time. The report further determined that the Applicant would not be able to return to her pre-accident employment or any other employment due to her training, education and experience.

[15] The General Division did not simply rely on the Dr. Getahun's statement that the Applicant "suffered from a severe and prolonged physical disability from an orthopedic perspective" when determining whether the Applicant was disabled pursuant to the criteria for disability under the CPP. Nor would that be appropriate. The Federal Court of Appeal set out in *Villani v. Canada (Attorney General)*, 2001 FCA 248 the criteria for assessing the severity of a disability under the CPP. The real world context set out in *Villani* states:

> [50] [T]he 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] It is the Applicant's capacity to work that determines the severity and not the medical condition (*Klabouch v. Canada (Social Development)*, 2008 FCA 33), and where there is evidence of work capacity, the Applicant must demonstrate efforts to obtain employment. Where those efforts have failed, the failure must be attributable to the medical condition (*Inclima v. Canada (Attorney General)*, 2003 FCA 117).

[17] In paragraphs 8 to 59, the General Division thoroughly summarizes the medical evidence provided by the Applicant. Over the nearly 13 pages of evidence reviewed by the General Division, there is no objective medical evidence before or at the time of the Applicant's MQP date that would indicate that the Applicant was regularly incapable of pursuing all types of employment. The General Division considers that, at the time of her MQP, the Applicant was 43 years old, she had completed high school, and her language proficiency was good. She did not suffer any serious mental health issues or concerns that would prevent her from further education or retraining. The General Division did not find Dr. Getahun's report persuasive, as it lacked any diagnosis for the Applicant's altered gait and, although Dr. Getahun had suggested the Applicant employ the use of a walker to assist her mobility, the Applicant had never followed this advice. It is incumbent on applicants seeking CPP disability benefits to adduce evidence of efforts to manage their health conditions, including following the advice of medical professionals (*Klabouch*).

[18] The Applicant does not agree with the General Division's findings and is 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 on which the Appeal Division may grant leave to appeal do not include a reconsideration of evidence already considered by the General Division. The General Division has discretion to consider the evidence before it and where the General Division finds certain evidence more reliable than other evidence, it must give reasons for preferring that evidence. In this case, the General Division has done this. The General Division has demonstrated that it considered not only the evidence of the medical conditions with which the Applicant has been diagnosed, but also correctly considered the medical evidence in the reports of how the diagnosed conditions affect the Applicant's day-to-

day functioning and her capacity for employment (*Klabouch*). The Appeal Division cannot see how this amounts to an erroneous finding of fact. The Applicant may not agree with the General Division's determination, but this does not constitute an erroneous finding of fact as contemplated in paragraph 58(1)(*c*) of the DESD Act.

[19] The Applicant's disagreement with the General Division's finding is not a ground for appeal enumerated in subsection 58(1) of the DESD Act. The Appeal Division does not have broad discretion in deciding leave pursuant to the DESD Act. It would be an improper exercise of the delegated authority granted to the Appeal Division to grant leave on grounds not included in subsection 58(1) of the DESD Act (see *O'keefe*). As a result, leave cannot be granted on this ground.

[20] The Applicant has not put forward a ground for appeal that would have a reasonable chance of success.

## CONCLUSION

[21] The Application for leave to appeal is refused.

Meredith Porter
Member, Appeal Division