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

Citation: *R. D. v. Minister of Employment and Social Development*, 2017 SSTADIS 260

Tribunal File Number: AD-16-789

BETWEEN:

R. D.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Jennifer Cleversey-Moffitt

Date of Decision: June 5, 2017

REASONS AND DECISION

INTRODUCTION

[1] On March 7, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension was not payable under the *Canada Pension Plan* (CPP).

[2] The General Division made its decision in light of determining that the Applicant had not proven, on a balance of probabilities, that she had a severe and prolonged disability on or before her minimum qualifying period (MQP) as per the definition of "disabled" found in paragraph 42(2)(*a*) of the CPP. The General Division found the date to be December 31, 2010, and this date went uncontested at the hearing.

[3] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division; the application was received on June 7, 2016.

ISSUE

[4] The Member must decide whether the appeal has a reasonable chance of success.

THE LAW

[5] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), "An appeal to the Appeal Division may only be brought if leave to appeal is granted" and "The Appeal Division must either grant or refuse leave to appeal."

[6] Subsection 58(2) of the DESD Act provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[7] According to subsection 58(1) of the DESD Act, 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.

[8] The process of assessing whether to grant leave to appeal is a preliminary one. The review requires an analysis of the information to determine whether there is an argument that would have a reasonable chance of success on appeal. This is a lower threshold to meet than the one that must be met on the hearing of the appeal on the merits. The Applicant does not have to prove the case at the leave to appeal stage: *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC). The Federal Court of Appeal, in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success.

SUBMISSIONS

[9] The Applicant's representative—who refers to the Applicant as "the Appellant" throughout the submissions—submits that the General Division erred in law. The submissions raise four issues under this ground of appeal:

a) The General Division erred in law by not applying the proper test to determine whether the Applicant continues to have a severe and prolonged disability;

b) The General Division erred in law by failing to properly consider the combined effect of the Applicant's medical conditions;

c) The General Division erred in law by failing to attach significant weight to the Applicant's uncontradicted oral evidence as to the impact of her medical conditions; and

d) The General Division erred in law by failing to consider and weigh her testimony relating to a statement contained in medical reports on her condition.

[10] The Applicant's representative submits that the General Division failed to take a "real world" approach in assessing whether the disability is severe in accordance with *Villani v.*

Canada (Attorney General), 2001 FCA 248, at paragraphs 32–40. Additionally, with respect to the definition of "regularly" from subparagraph 42(1)(*a*)(i) of the CPP, the Applicant's representative cited paragraph 38 of *Villani*, where the court noted that the word "regularly" is to be interpreted to mean, "with consistent frequency." To address this point, the Applicant's representative notes:

> i. The Appellant's [Applicant's] disabilities prevent her from meeting basic expectations. As a result of the Appellant's [Applicant's] degenerative disc disease, chronic low back and left hip pain, facet hypertrophy, hypertension and knee lateral collateral ligament full thickness tear, the Appellant [Applicant] has mobility difficulties that impede her efforts depending on the type of job. (paragraph 27 of submissions)

[11] The Applicant's representative also raised the issue of employment efforts. Furthermore, the representative submits that the Applicant lacked work capacity due to a severe physical disability, and that her functional abilities had deteriorated before her MQP and that they have continued to deteriorate since the end of her MQP. Additionally, it is submitted that the Applicant's condition worsened after the completion of her retraining program, which began and ended after the expiry of the MQP.

[12] With respect to determining what a "substantially gainful occupation" is, the Applicant's representative cited *Villani*'s explanation of the phrase from paragraph 38. An occupation must be "truly remunerative." The submissions on this point are that, "due to the Appellant's [Applicant's] disabilities and her limitations, she would not be able to secure and maintain any kind of remunerative work in a highly competitive Canadian labour market" (paragraph 39 of the submissions).

[13] The representative also submits that the General Division did not adequately perform the test to analyze "prolonged." The submissions note that consideration should have been given to the Departmental policy, which uses one year as a guideline (Employment and Social Development Canada, *Canada Pension Plan Adjudication Framework*, Criterion Four: The Prolonged Criterion; Component 2.2 "Likely to be Long Continued" and "of Indefinite Duration").

[14] The Applicant's representative also submits that the General Division erred in not considering the cumulative effect of multiple conditions. The submissions are that although an individual condition may not qualify as severe, the General Division should have considered the cumulative effect of the Applicant's multiple conditions, which, when combined, rendered the Applicant disabled. Again in reference to the "real world" approach, the Applicant's representative submits that the General Division failed to consider the Applicant's work history.

[15] The representative submits that the Tribunal did not consider her length of work history as a contributory factor. The submissions are that the Applicant's medical conditions are so severe that she would not meet basic employment expectations. Further, the Applicant would pose a safety risk to the employer and employees around her (paragraph 58 of the submissions). Additionally, the submissions are that the Tribunal also erred in not considering her significant CPP contribution history as evidence that, if she had been able to work, she would have worked. It is also submitted that the Applicant would be an unideal candidate for sedentary work as no employer would hire her.

[16] On the third issue, the submissions are that the General Division erred by failing to attach significant weight to the Applicant's uncontradicted evidence. The Federal Court and Federal Court of Appeal have both commented on the pertinence of subjective evidence. The cases of *Canada (Attorney General) v. MacRae*, 2008 FCA 82, *Arthurs v. Canada (Minister of Social Development)*, 2006 FC 1107, and *Grenier v. Canada (Minister of Human Resources Development)*, 2001 FCT 1059, were referenced in submissions to explain that "[b]oth 'subjective' evidence (such as an appellant's testimony as to the extent of his/her pain) and 'objective' evidence (such as clinical test results and X-rays) are relevant in CPP disability determinations" (paragraph 63 of the submissions). Additionally, the representative noted that other General Division decisions have commented on the issue of chronic pain, the lack of objective evidence and the need for subjective evidence like the description of pain (paragraph 66 of the submissions).

[17] Finally, the Applicant's representative submits that the General Division erred by failing to consider and weigh her testimony relating to a statement contained in the medical reports. More specifically, the Applicant feels that more weight should have been given to Dr.

Naaman's report, which was obtained after the expiry of her MQP. In the report dated March 20, 2012, Dr. Naaman stated the following:

> The patient is alert. She seems in discomfort. In the lumbosacral spine there is tenderness in the mid lower lumbar spine with very limited range of motion including flexion is about 20 degrees, extension is slightly painful bilaterally flexion is painful. Straight leg test on the left is 45 degrees, on the right is 90 degrees. Her range of motion is slightly limited on the left side [sic]. There is also severe tenderness in the dorsum of the right foot.

ANALYSIS

[18] The first issue of alleged error in law was that the General Division failed to use the proper test to determine whether the disability was severe and prolonged. In reviewing the General Division decision, it is clear that *Villani* was not mentioned, nor were the factors discussed. Additionally, the General Division did not make mention as to why the *Villani* analysis was irrelevant in this decision. There was no analysis of the Applicant's personal characteristics, such as her age, education level, language proficiency, past work experience and life experience, as well as whether they impacted her capacity regularly of pursuing any substantially gainful occupation (*Villani*, paragraph 38). Although one personal characteristic was noted in the General Division decision—education level was mentioned in paragraph 8 of the decision—this factor was not evaluated within the context of the Applicant's capacity regularly of pursuing any substantially gainful occupation.

[19] Without reviewing the *Villani* factors, the General Division determined that the disability had not occurred on or before the Applicant's uncontested MQP date and that this was based on three pieces of evidence: 1. that the Applicant enrolled in and attended an eighteen-month retraining program on a full-time basis, which began and ended after the expiry of the MQP; 2. that her work stoppage in January of 2009 was because her employer was unable/unwilling to provide suitable modified duties; and 3. that the General Division found there was a lack of medical evidence contemporaneous to the MQP. By not considering the application of *Villani*, this analysis falls short of understanding her capacity to work. The Tribunal must take a "real world" approach in determining whether the Applicant is capable regularly of pursuing any substantially gainful occupation.

[20] The fact that the decision maker at the General Division level failed to cite or mention *Villani*, suggests that the analysis might not have been conducted. Furthermore, a failure to conduct an analysis into how those factors impact one's capacity of regularly pursuing any substantially gainful employment is an error of law.

[21] Attending full-time studies can show a capacity to work. As the Federal Court outlined at paragraph 33 of the decision in *Cvetkovski v. Canada (Attorney General)*, 2017 FC 193:

> The capacity to work is indicated by the performance of part-time work, modified activities, sedentary occupations, and school attendance: see *Miceli-Riggins v Canada (Attorney General),* 2013 FCA 158 at paras 14-15 and *McDonald v Canada (Human Resources and Skills Development),* 2009 FC 1074 at para 14.

However, this analysis still needs to be whether someone is incapable regularly of pursuing any substantially gainful occupation, and it needs to be conducted using the "real world" approach articulated in *Villani*. I find that the General Division erred in law by not assessing the Applicant's disability in a "real world" context.

[22] I am satisfied that the appeal has a reasonable chance of success on this ground.

[23] Leave to appeal is granted. Having found that the Applicant has raised an arguable case with respect to whether the General Division committed an error of law in failing to apply the proper test to determine whether the Applicant has a severe and prolonged disability, the Appeal Division finds there is no need to address the other grounds of the Application.

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

Jennifer Cleversey-Moffitt
Member, Appeal Division