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

Citation: *J. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 266

Tribunal File Number: AD-16-1331

BETWEEN:

J. 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: June 8, 2017

Canada

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 of Canada (Tribunal) dated August 26, 2016. Having conducted a hearing by reviewing the documentary record, the General Division determined that the Applicant was ineligible 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, 2011.

[2] On November 30, 2016, within the specified time limitation, 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 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]

[7] 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 stage, an applicant does not have to prove the case.

ISSUE

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

SUBMISSIONS

[9] The Applicant's representative submitted a brief with the application for leave to appeal that contained detailed criticism of the General Division's decision under the following categories:

Alleged Violation of Applicant's Right to be Heard

[10] The Applicant submits that, because of the nature of his illness and in view of the General Division's finding that the objective medical record was insufficient, oral testimony was an absolutely essential component to the determination of his appeal. By denying his right to testify either in person or by videoconference, the General Division failed to observe a fundamental principle of natural justice.

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[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No 1252 (QL).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[11] In a letter dated July 6, 2016, the General Division notified the Applicant that no hearing would be held and that his case would proceed based on the written record. On August 4, 2016, the Applicant's representative registered his objection to appeal going forward by this format and requested that a hearing be held either in person or by videoconference for the following reasons:

- The General Division is an adjudicative body deciding individual and fact-driven cases through an adversarial process. Greater procedural protections are required where, as in this case, appealing to the Appeal Division is not as of right and leave must be granted. If it is granted, new evidence cannot be provided at that point and appellants must rely on evidence adduced at the first instance.

- Procedural protections are even more important in a situation like the Applicant's, where he has applied for, and been refused, a major source of income replacement based on being disabled. A decision on CPP disability eligibility has a significant impact on claimants who have already been disadvantaged by their impairments.

- If the General Division was to properly determine the extent of the Applicant's disability, then it was also required to assess the impact of the Applicant's illnesses on him. The only way to have done this was to ensure that the Applicant was able to explain it in his own words. Efficiency in proceedings does not trump the necessity for natural justice.

- The subject matter of this appeal—illness and disability—is sensitive, and the Applicant would benefit from a face-to-face meeting to discuss such issues. As well, the General Division would benefit from personally observing the Applicant.

[12] The Applicant did not receive a response to his objection prior to the August 12, 2016 deadline to file documents, so his representative proceeded to file written submissions on the substantive question of whether he suffered from a severe and prolonged disability. However,

when it was issued, the General Division's decision contained no mention of the Applicant's submissions on the form of hearing.

[13] The Applicant reiterates his argument that the hearing before the General Division should have proceeded in person or, at the very least, by way of a videoconference. One of the General Division's central reasons for dismissing the appeal appears to be that it found little supportive objective medical evidence to substantiate the opinion of the Applicant's family doctor. As such, it was essential that the Applicant himself be permitted to offer testimony. Medical evidence by itself should not determine whether a claimant suffers from a severe and prolonged disability, particularly where the predominant symptoms are pain-related. Consideration must also be given to the subjective nature of disability and, in most cases, that requires an assessment of testimony. An oral hearing would have enabled the Applicant to discuss the intensity and frequency of his symptoms, as well as the real-world context of his difficulties in returning to work. The Tribunal has often confirmed this approach, as did its predecessor, the Pension Appeals Board, which went so far as to say that the nature and credibility of an appellant's oral evidence may be of sufficient probative value to outweigh the absence of any objective clinical medical evidence.

Alleged Failure to Apply *Villani*

[14] The Applicant submits that the General Division erred in law by failing to properly apply the "real world" test as set out in *Villani v. Canada*,[3] which requires a decision-maker to specifically consider an applicant's age, education and work experience in assessing disability. In this case, the General Division found that the only factor relevant to the Applicant's employability was his age, and it offered no analysis as to how it was relevant to the decision. The Applicant submits that his work experience should have been given consideration, as he had claimed that he was not just incapable of performing physical work, but also sedentary jobs such as his previous occupation as a limousine driver. Although the General Division summarized the Applicant's work history early in its decision, it was not a factor in its analysis.

[3] *Villani v. Canada (Attorney General)*, 2001 FCA 248.

ANALYSIS

Form of Hearing

[15] The Applicant alleges that, in electing to hear his appeal exclusively by way of documentary review instead of permitting some form of testimony, the General Division breached a principle of natural justice by denying him his right to present a full case. I am ordinarily reluctant to interfere with the discretionary authority of the General Division to decide on an appropriate form of hearing, but in this case there may be cause to make an exception.

[16] The *Social Security Regulations* give the Tribunal's two branches wide discretion to hold a hearing as they see fit. Section 21 permits the General Division to hold a hearing by one of several methods, including written questions and answers, teleconference, videoconference or personal appearance. Use of the word "may" in the text, in the absence of qualifiers or conditions, suggests that the General Division has discretion to make this decision. However, such discretion must be exercised in compliance with the rules of procedural fairness. The Supreme Court of Canada has pronounced on this issue in *Baker v. Canada*,[4] which held that that a decision affecting an individual's rights, privileges or interests is sufficient to trigger the application of the duty of fairness. The concept of procedural fairness, however, is variable and it is to be assessed in the specific context of each case. *Baker* then set out a non-exhaustive list of factors to be considered in determining the duty of fairness required in a particular case, including the nature of the decision being made, the importance of the decision to the individual affected, the legitimate expectations of the person challenging the decision, and the choices of procedure made by the agency itself, particularly when the legislation gives the decision-maker the ability to choose his or her own procedure.

[17] In this case, I do not doubt that the Applicant would regard his appeal for disability benefits as important and therefore worthy of something approaching a "full" hearing, complete with oral testimony. As the Applicant's representative has noted, a hearing before the General Division is ordinarily the final opportunity for the evidence in a disability claim to be assessed on its merits, and this is a case that is founded on claims of chronic back pain and diminished

[4] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC).

energy following a myocardial infarction (MI). While medical conditions can be diagnosed by means of laboratory tests and imaging results, the subjective intensity of the Applicant's symptoms and their effect on his vocational capacity during his MQP cannot be documented so easily and, in my view, are best relayed by means of unfiltered oral testimony.

[18] As Chief Justice Dickson of the Supreme Court noted in an earlier case involving the Immigration Appeal Board (now the Immigration and Refugee Board):[5]

> I should note, however, that even if hearings based on written submissions are consistent with the principles of fundamental justice for some purposes, they will not be satisfactory for all purposes. In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. Appellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person […] I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.

[19] In paragraph 1 of its decision, the General Division offered a number of *pro forma* reasons for choosing to avoid an oral hearing:

(a) The member has decided that a further hearing is not required.

(b) The issues under appeal are not complex.

(c) There are no gaps in the information in the file and there is no need for clarification.

(d) Credibility is not a prevailing issue.

(e) This method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

[20] A case can be made that, except in those few cases where the law unambiguously precludes eligibility, credibility is, on some level, almost always an issue in CPP disability

[5] *Singh v. Minister of Employment and Immigration*, [1985] l SCR 177, 1985 CanLII 65 (SCC).

claims; the Applicant, like many in his position, argues that he is disabled despite what some of the medical reports may suggest, and he submits that his oral evidence would have been a relevant and valuable supplement to the documentary record. I am satisfied that the General Division's refusal to hear his testimony has given rise to a potential breach of procedural fairness.

Villani

[21] The Applicant argues that the General Division erred in law by failing to apply the "real world" test. In my view, this submission also has a reasonable chance of success on appeal. While the General Division correctly summarized the *Villani* principle in its decision, it is not clear that it applied it to the Applicant's particular circumstances. Paragraph 22 reads:

> The severe criterion must be assessed in a real world context [...] This means that when deciding whether a person's disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. The only factor that is relevant in this situation is that the Appellant was 57 years old at the time of his application. However, it should be noted that he was 5 years younger when he stopped work in November 2009.

[22] It is not enough to merely cite case law; the trier of fact must also apply it fairly to an applicant's particular circumstances. Here, it is unclear whether the General Division believes that the Applicant's age is an impediment to his continued participation in the labour market. In any event, I note that the General Division does not explain why it found the Applicant's age to be the "only" relevant *Villani* factor, when a casual perusal of the record indicates that Mr. J. C. emigrated from India as an adult, a fact that goes unmentioned in the decision. I think it is within the realm of possibility that the Applicant's proficiency in English, his work history and the perceived value of his educational credentials would have bearing on his ability to secure and maintain substantially gainful employment.

Additional Considerations

[23] Although the Applicant has raised no other issues, I would like to make the following observations:

Sufficiency of Reasons

[24] The General Division's reasons, including the title page, are just over seven pages, most of them concerned with summaries of the documentary evidence, the law and the parties' written submissions. There is a page on the issue of severity, but more than half of this section is occupied with perfunctory recitations of case law. With only a few sentences remaining for analysis *per se*, I think there is an arguable case, particularly given the apparent omissions and inconsistencies identified below, that the General Division failed to observe a principle of natural justice by giving insufficient reasons for its dismissal of the Applicant's appeal.

Dr. Safieh's Findings

[25] In paragraph 25 of its decision, the General Division wrote:

> The Appellant presents that his mental health is an issue. Again, there is no objective medical evidence to substantiate this claim. There are no reports of a referral to a mental health care specialist. Nor does Dr. Safieh refer to the Appellant's mental health in his letters of 2015 and 2016.

[26] Here, the General Division appears to refer to Dr. Safieh's letter of January 4, 2016, but I note that, contrary to its finding, the Applicant's family physician did, in fact, refer to mental health issues:

> All of Mr. J. C.'s medical conditions are considered to be severe. They have all compounded each other and the main cardiac and back issues have led to the other severe medical conditions. These conditions are back pain, chest pain, hypertension, headaches, *anxiety/depression and memory issues (also associated with depression)*… As stated, Mr. J. C. is incapable of working in any capacity since he is not able to do any physical or *mental* activities in any capacity [emphasis added].

[27] I see an arguable case that the General Division based its decision on an erroneous finding of fact, contrary to paragraph 58(1)(*c*) of the DESDA.

Heart Condition

[28] The Applicant's August 2014 application materials indicate that his heart problems, as much as his back condition, were a significant component of his disability claim. Despite this, the General Division made no mention of any of the symptoms (such as weakness and chest

pain) related to the Applicant's MI in its analysis proper. While a trier of fact is presumed to have considered all the material before it, I think a case can be made that the General Division did not take into account the totality of the relevant evidence.

Evidence of Severity

[29] In paragraph 23, the General Division wrote, "Medical evidence has failed to disclose any severe medical conditions that would have prevented him from work at the time of his MQP of December 31, 2011."

[30] I acknowledge that it is the General Division's role to assess the available evidence for the purpose of determining whether an applicant's disability is "severe." However, a trier of fact cannot flatly state a conclusion without outlining the chain of logic that led to it. This is especially important where, as in this case, evidence existed that, on its face, was at odds with said conclusion. I refer to the January 25, 2011 MRI of the lumbar spine, which noted "moderately severe spinal canal stenosis" at L4-5. In my view, there is an arguable case that the General Division owed the Applicant a duty of fairness to address this item of ostensibly contradictory evidence.

CONCLUSION

[31] I am granting leave to appeal on all grounds claimed by the Applicant. Should the parties choose to make further submissions, they are free to offer their views on whether a further hearing is required and, if so, what format is appropriate.

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

Member, Appeal Division