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

Citation: *S. N. v. Minister of Employment and Social Development*, 2017 SSTADIS 184

Tribunal File Number: AD-16-1267

BETWEEN:

S. N.

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 26, 2017

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal (Tribunal) dated August 11, 2016. The General Division had earlier conducted a hearing by teleconference and determined that the Applicant was not eligible for the disability benefit under the *Canada Pension Plan* (CPP), because his disability was not "severe" prior to the minimum qualifying period (MQP), which ended on December 31, 2015.

[2] On November 3, 2016, the Applicant's representative submitted an application requesting leave to appeal to the Appeal Division. 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 an 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 AND ANALYSIS

[9] The Applicant's submissions contain a detailed overview of his CPP disability claim, as well as some of the evidence supporting it. His submissions also cite several instances in which the General Division allegedly erred in fact and law. I have summarized and addressed these allegations below.

Capacity to Retrain for Alternative Work

[10] The Applicant submits that the General Division erred in stating that alternative work was available to him, while ignoring the fact that he cannot afford to be retrained and does not have the education that would allow him to become employed in a sedentary position.

[11] I see no reasonable chance of success on this ground. In its decision, the General Division acknowledged that it was unrealistic to expect that the Applicant could still manage kitchen work, but found that he had made little attempt to find suitable employment within his limitations. The Applicant has pleaded that he had neither the financial means nor the

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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.

educational foundation to retrain for a more sedentary job, but I see no indication that the General Division disregarded these submissions. First, it should be kept in mind that an administrative tribunal is presumed to have considered all of the evidence before it and need not address each and every one of the parties' submissions.[3] Second, the CPP disability regime is entirely concerned with an applicant's functional and vocational capacity; there is nothing in the provisions of section 42 that obliges the General Division to consider the Applicant's financial circumstances in assessing either his entitlement to the benefit or his capacity to retrain.

[12] Whether the General Division adequately assessed the impact of the Applicant's education on his vocational prospects is a question better saved for my larger discussion on *Villani*, below. Otherwise, I see no arguable case under this heading.

Efforts to Continue Working

[13] The Applicant alleges that that the General Division erred in finding that he did not make any reasonable attempt to return to work, although the written and oral evidence at the hearing contradicted that conclusion. In fact, he has done everything possible to resume employment. The General Division failed to acknowledge that the Applicant sought employment by sending out his resume and speaking with friends about potential employment opportunities. He attempted to work for one or two weeks in 2015, but his boss, who was also a friend, was unable to accommodate his inability to work more than two to three hours per day. Such short shifts cannot be said to constitute "regular" or "gainful" employment, and any arms-length employer would be reluctant to hire someone with the Applicant's diminished capacity. Since the hearing, the Applicant has started working for a friend, although he is not sure if it is sustainable. Despite the Applicant's demonstrated attempts to carry on working, the General Division wrote that the Applicant had "simply chosen to adopt a disabled lifestyle"—a characterization for which there is no support.

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

[14] I see no reasonable chance of success on these grounds. In its decision, the General Division cited the leading case on mitigation, *Inclima v. Canada*,[4] adding:

> The Appellant has made little attempt to find suitable employment within his limitations. Although he testified that he had approached friends about employment in the restaurant/catering industry, it was unrealistic for him to believe that he would be able to do such work, particularly because of his inability to stand for more than 10 minutes at a time. Even more importantly, the Appellant made no attempt to return to school or attempt any re-training for an occupation that would be more suitable to his limitations.

[15] This passage indicates that the General Division was well aware of the evidence of the Applicant's efforts to seek alternative employment but found it wanting. The General Division did not deny that the Applicant had made attempts to find work but faulted him for focusing his efforts on the kinds of jobs he had been doing previously. If, as claimed, the Applicant suffered from conditions that limited his capacity to do physical work, then the General Division expected that he would have at least investigated whether there were sedentary jobs available better suited to his limitations. Given the legal framework underpinning the CPP disability regime, I do not see how this expectation was unreasonable.

[16] As for the Applicant's allegation that the General Division unjustifiably accused him of having adopted a "disabled lifestyle," I also fail to see an arguable case. Paragraph 49 makes it clear that the General Division did not specifically target the Applicant with the offending phrase, which comes, instead, from a decision of the now-defunct Pension Appeals Board. The General Division referred to *F.E. v. MHRD*[5] to reinforce the well-established principle that a CPP disability claimant must make a reasonable effort to return to suitable work, lest he or she be suspected of malingering.

Ongoing Treatment

[17] The Applicant alleges that the General Division incorrectly dismissed his claim for disability benefits because he failed to establish that he was undergoing treatment at the time of the hearing. In doing so, the General Division disregarded the Applicant's testimony, in which he explained that he could not afford to attend treatment, since he was not receiving any income.

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[4] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.
[5] *F.E. v. Minister of Human Resources and Skills Development* (June 17, 2011) CP 26480 (PAB).

[18] Case law has imposed a duty on CPP disability claimants to take all reasonable steps to pursue treatment. I agree that lack of resources may be one reason why a claimant has not followed doctors' orders, particularly if the recommended service is not covered by public health insurance. I note that the General Division mentioned (in paragraphs 12 and 13 of its decision) the Applicant's testimony that he could not afford physiotherapy or mental health counselling, but it nevertheless drew an adverse inference from his lack of treatment without addressing his stated rationale for that lack of treatment.

[19] This is a case in which the Applicant suffered injuries, not at work, nor in an automobile accident, but on private property, for which there was no recourse for compensation other than to sue the homeowner—a lengthy and highly adversarial process with little certainty of success. As a consequence, it appears there was no readily accessible source of funds (such as workers' compensation or statutory accident benefits) from which the Applicant might have drawn to pay for therapy that was not covered by the Ontario Health Insurance Plan. I think the Applicant has an arguable case that the General Division had a duty of fairness to take these background factors into account in its analysis proper.

Application of *Villani* Real World Factors

[20] The Applicant alleges that the General Division erred in law by failing to appropriately apply the facts of his situation to the test set out in *Villani v. Canada.*[6] The Applicant concedes that the General Division correctly cited *Villani*, noting that the test for severity must be assessed in a "real world context," in which consideration must be given to factors such as age, level of education, language proficiency, and past work and life experience. In this case, the Applicant's only post-secondary education is his training as a sous-chef, his past work experience solely involves physical labour and he has no computer proficiency. Despite this background, the General Division wrote that "none of the above factors" were relevant. The General Division did not give appropriate weight, if any, to the fact that it will be incredibly difficult for the Applicant, at his age, to be retrained and find a new job in a field in which he has no experience— particularly one that does not involve a physical component.

[6] *Villani v. Attorney General of Canada*, 2001 FCA 248.

[21] I see a reasonable chance on this ground. While the General Division summarized the *Villani* principles in paragraph 39 of its decision, I see little indication that it made a wholehearted attempt to apply them to the Applicant's particular circumstances. The General Division determined that the Applicant's age, level of education, language proficiency, and past work and life experience were irrelevant, but *Villani* dictates that they are always relevant—although it is a question of degree. In this case, the Applicant possesses personal characteristics that might conceivably act as barriers to his continued employment—he is now middle-aged with limited post-secondary education and work experience involving mainly manual skills. It seems to me these factors are worthy of discussion, not a one-sentence dismissal.

Consideration of Severe and Prolonged Criteria

[22] The Applicant suggests that the General Division dismissed his appeal despite medical evidence indicating that his condition was "severe and prolonged" according to the criteria governing CPP disability. In doing so, the General Division ignored medical evidence relevant to the severity criterion, while failing to make a finding on whether the Applicant's disability was prolonged.

[23] I see no arguable case on this broadly stated ground, which does not specify how, in coming to its decision, the General Division failed to observe a principle of natural justice, committed an error in law or made an erroneous finding of fact. In effect, this submission recapitulates evidence and arguments that, from what I can gather, were already presented to the General Division. Unfortunately, the Appeal Division has no mandate to re-hear disability claims on their merits. While applicants are not required to prove the grounds of appeal at the leave stage, they must set out some rational basis for their submissions that fall into the grounds of appeal enumerated in subsection 58(1) of the DESDA. It is not sufficient for an applicant to merely state their disagreement with the General Division's decision, nor is it enough to express their continued conviction that their health conditions render them disabled within the meaning of the CPP.

[24] As for the Applicant's allegation that the General Division failed to consider the "prolonged" criterion, paragraph 51 explicitly explained why it did not. Having found that the Applicant's disability was not "severe" according to the statutory definition, the General

Division concluded that it was unnecessary. Paragraph 42(2)(*a*) of the CPP defines disability as a physical or mental disability that is "severe *and* prolonged" [my emphasis]. To qualify for CPP disability benefits, it is not enough to have an impairment that is either severe or prolonged; it must be both. Logic demands that if the General Division found that the Applicant's disability fell short of severe, then his claim must fail, regardless of how long-lived or indefinite his condition might be.

CONCLUSION

[25] I am granting leave to appeal on the grounds that the General Division may have (i) breached a principle of natural justice by finding that the Applicant had failed to undergo treatments without considering the evidence that he could not afford them and (ii) erred in law by failing to apply the test set out in *Villani* and disregarding the Applicant's personal characteristics.

[26] I invite the parties to provide submissions on whether a further hearing is required and, if so, what type of hearing is appropriate.

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

Member, Appeal Division