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

Citation: *B. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 278

Tribunal File Number: AD-16-1351

BETWEEN:

B. S.

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 14, 2017

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 September 10, 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 it found that her disability was not "severe" prior to her minimum qualifying period (MQP), which ended on December 31, 2015.

[2] On December 6, 2016, within the specified time limitation, the Applicant's authorized representative submitted an application requesting leave to appeal to the Appeal Division detailing alleged grounds for appeal.

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. The Appeal Division must either grant or refuse leave to appeal.

[4] 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.

[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] 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 the 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, the Applicant does not have to prove the case.

ISSUE

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

SUBMISSIONS

[9] In her application requesting leave to appeal, the Applicant's representative made the following submissions:

(a) The General Division erred in not taking into consideration the totality of the evidence before it when it decided that the Applicant was not entitled to a disability pension. She suffers from a severe and prolonged disability within the meaning of paragraph 42(2)(*a*) of the CPP.

(b) The General Division erred in failing to adequately consider numerous medical reports indicating that the Applicant was disabled from work as of her MQP.

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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.

(c) The General Division erred in suggesting that the Applicant has shirked her responsibility to attend to her health. In fact, as she testified at the hearing, she does home exercises as stipulated by her physiotherapist, but pain prevents her from completing them.

(d) The General Division erred in law by failing to apply the principles of *Villani v. Canada*,[3] which required it to consider factors such as age, level of education, language proficiency and past work and life experience. The Applicant was 42 years old at the time of the hearing and has only a grade 12 education from India. She has worked only in labour-intensive jobs, in which she was surrounded by co-workers who spoke languages similar to Punjabi, her mother tongue. Although she has attempted to upgrade her English-language skills and increase her chances of obtaining sedentary work, she suffers from physical and psychological conditions that prevent her from attending English as a Second Language classes. She remains non-proficient in spoken English. In a "real world" context, the Applicant has no prospect of returning to any occupation compatible with her impairments.

ANALYSIS

Failure to Consider the Totality of the Evidence

[10] The Applicant alleges that the General Division erred in failing to consider the totality of the impairments that rendered her disabled. The Applicant did not specify which impairments she believes the General Division overlooked, but it is settled law that an administrative tribunal charged with finding fact is presumed to have considered all the evidence before it and need not discuss each and every element of a party's submissions.[4] That said, I have reviewed the General Division's decision and found no indication that it ignored, or gave inadequate consideration to, any significant aspect of the Applicant's claimed conditions.

[3] *Villani v. Canada (Attorney General)*, 2001 FCA 248.
[4] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

[11] The General Division's decision contains a comprehensive summary of the medical evidence, including many reports that document investigations and treatment for the Applicant's various medical problems. The decision closes with an analysis that suggests the General Division meaningfully assessed the evidence before concluding that the Applicant had residual capacity to regularly pursue substantially gainful employment. In so doing, the General Division noted Dr. Galvin's and Dr. Rahil's reports, which specified restrictions on the repetitive use of the Applicant's upper extremities but did not preclude all forms of substantially gainful employment. The General Division also referred to Dr. Glumac's psychiatric report, which noted that the Applicant performed numerous domestic tasks.

[12] I see no arguable case on this ground.

Failure to Recognize the Severity of the Applicant's Condition

[13] It must be said that a large portion of the Applicant's submissions is, in essence, a recapitulation of evidence and arguments that were already presented to the General Division. The Applicant alleges that the General Division dismissed her appeal despite medical evidence indicating that her overall condition was "severe" according to the CPP criteria.

[14] However, outside this broad allegation, the Applicant has not identified how, in coming to its decision, the General Division failed to observe a principle of natural justice, committed an error in law or made an erroneous finding of fact. My review of the decision indicates that the General Division analyzed in detail the Applicant's claimed medical conditions—principally an injury to her right arm, secondary to depression—and whether they affected her capacity to regularly pursue substantially gainful employment during her MQP. While applicants are not required to prove the grounds of appeal at the leave to appeal stage, they must set out some rational basis for their submissions that fall into the enumerated grounds of appeal. It is not sufficient for an applicant to merely state their disagreement with the General Division's decision, nor is it sufficient for an applicant to express their continued conviction that their health conditions render them disabled within the meaning of the CPP.

[15] In the absence of a specific allegation of error, I find this claimed ground of appeal to be so broad that it amounts to a request to retry the entire claim. If she is requesting that I

reconsider and reassess the evidence and substitute my decision for that of the General Division in her favour, I must point out that I am unable to do this. My authority as an Appeal Division member permits me to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds of subsection 58(1) of the DESDA, and whether any of them has a reasonable chance of success.

[16] I see no reasonable chance of success on this ground.

Failure to Recognize the Applicant's Efforts to Regain Health

[17] The General Division cited the Federal Court of Appeal decision *Kambo v. Canada*,[5] for the proposition that a CPP disability claimant bears a personal responsibility to cooperate in his or her health care. The Applicant submits that the General Division failed to properly apply this case law to the facts surrounding 'her efforts to overcome her impairments.

[18] I see no arguable case on this ground. *Kambo* is one of many cases that have imposed an obligation on benefit claimants to take all reasonable steps to follow medical advice—including doctors' recommendations to increase physical exercise and activity. The Applicant does not dispute that this is valid law, only that the General Division ignored evidence that her attempts to get well were hindered by ongoing pain. There is no question that the General Division drew an adverse inference from what it found was a failure to mitigate her losses:

> [36] […] The Appellant was recommended by Dr. Glumac to get out of the house and become busier and he also suggested schooling. He noted the Appellant rejected suggestions to become more active. The Appellant was booked on two occasions with Dr. Talukdar who indicated she cancelled one appointment the same day and the week before did not show up. He refused to book the Appellant further. She was recommended to be active and to continue exercises however she testified she does very little in respect to home exercises as stipulated by the physiotherapist. She testified sits for most of the day and has gained weight. The Tribunal understands it is not always easy to exercise or to watch weight in order to improve health. The Tribunal however finds the Appellant has not made a reasonable effort to cooperate with the recommendations of her doctors.

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[5] *Kambo v. Canada (Human Resources and Development)*, 2005 FCA 353.

[19] I have reviewed the supporting documents cited in the above passage and find that the General Division accurately and fairly characterized their contents. I have also listened to the audio recording of the hearing and heard nothing to indicate that the General Division misrepresented the Applicant's testimony; as was documented in the decision, she did in fact testify that she sits for most of the day and does not exercise because it causes her pain. The General Division's reasoning was based on the premise that the Applicant's treatment providers would not have recommended exercise—with its attendant pain—unless it was likely to produce a substantive improvement in her condition. I see nothing perverse, capricious or contrary to the record in either the General Division's findings of fact or the inferences it drew from them.

Failure to Apply *Villani*

[20] The General Division summarized the Applicant's personal characteristics at paragraph 8 of its decision, and referred to the correct test at paragraph 38. In the following paragraph, it considered her background—age, education, language skills and work experience—before determining that her impairments did not preclude her from potentially securing and maintaining a lower-impact job. It specifically found that her efforts to learn English thus far did not indicate an insurmountable language barrier, given her education and previously demonstrated capacity to acquire skills.

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

> […] as 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.

[22] I would not overturn the General Division's assessment, where it has noted the correct legal test and considered the Applicant's "real world" employment prospects in the context of not only her impairments, but also her personal profile. As the Applicant has failed to show that the General Division misapplied *Villani*, I see no arguable case on this ground.

CONCLUSION

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

Member, Appeal Division