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

Citation: *K. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 256

Tribunal File Number: AD-16-1287

BETWEEN:

K. C.

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: May 31, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated August 23, 2016. The General Division had earlier conducted a hearing by teleconference and determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP), because her disability was not severe during her minimum qualifying period (MQP), which ended on December 31, 2014.

[2] On November 9, 2016, within the specified time limitation, the Applicant 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

Canada Pension Plan

[3] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

(a) be under 65 years of age;

(b) not be in receipt of the CPP retirement pension;

(c) be disabled; and

(d) have made valid contributions to the CPP for not less than the MQP.

Department of Employment and Social Development Act

[4] 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.

[5] 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.

[6] 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;
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> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

[7] Some arguable ground upon which the proposed appeal might succeed is needed for leave to appeal 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]

[8] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial 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 to appeal stage, an applicant does not have to prove the case.

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[1]. *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC).
[2]. *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

ISSUE

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

SUBMISSIONS

[10] The Applicant's application requesting leave to appeal was accompanied by a brief, supported by various medical reports, that was identical to a document submitted to the General Division in August 2015. In a letter to the Applicant's representative dated May 1, 2017, the Appeal Division reiterated the specific grounds of appeal permitted under subsection 58(1) of the DESDA and asked him to provide, within a reasonable timeframe, detailed reasons why he believed his client had a reasonable chance of success on appeal.

[11] In a letter dated May 4, 2017, the Applicant's representative replied that the "incorrect reasons" had been submitted, and he enclosed another brief, this one setting out the following grounds of appeal:

(a) The General Division erred in law in making its decision, applying the wrong test for determining whether the Applicant suffered from a severe and prolonged disability. Despite acknowledging that the disability must be assessed in a "real world" context and that the claimant's condition must be assessed in its totality, the General Division completely failed to do so, only dealing with the Applicant's disabilities in a compartmentalized manner.

(b) The General Division also made numerous palpable and overwhelming findings of fact. It found that the Applicant, while incapable of returning to her own employment, was capable of returning to work in the context of some other employment. This finding ignored extensive evidence submitted to the General Division—including unchallenged reports and records from Dr. Rosenberg and Dr. Paulovic, as well as a Functional Abilities Evaluation dated September 2014—that she was incapable of returning to any work.

ANALYSIS

Failure to Apply the Correct Test for Severity

[12] As the Federal Court has recently indicated in *Canada v. Thériault*,[3] it is not sufficient for the General Division to correctly state a legal test in its decision; it must actually apply that test to the available evidence. The Applicant suggests that, despite its reference to *Villani v. Canada*[4] in its analysis, the General Division failed to consider factors such as her age, education and work experience in determining whether she was disabled regularly from pursuing substantially gainful employment.

[13] In its decision, the General Division summarizes the Applicant's evidence about her education and work history in paragraph 2 and refers to the correct test in paragraph 55 of its decision. In paragraph 60, the General Division writes:

> In assessing the severe criterion in a "real world" context as required by *Villani*, the Tribunal takes into consideration that, at the time of her MQP in December 2014, the Appellant was 55 years of age. She has a Grade 11 education and 1.5 years of college. She was last employed as a guidance secretary doing clerical work with a school board from November 1999 to May 2011 when she stopped working due to her "disability."

[14] In the words of the Federal Court of Appeal in *Villani*:

> [A]s long as the decision-maker applies the correct legal test for severity—that is, applies the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) he or she will be in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantially gainful occupation. The assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere.

[15] The decision indicates that the General Division was well aware that the Applicant was well into middle age as of her MQP, lacks a higher education and has worked predominantly in clerical jobs. I also note that the General Division dismissed the appeal in part because it determined that she had not made a sufficient effort to pursue alternative employment. I would not overturn an assessment that the General Division has undertaken, where it has noted the

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[3]. *Canada (Attorney General) v. Thériault*, 2017 FC 405.
[4]. *Villani v. Canada (Attorney General)*, 2001 FCA 248.

correct legal test and considered the Applicant's "real world" employment prospects in the context of her impairments, as well as her background.

[16] The Applicant also alleges that the General Division failed to deal with the Applicant's condition in its "totality" and "compartmentalized" the Applicant's disabilities. Here, the Applicant appears to be suggesting that the General Division disregarded the principle from *Bungay v. Canada*,[5] but I see no indication this is so. In her original application for benefits, the Applicant pleaded that she was disabled due to anxiety, depression and chronic knee pain, and I see that the General Division considered all these conditions, taking care to note, in paragraph 66 of its analysis, that it based its decision "on the totality of the evidence and the cumulative effect of [her] medical conditions."

[17] Finally, the Applicant submits that the General Division erred in law by disregarding the "regular" aspect of the disability severity test. Paragraph 42(2)(*a*) of the CPP demands consideration of whether an applicant was "incapable regularly of pursuing any substantially gainful occupation." I note that the Applicant has not pointed to a specific instance in which the General Division misapplied the test, but it is important to recall that there is no onus on the General Division to show that the Applicant is capable of regular employment; rather, the burden of proof lies on the Applicant to show that she is incapable "regularly" of pursuing a substantially gainful occupation. In this case, the General Division, having weighed the available evidence, was not convinced that the Applicant suffered from a disability that impeded her from reliably attending a job. It therefore writes, at paragraph 65, the following:

> Based on all the evidence, the Tribunal finds that due to her psycho-emotional disability and cognitive issues, the Appellant is unable to continue in her regular employment as a guidance secretary with the school board. However, for a disability to be severe, the Applicant must not only be unable to do her regular job, but rather be unable to perform any work (Klabouch). While it is contraindicated that the Appellant work in an interactive employment workplace, the evidence indicates that a good portion of the appellant's psycho-emotional problems arise from her expectation that she will return to her previous workplace. She has not looked for alternate work. When asked if there was any work that she could see herself doing, she testified that she could not do work that involved people or concentration and she could not guarantee an employer she is not going to hurt someone. The Appellant has not satisfied the Tribunal that she is incapable regularly of pursuing suitable employment within

[5]. *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

> her limitations. The Tribunal acknowledges that the Appellant has psycho-emotional difficulties which have been treated conservatively with pharmacotherapy, cognitive behavioural therapy and psychotherapy by her family doctor and a psychologist. She has not required psychiatric care or hospitalization.

[18] In sum, I am not convinced that the Applicant has an arguable case that the General Division erred in law by misapplying the test for severity, in all its aspects, to her condition.

Failure to Give Appropriate Weight to Selected Reports

[19] Here, the thrust of the Applicant's submissions was that the General Division dismissed her appeal despite what it contends is "overwhelming" medical evidence indicating that her condition was "severe and prolonged," according to the criteria governing CPP disability.

[20] I do not see a reasonable chance of success on this ground. In alleging that the General Division erred in fact by finding insufficient evidence that her disability was severe, the Applicant is, in effect, merely expressing her disagreement with the outcome. In her submissions, the Applicant cites passages from selected medical documents, but she does not specify how the General Division misinterpreted or mischaracterized their findings; rather, she criticizes the General Division for assigning them less value (as compared to competing evidence) than she would have preferred.

[21] The courts have previously addressed this issue in other cases where it has been alleged that administrative tribunals failed to consider all the evidence. In In *Simpson v. Canada*,[6] the appellant's counsel identified a number of medical reports that, according to her, the Pension Appeals Board—the predecessor to the Appeal Division—ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the application for judicial review, the Federal Court of Appeal held:

> [A]ssigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact….

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

[22] While the reports may have variously described the Applicant as "significantly impaired," prone to "unpredictable and inconsistent attendance and performance," and facing "significant barriers to return to any sustainable vocational activity," the General Division, as trier of fact, was within its authority to weigh these opinions against other evidence. I see no indication that the General Division ignored, or gave inadequate consideration to, the totality of the evidence before it. The Applicant may not agree with the General Division's analysis, but it is open to an administrative tribunal to weigh the evidence as it sees fit, so long as it arrives at a defensible conclusion. My review of the decision in this case indicates that the General Division analyzed in detail the Applicant's medical conditions and how they affected her capacity to regularly pursue substantially gainful employment as of December 31, 2014.

CONCLUSION

[23] The Applicant has not identified grounds of appeal under subsection 58(1) that would have a reasonable chance of success on appeal. Thus, the application for leave to appeal is refused.

Member, Appeal Division