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

Citation: *L. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 249

Tribunal File Number: AD-16-614

BETWEEN:

L. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Nancy Brooks

Date of Decision: May 30, 2017

REASONS AND DECISION

[1] This is an application for leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal), issued on March 1, 2016, which determined that the Applicant was not entitled to a disability pension under the *Canada Pension Plan* (CPP).

[2] Pursuant to s. 58(1) of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal from a decision of the General Division: first, a breach of natural justice; second, an error in law; and third, an erroneous finding of fact made in a perverse and capricious manner or without regard to the material before it. The use of the word "only" in s. 58(1) means that no other grounds of appeal may be considered: *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100, at para. 72.

[3] An appeal to the Appeal Division may be brought only if leave to appeal is granted: DESDA, s. 56(1). The requirement to obtain leave to appeal to the Appeal Division serves the objective of eliminating appeals that have no reasonable chance of success: *Bossé v. Canada (Attorney General)*, 2015 FC 1142, at para. 34, and leave will be granted only where the Applicant demonstrates that the appeal has a reasonable chance of success on one or more of the grounds identified in s. 58(1) of the DESDA: *Belo-Alves*, at paras. 70–73. In this context, having a reasonable chance of success means "having some arguable ground upon which the proposed appeal might succeed": *Osaj v. Canada (Attorney General)*, 2016 FC 115, at para. 12.

[4] Under s. 58(2) of the DESDA, "Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." Accordingly, the issue before me on this application is whether the Applicant's appeal has a reasonable chance of success.

BACKGROUND

[5] The Applicant applied for a CPP disability pension on October 11, 2011. The Respondent denied the application initially and on reconsideration. The Applicant then appealed to the General Division.

[6] The General Division found, as agreed to by the parties, that the minimum qualifying period (MQP) date is December 31, 2014. In its decision issued on March 1, 2016, the General

Division dismissed the Applicant's claim for disability benefits under s. 42 of the CPP because it was not satisfied, on a balance of probabilities, that the Applicant suffered from a severe disability on or before the MQP. Given the finding that the Applicant's disability was not severe, the General Division did not go on to determine whether her disability was prolonged.

SUBMISSIONS

[7] The Respondent made no submissions on the application for leave to appeal.

[8] The Applicant asserts breaches by the General Division in relation to all three grounds listed under s. 58(1). She alleges (AD1B-3, para. 9) that the General Division erred in:

> (a) finding the Applicant does not suffer from a severe disability such that she is incapable of regularly pursuing [*sic*] any substantially gainful occupation;
>
> (b) failing to apply a "real world" approach when assessing the evidence before it;
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> (c) failing to consider the medical evidence which exists to support the Applicant's disability as falling within the definition in s. 42(2) of the CPP;
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> (d) failing to consider the totality of subjective and objective evidence presented before it, contrary to the decisions in *S. T. Minister of Employment and Social Development*, 2015 SSTAD 65, and *Bungay v. Canada (Attorney General)*, 2011 FCA 47;
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> (e) failing to consider the *viva voce* testimony of the Applicant who presented credibly and well with respect to the effects of her disability as falling with (*sic*) the definition in s. 42(2) of the CPP; and
>
> (f) determining that the Applicant has not attempted to return to work due to the availability of work in her remote area and finding that it is socio-economic conditions that are preventing the Applicant from working.

[9] Although characterized as factors underpinning an error of law, allegations (c) through (e) are all concerned with the findings of fact made by the General Division, allegedly without regard to the material before it, therefore falling within the ambit of s. 58(1)(*c*) of the DESDA. The allegations in (c) through (e) taken together are that the General Division member failed to consider the totality of the evidence, both documentary and testimonial, before him.

[10] With regard to (f), I note that the General Division made no finding that availability of work and socio-economic conditions are preventing the Applicant from working; therefore I read this submission as an allegation of an error of law based on the fact that the General Division did not take these factors into account when it determined that the Applicant had not attempted to return to work.

[11] The Applicant also submits (AD1B-6) that the principles of natural justice were violated because the General Division member "does not have sufficient medical experience to draw [the] conclusion" that her cervical spine condition does not cause severely restricted sitting tolerances. The Applicant also submits that the General Division member was biased (AD1B-7, para. 23).

ANALYSIS

[12] Paragraph 42(2)(*a*) of the CPP defines a disability as "severe" when it affects the claimant's capacity to work: the claimant must be "incapable regularly of pursuing any substantially gainful occupation."

[13] The leading case on the interpretation of "severe" is *Villani v. Canada (Attorney General)*, 2001 FCA 248. In *Villani*, the Federal Court of Appeal held that, in assessing whether a disability is severe, the Board must adopt a "real world" approach. Such a "real world" approach requires it to determine whether an applicant, in the circumstances of his or her background and medical condition, is employable, i.e. capable regularly of pursuing any substantially gainful occupation. The Court held that matters such as "age, education level, language proficiency and past work and life experience" are relevant to the claimant's background (*Villani*, at para. 38).

[14] In *Bungay*, para. 8, the Federal Court of Appeal noted that the assessment of a claimant's medical condition is a:

> […] broad inquiry, requiring that the claimant's condition be assessed in its totality. All of the possible impairments of the claimant that affect employability are to be considered, not just the biggest impairments or the main impairment. The approach of assessing the claimant's condition in its totality is consistent with section 68(1) of the [*Canada Pension Plan*] *Regulations*, which requires claimants to submit highly particular information

> concerning "any physical or mental disability," not just what the claimant might believe is the dominant impairment.

[15] In *Inclima v. Canada (Attorney General)*, 2003 FCA 117, the Federal Court of Appeal stated that to establish that a disability is severe, a claimant must show not only that he or she has a serious health problem, but also, where there is evidence of work capacity, that efforts to obtain and maintain employment have been unsuccessful by reason of that health condition.

[16] Although the Applicant does not expressly refer to *Villani* in her submissions, she submits that the General Division member failed to apply a real world approach when assessing the evidence (AD1B-3, para. 9(b)). The member correctly summarized the *Villani* principles at para. 27 of his reasons. In paras. 29 and 38, he considered the *Villani* "background" factors and made clear findings with respect to the Applicant's age (40 years old when she applied for a CPP disability pension), her employment history and most recent efforts to work, her education, language capability and cognitive capacity, noting that, although her lower level of formal education presents as a barrier to retrain or become re-employed, she understands English and does not allege diminished cognitive capacity to retrain or become re-employed in a lighter or more sedentary job suitable to her limitations (reasons, para. 38). In my view, the member was alive to the *Villani* factors in his analysis of whether the Applicant's disability was severe as of the MQP date, and I see no reasonable chance of success on the basis that the General Division did not properly apply *Villani*.

[17] The Applicant disagrees with the General Division member's conclusion that her disability was not severe and takes issue with his reliance on Dr. Goplen's report dated November 20, 2012. She submits that the member "ignored" Dr. Goplen's July 7, 2014, report in which, she claims, "[Dr. Goplen] changed his opinion."

[18] The Applicant is correct that the General Division does not refer to Dr. Goplen's July 2014 report. In his July 2014 report (GD12-2), Dr. Goplen stated:

> She again has a giving way weakness of all muscle groups of her upper extremities, which often does not impress me. […] MRI shows a moderate disc herniation at C6-7 accounting for a right C7 pain. […] Despite a few things, I do think she has a painful right C7 radiculopathy. I discussed the option of anterior cervical disceotomy and fusion C6-7 with plating. We discussed risks and

> benefits including risks of paralysis and damage to trachea esophagus or carotid. She will be thinking this over and if she would like surgery booked she will contact my office for a booking.

[19] I believe the Applicant overstates the situation when she says that Dr. Goplen changed his opinion in July 2014 report. That is not my reading of the two reports. In the July 2014 report, Dr. Goplen has retained a degree of caution in his assessment of the Applicant, whose "giving way weakness of all muscle groups of her upper extremities […] often does not impress me." This echoes the cautious comments in his earlier November 2012 report where he stated:

> Motor exam was very unusual. Despite having normal gait and taking her jacket off and on without difficulty, the myotomal examination was met with no demonstration of strength whatsoever in any myotomes. This is a bit of a red flag. […] This woman is too much of a red flag both in the vague nature of her symptoms, the non-neuroanatomic distribution and the total inability to contract muscles in her upper extremities although she demonstrates normal function otherwise.

[20] The July 2014 Goplen report stated that the moderate disc herniation at C6-7 accounted for a right C7 pain. The November 2012 Goplen report stated that an MRI showed stenosis at C6 and foraminal stenosis over the C6 roots.

[21] It is settled law that an administrative tribunal need not refer to every piece of evidence in its reasons, but is presumed to have considered all the evidence before it: *Simpson v. Canada (Attorney General)*, 2012 FCA 82. While the General Division member did not refer to the July 2014 Goplen report in his reasons, he was clearly alive to the C6-7 disc herniation issue. He noted the issue of a disc herniation at C6-7, as well as the results of MRIs in 2012 and 2014 which showed "multilevel degenerative changes in the cervical spine with at least moderate bilateral neural foraminal stenosis at C5-6" and "a new moderate sized focal disc herniation at C6-7, with no other significant changes in the cervical spine" (reasons, para. 13). In para. 34 of the reasons, the member refers again to the C6-7 disc herniation, while noting that "[…] all of her doctors assessed the Appellant and could not align her complaints with a definitive neurologic disease." As the C6-7 disc matters were the subject of other reports that the General Division member referred to in his decision, I see no arguable case arising from the fact that he did not refer to Dr. Goplen's second report in his decision.

[22] The Applicant disagrees with the member's finding that her credibility was undermined by the medical information showing that she demonstrated a dramatic and exaggerated pain presentation (reasons, para. 35). In this regard, the Applicant argues that the member based his finding on "old medical reports" (AD1B-6, para. 20) when he did not mention Dr. Goplen's July 2014 report. The Applicant had the onus to demonstrate that her disability met the requirements of s. 42 of the CPP. She filed evidence, including what she now characterizes as "old medical reports," to support her appeal to the General Division. The member's findings of credibility flowed from a detailed review of the medical reports. The member found those reports to be relevant to the issues before him. He cannot be faulted for relying on relevant reports that were filed by the Applicant. The Applicant also argues that the member did not consider her testimony with respect to the effects of her disability and states that she "presented credibly and well." The reasons refer to the Applicant's testimony on the effects of her disability in paras. 10−13 and 21. Although her testimony is not covered in great detail, the principle set out in *Simpson* applies here as well. I see no arguable grounds upon which an appeal could succeed in relation to the findings on credibility.

[23] The Applicant makes two arguments with respect to the lack of a functional capacity evaluation (FCE): first, she submits that the member erred in relying on the fact that she had failed to obtain an FCE to conclude she had a residual work capacity and, second, she questions how, without such an FCE, the member was able to draw this conclusion (AD1B-6, para. 22). These arguments fall under s. 58(1)(*c*) of the DESDA, i.e. that the member made an erroneous finding of fact in a perverse and capricious manner or without regard to the evidence before him. With respect to the FCE, the member noted that there was no FCE to support the Applicant's claim she could not work. He was entitled to take this into account when assessing whether the Applicant had a residual capacity to work. He was not precluded from finding she had a capacity to work on the basis of the other evidence before him in the absence of an FCE. He found that her cervical spine condition did not cause severely restricted sitting tolerances. He determined (at para. 31) that the information before him did not support that the Applicant could not function in a sedentary job, even if only on a part-time basis. He noted that the Applicant said she had "substantially impaired sitting capacity on account of severe arthritis throughout her spine," but he found this was not supported by the medical evidence. I am

unable to conclude that the member erred in his assessment of the evidence, and I see no reasonable chance of success on this basis.

[24] With respect to the *Bungay* directive that all of the claimant's possible impairments affecting employability be assessed, I do not agree with the Applicant that the General Division member failed to consider the totality of the Applicant's condition. In my view, he did.

[25] In his reasons, the General Division member referred to all of the medical impairments that the Applicant claimed to have. He noted that the Applicant "claimed in her Questionnaire [forming part of her application for a disability pension] that her main disabling condition is right arm pain, numbness, weakness and swelling" (reasons, para. 32). The reasons also referred to the fact that "[o]bjective testing shows multilevel degenerative changes in the cervical spine with at least moderate bilateral neural foraminal stenosis at C5-6, and a C6-7 disc herniation" (para. 34) and that the Applicant indicated she had "a substantially impaired sitting capacity on account of severe arthritis throughout her spine" (reasons, para. 35) but stated, "the information falls short of establishing that these conditions constitute a severe disability." The member also noted the Applicant's position that she had multiple medical conditions, which, taken together, rendered her unemployable, including her complaints of "considerably limited level of functioning or tolerances for sitting, standing, walking, lifting, carrying, reaching and bending" (reasons, para. 38). However, the Tribunal noted that these claims were "not supported by the medical information or objective testing" (reasons, para. 38). The Tribunal also acknowledged (at para.21) the Applicant's claim that she had difficulty with sitting for prolonged periods due to severe arthritis all through her spine, but it found (reasons, para. 35) that "[t]his assertion was not supported by the medical evidence. There are no objective thoracic or lumbar objective tests which support her assertion."

[26] Contrary to the Applicant's submission, the member did not say the Applicant had an obligation "to aggressively seek treatment" (AD1B-6, para. 22). The member noted the recommendation by Dr. Lefebvre that the Applicant see a rheumatologist (reasons, para. 20) and found the fact that she did not do so did not support that the Applicant tried to seek all recommended treatment to address her medical condition (reasons, para. 36).

[27] In summary, I see no reasonable chance of success on the ground that the General Division failed to consider the totality of the Applicant's conditions when making its determination that her disability was not severe.

[28] The Applicant also submits generally that the evidence supports a finding of severe disability. The Appeal Division's role is not to reweigh the evidence: *Tracey v. Canada (Attorney General)*, 2015 FC 1300, at para. 33. Furthermore, an appeal to the Appeal Division is not an opportunity to re-argue the case and ask for a different outcome: *Marcia v. Canada (Attorney General*), 2016 FC 1367.

[29] The Applicant pleads that the General Division erred in law by not taking into account availability of work and socio-economic conditions. There is no merit to this submission. The Federal Court of Appeal has noted that "[n]othing in the language of s. 42(2)(*a*)(i) suggests that labour market conditions are relevant in a disability assessment. […] what is relevant is any substantially gainful occupation having regard to the individual's personal circumstances, but not whether real jobs are available in the labour market": *Canada (Minister of Human Resources Development) v. Rice*, 2002 FCA 47, at paras. 9 and 10. Given the jurisprudence, I conclude this submission has no reasonable chance of success on appeal.

[30] Finally, the Applicant submits that the principles of natural justice were violated because the member "does not have sufficient medical experience to draw [the] conclusion" that her cervical spine condition does not cause severely restricted sitting tolerances, and also because the member was biased.

[31] With respect to the medical experience issue, the General Division is charged with making findings of fact based on the evidence filed in order to determine whether an applicant has established that he or she is entitled to a disability pension under s. 42 of the CPP. This involves an assessment of the evidence—both medical and otherwise—to determine whether an Applicant has a severe disability as of the MQP date. It is not necessary that a Tribunal member possess medical training or experience to be able to carry out this task. The member in this case acted within the bounds of his duty and authority in assessing the evidence and making findings of fact. I conclude that this submission presents no arguable case upon which the proposed appeal could succeed.

[32] With respect to the allegation of bias, the Applicant bases this on the submission that the General Division member's "judgment was not based on the evidence at hand, but on his own speculation, for example, stating that because a doctor does not suggest something, that it must therefore be so." I find there is no basis for a finding of bias on the member's part. The Applicant is simply alleging, under cloak of an allegation of bias, a breach of s. 58(1)(*c*) of the DESDA, i.e. that the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it. The example given is vague and non-specific, and the Applicant has not provided any link to the evidence or reasons. I conclude that the allegation of bias has no reasonable chance of success on appeal.

CONCLUSION

[33] For the reasons set out above, I conclude that the proposed appeal has no reasonable chance of success. The application for leave to appeal is therefore refused.

Nancy Brooks
Member, Appeal Division