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

Citation: *P. F. v. Minister of Employment and Social Development*, 2017 SSTADIS 252

Tribunal File Number: AD-16-635

BETWEEN:

P. F.

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 February 24, 2016, which determined that the Applicant was not entitled to a disability pension under the *Canada Pension Plan* (CPP).

[2] Appeals to the Appeal Division are governed by Part 5 of the *Department of Employment and Social Development Act* (DESDA). In accordance with s. 56(1) of the DESDA, "An appeal to the Appeal Division may only be brought if leave to appeal is granted."

[3] 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. Furthermore, leave to appeal 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 v. Canada (Attorney General)*, 2014 FC 1100, 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] Subsection 58(1) of the DESDA states that 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.

The use of the word "only" in s. 58(1) means that no other grounds of appeal may be considered: *Belo-Alves*, at para. 72.

[5] 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." The issue before me is whether the proposed appeal has a reasonable chance of success.

SUBMISSIONS

[6] The Respondent made no submissions on this application for leave to appeal.

[7] 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 law 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 that 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. v. Minister of Employment and Social Development*, 2015 SSTAD 65, and *Bungay v. Canada (Attorney General)*, 2011 FCA 47;
>
> (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.

[8] 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.

[9] With regard to (f), I note that the General Division stated that labour market conditions and socio-economic factors are irrelevant to a determination of whether a person's disability is severe under the CPP (reasons at para. 34). Therefore, I read this submission as an allegation of an error of law based on the fact that the General Division did not take into account these factors when it determined that the Applicant had not attempted to return to work.

[10] The Applicant also submits (AD1B-7, para. 25) that the principles of natural justice were violated because the General Division member "was not free from bias."

ANALYSIS

[11] Under the CPP, a disability is considered "severe" when it affects the claimant's capacity to work: the claimant must be "incapable regularly of pursuing any substantially gainful occupation": s. 42(2)(*a*) of the CPP.

[12] In *Villani v. Canada (Attorney General)*, 2001 FCA 248, the Federal Court of Appeal held that severity must be assessed in the "real world" context of an applicant, considering factors such as the applicant's age, education level, language proficiency, and past work and life experience. As the Federal Court of Appeal stated in *Klabouch v. Canada (Attorney General)*, 2008 FCA 33, "the measure of whether a disability is 'severe' is not whether the applicant suffers from severe impairments, but whether his disability 'prevents him from earning a living'. [citation omitted] In other words, it is an applicant's capacity to work and not the diagnosis of his disease that determines the severity of a disability under the CPP." The threshold for an applicant to demonstrate that his or her disability is "severe and prolonged" within the meaning of s. 42(2) of the CPP is therefore a highly restrictive one (*Atkinson v. Canada (Attorney General)*, 2015 FCA 187, at para 3).

[13] In *Bungay*, the Federal Court of Appeal provided direction on how a claimant's medical condition should be assessed. The Court stated (at para. 8) that such an assessment 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.

[14] 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 that, where there is evidence of work capacity, efforts to obtain and maintain employment have been unsuccessful by reason of that health condition.

[15] The gravamen of the Applicant's submissions is that the General Division erred in finding on the evidence before it that her condition was not severe. This is a question of mixed fact and law with which this Tribunal can interfere only if satisfied that the General Division's decision was in breach of one of the grounds under s. 58(1) of the DESDA. 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.

[16] Although the Applicant does not expressly refer in her submissions to *Villani*, she submits that the General Division member failed to take a "real world" approach to his evaluation of the evidence. I do not agree. The member referred to *Villani* at para. 29 of the reasons and correctly set out the factors that should be considered in a real-world context. In para. 30, he made clear findings regarding those factors in the Applicant's case, noting that she was 33 years old at her minimum qualifying period and had a post-secondary education and teacher's assistant skills. He concluded she was articulate, had a good education and had transferrable skills. He noted that there was no support in the medical information that the Applicant had cognitive limitations that would preclude use of her skills and education toward a return to her former job on a part-time basis or retraining for suitable work. Given his correct statement of the law and the analysis he undertook, I am unable to conclude the General Division member committed an error of law in respect of his application of *Villani*. This allegation does not raise an arguable ground upon which the proposed appeal might succeed.

[17] The Applicant alleges that the General Division member failed to consider the totality of the evidence before him, both documentary and in testimony, in reaching his conclusion that the Applicant's disability was not severe within the meaning of the CPP. In this regard, the Applicant submits that the General Division member "ignored various aspects of the medical evidence in fact the Tribunal completely ignored the totality of the information [*sic*]." (AD1B-5, para. 19). She takes issue in particular with the General Division member's interpretation of the January 2012 report of Dr. S. Isserow, in para. 38 of the reasons.

[18] At para. 38, the General Division stated:

> The Tribunal prefers the evidence of heart specialists, Drs. Baker and Isserow, to that of Dr. LeGresley, generalist. Dr. Baker said the Appellant has had a significant improvement in her left ventricular function, which is now borderline normal, with no peripheral edema. Dr. Isserow said the Appellant has non-ischemic cardiomyopathy which has almost completely resolved, and has no symptoms from the cardiomyopathy per se. In January 2012, Dr. Isserow said "*at the moment*" he does not think she would be able to go back to her former employment due to fatigue and limited endurance; however, he does not suggest she cannot return on a part-time basis, or return to some other alternate sedentary or part-time job. He finds the Appellant's fatigue is at least partly on account of her deconditioning, which is within the control of the Appellant for improvement in her condition. [italics in original]

[19] Referring to this passage, the Applicant submits that "it is an erroneous finding of fact for the Tribunal to jump to the conclusion that because a doctor DOES NOT STATE SOMETHING that it means that it must be the case and use it as a ground to deny the Applicant" (upper case as in original). In essence, the Applicant is objecting to the inference drawn by the General Division member that the Applicant was capable of returning to her former employment on a part-time basis, or of returning to some other alternate sedentary or part-time job.

[20] I am unable to agree with the Applicant's submission. In *Ferreira v. Canada (Attorney General)*, 2013 FCA 81, the Federal Court of Appeal held that it was not unreasonable for the Pension Appeals Board to draw an identical inference from a letter that the applicant's family physician had written stating that the applicant in that case was incapable of a full day's work: *Ferreira* at para. 8. In this case, I likewise find that it was not unreasonable for the General Division member to draw the inference he did from Dr. Isserow's report. This allegation does not raise an arguable ground upon which the proposed appeal might succeed.

[21] With respect to the specific allegation that the General Division did not discuss the issue of the impact on the Applicant of a reduction in her dosage of beta blockers (AD1B-6, para. 19), this is inaccurate. The General Division member referred to this at para. 23 of the reasons. I am unable to conclude he did not take this evidence into account in his analysis or decision. With respect to the allegation that the General Division member ignored the Applicant's oral

testimony with respect to the effects of her disability, this is not borne out by the reasons. The member referred to the Applicant's testimony on this matter at paras. 17, 22–24, 33 and 36 of the reasons. I therefore conclude that these allegations do not raise any arguable ground upon which the proposed appeal might succeed.

[22] The Applicant objects to the greater weight given by the General Division member to the reports of the specialists (Drs. Baker and Isserow) than to the evidence of the Applicant's family physician, Dr. LeGresley. The member found that Dr. LeGresley had assumed the role of an advocate for the Applicant (reasons, para. 40). He explained why he gave less weight to Dr. LeGresley's reports at paras. 38, 40 and 42 of the reasons. It is the General Division's role, as the finder of fact, to assign weight to the evidence. It is not the Appeal Division's role to reweigh the evidence: *Tracey v. Canada (Attorney General)*, 2015 FC 1300, at para. 33. Nor is an appeal to the Appeal Division an opportunity to re-argue the case and ask for a different outcome: *Marcia v. Canada (Attorney General*). This argument does not raise an arguable ground upon which the proposed appeal might succeed.

[23] The Applicant also objects that the General Division member did not make any finding concerning the Applicant's credibility. It is not necessary for a fact-finder to make a finding of credibility in order to make a decision on the evidence before him or her. The General Division member had before him medical reports that addressed the Applicant's medical condition and capacity to work. He was simply not persuaded by the evidence before him that the criteria required under s. 42(2) of the CPP had been met. Consequently, his determination was not premised on the Applicant's credibility, but rather on his assessment of the evidence. I conclude that this submission does not have a reasonable chance of success.

[24] The Applicant submits that the General Division erred in law by not taking into account availability of work and socio-economic conditions. 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. 9–10. In the present case, the General Division properly applied the law. Accordingly, I conclude that this submission has no reasonable chance of success on appeal.

[25] Finally, with respect to the allegation that the General Division member was biased, if this were the case, it would constitute a breach of a principle of natural justice under s. 58(1)(*a*) of the DESDA. In support of this allegation, the Applicant submits that the General Division member's decision "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" (AD1B-7, para. 25). This is a repetition of the argument that the General Division based its decision on erroneous findings of fact without regard to the material before it. The only example given is the inference drawn by the General Division member, which I have dealt with above. The Applicant has provided no other basis for the allegation of bias. I conclude that the allegation of bias has no reasonable chance of success on appeal.

CONCLUSION

[26] In summary, I am unable to conclude that the Applicant's proposed appeal has a reasonable chance of success. Accordingly, the application for leave to appeal is refused.

Nancy Brooks
Member, Appeal Division