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

Citation: *D. P. v. Minister of Employment and Social Development*, 2017 SSTADIS 284

Tribunal File Number: AD-17-186

BETWEEN:

D. P.

Applicant/Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: June 16, 2017

REASONS AND DECISION

INTRODUCTION

[1] On March 11, 2015, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that that a disability pension under the *Canada Pension Plan* (CPP) was not payable.

[2] The Applicant filed an application for leave to appeal with the Tribunal's Appeal Division on April 10, 2015. The Appeal Division refused leave to appeal on April 24, 2015. The Applicant sought judicial review of the Appeal Division decision.

[3] On November 3, 2016, the Federal Court set aside the April 24, 2015, Appeal Division decision and referred the matter back to the Appeal Division for redetermination by a different member.

ISSUES

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

[5] If the appeal is determined to have a reasonable chance of success, should a decision be rendered on the record or does the matter require a hearing?

[6] Then the Appeal Division must decide whether to dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate, or confirm, rescind or vary the decision of the General Division in whole or in part.

LAW AND ANALYSIS

[7] Pursuant to paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESD Act), an application must be made to the Appeal Division within 90 days after the day on which the decision appealed is communicated to the appellant.

[8] According to subsections 56(1) and 58(3) of the 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.”

[9] 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.”

[10] Subsection 58(1) of the DESD Act 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.

[11] The Federal Court found, among other things, that:

a) The General Division held, contrary to the evidence, that the new conditions suffered by the Applicant did not alter her employability, but it failed to reasonably assess how the new diagnoses of chronic pain syndrome and chronic depression outlined in new reports impacted and affected the Applicant’s employability.

b) The General Division acted unreasonably (and erred in applying established law) in determining that the test for severe disability requires the Applicant to establish that her diagnosis and forward-looking prognoses prevented her from “all work.” That finding places the bar too high and is contrary to the Federal Court of Appeal’s decision in *Villani v. Canada (Attorney General)*, 2001 FCA 248.

c) In these two respects, the Appeal Division acted unreasonably because it refused leave to appeal notwithstanding that the Applicant had a reasonable prospect of success on her proposed appeal under paragraphs 58(1)(*b*) and (*c*) of the DESD Act.

d) The General Division made its decision without regard to the material before it, in new reports, thereby committing an error per paragraph 58(1)(*c*) of the DESD Act. The Appeal Division did not act reasonably in refusing leave to appeal in light of that error.

e) The General Division adopted the very approach rejected in *Villani* in seemingly requiring the Applicant to establish that her newly diagnosed conditions and related prognoses and impacts, "would have prevented her from all work." This approach was contrary to settled law and the Appeal Division acted unreasonably in not granting leave to appeal, as failure to properly apply *Villani* presents another ground on which the Applicant's appeal had a reasonable prospect of success under paragraph 58(1)(*b*) of the DESD Act.

Leave to Appeal

[12] Given the Federal Court's findings, as set out in paragraph 11 above, I am satisfied that the appeal has a reasonable chance of success.

Errors of the General Division

[13] This appeal proceeded on the basis of the record for the following reasons:

a) the lack of complexity of the issue under appeal;

b) the Federal Court decision; and

c) the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

[14] The General Division:

a) Failed to reasonably assess how the new diagnoses of chronic pain syndrome and chronic depression outlined in new reports affected the Applicant's employability.

b) Made its decision without regard to the material before it, namely Dr. Plotnich's report of October 2004 with the Pain Management Report of June 2005, and the

Dr. Cjandrasena's report of September 2005 with a Global Assessment of Function, thereby committing an error within the meaning of paragraph 58(1)(*c*) of the DESD Act.

c) Erred in applying established law in determining that the test for severe disability requires the Applicant to establish that her diagnosis and forward-looking prognoses prevented her from "all work." This approach is contrary to settled law (such as *Villani*) and, thereby, the General Division committed an error within the meaning of paragraph 58(1)(*b*) of the DESD Act.

[15] Therefore, the General Division based its decision on reviewable errors.

[16] Given the Federal Court decision, and my review of the General Division decision and the appeal record, I find that the General Division erred as described in subsection 58(1) of the DESD Act.

[17] Subsection 59(1) of the DESD Act sets out the Appeal Division's powers. It states: "The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate, or confirm, rescind or vary the decision of the General Division in whole or in part."

[18] Given all of the foregoing, I allow the appeal. The matter should be returned to the General Division for determination in accordance with this decision and the Federal Court decision.

CONCLUSION

[19] The application for leave to appeal is granted.

[20] The appeal is allowed. The case will be referred back to the Tribunal's General Division for reconsideration in accordance with this decision and the Federal Court decision.

Shu-Tai Cheng
Member, Appeal Division