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

Citation: *L. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 295

Tribunal File Number: AD-16-559

BETWEEN:

L. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Meredith Porter

Date of Decision: June 27, 2017

REASONS AND DECISION

DECISION

[1] Leave to appeal is granted.

BACKGROUND

[2] The General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP) in its decision dated January 20, 2016.

[3] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on April 11, 2016. In her application, the Applicant asserted that the General Division had erred in law, made an erroneous finding of fact and failed to observe a principle of natural justice or acted beyond or refused to exercise its jurisdiction. However, the Applicant did not provide details regarding the General Division's alleged errors.

[4] The Appeal Division decided the Applicant should be notified of the deficiencies in her application and given an opportunity to provide necessary additional details regarding the grounds on which she was basing her application requesting leave to appeal. As a result, the Tribunal sent a letter to the Applicant explaining the grounds of appeal open to her, and inviting additional details (*Bossé v. Canada (Attorney General)*, 2015 FC 1142).

[5] The Applicant clarified the grounds on which she was requesting leave to appeal, by letter received by the Tribunal on May 12, 2016.

ISSUE

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

THE LAW

[7] 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."

[8] 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." A reasonable chance of success has been equated to "an arguable case" (*Fancy v. Canada (Attorney General)*, 2010 FCA 63).

[9] 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 that it made in a perverse or capricious manner or without regard for the material before it.

SUBMISSIONS

[10] The Applicant submits that her family doctor has diagnosed her with anxiety and depression and has advised, by way of medical note, that the Applicant is unable to work.

[11] The Applicant further submits that the General Division based its decision on an erroneous finding of fact made in a perverse and capricious manner or without regard for the material before it in finding that the Applicant's family responsibilities were the primary reason why the Applicant could not work, when, in fact, it is the Applicant's own health condition that prevents her from working.

ANALYSIS

[12] The initial hurdle to be met in requesting leave to appeal to the Appeal Division is lower than the hurdle that must be met at the merit stage (*Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC); however, I am restricted to considering only those grounds of appeal that fall within subsection 58(1) of the DESD Act. The subsection does not permit me to reassess or reweigh the evidence.

[13] The Applicant filed new evidence to support her request for an appeal. She included a note from her family doctor, Dr. Pond, dated February 12, 2016.

[14] Hearings before the Appeal Division are not *de novo*: the Appeal Division cannot consider evidence that absent from the record before the General Division. Additionally, subsection 58(1) of the DESD Act sets out the grounds of appeal to the Appeal Division and the submission of new evidence is not a ground for which leave to appeal can be granted (*Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100). As a result, the Appeal Division cannot consider the note from Dr. Pond in its decision on whether to grant leave.

[15] The Applicant has argued that the General Division attributed the Applicant's inability to work to her obligations at home and to fulfilling her responsibilities to her children. She submits that the General Division overlooked the fact that the Applicant suffers from health conditions that render her incapable regularly of pursuing any substantially gainful occupation.

[16] The determination of "severity" under the CPP is not based on the diagnosis of the particular health condition. Severity is determined based on the applicant's capacity to work; to be "severe" a disability must render a person incapable regularly of pursuing any substantially gainful occupation (*Klabouch v. Canada (Social Development)*, 2008 FCA 33). An applicant must show not only that they have a serious health problem but, where there is evidence of work capacity, they must also show that their efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition (*Inclima v. Canada (Attorney General)*, 2003 FCA 117).

[17] In addition to the above jurisprudence, the Federal Court of Appeal in *Villani v. Canada (Attorney General)*, 2001 FCA 248 stated at paragraph 38:

> Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.

[18] The real world context set out in *Villani* does not refer to an applicant's subjective assessment of whether they could work in a "real world." The real-world context in *Villani* means that certain factors should be kept in mind when determining the severity of a person's disability and their subsequent capacity for employment.

[19] Considering the *Villani* factors in this case, the Applicant was relatively young at her minimum qualifying period (MQP) date, being 44 years old. She had completed high school and a behavioural modification course intended to assist her in dealing with her autistic son's behaviour. She has two children, a severely autistic son and a daughter who was diagnosed with attention deficit hyperactivity disorder, Asperger's syndrome and post-traumatic stress disorder. The Applicant worked for many years at various part-time jobs. There were no issues with her language proficiency.

[20] The General Division did not find that the above factors reflected the Applicant's incapacity to work. However, I have reviewed the record and note that the Applicant has not been able to maintain employment since the end of her MQP (December 2011) due to her health condition. Dr. Pond, her family physician, noted in 2014 that the Applicant had been unable to work since December 2011. Dr. Pond has treated the Applicant since 1997 and diagnosed her with generalized anxiety disorder and depression in 1999. Since that time, she has also been diagnosed with attention deficit disorder, social anxiety, panic disorder, learning disabilities and post-traumatic stress issues pertaining to her children's medical issues. Although the General Division noted *Villani* and set out the relevant factors in this case, I do not find that the General Division's analysis was sufficient.

[21] At paragraph 31 of the General Division decision, it states:

> The Appellant has been shown to have depression that has been present for many years. She has been taking medication for many years while she was working. The Tribunal finds that it is her family situation that has had a significant negative affect on her ability to work in an appropriate workplace.

[22] In *Garrett v. Canada (Minister of Human Resources Development)*, 2005 FCA 84, the Federal Court of Appeal determined that, in addition to the applicant's primary health condition, the *Villani* factors should be considered in a "real world" context, including what

impact an applicant's health condition has on their respective employability. This assessment ought to include consideration of any aggravating factors. Similarly, in *Bungay v. Canada (Attorney General)*, 2011 FCA 47, the Federal Court of Appeal states at paragraph 8:

> Employability is not to be assessed in the abstract, but rather in light of "all of the circumstances". The circumstances fall into two categories:
>
> (a) *The claimant's "background."* Matters such as "age, education level, language proficiency and past work and life experience" […]
>
> (b) *The claimant's "medical condition."* This is a broad inquiry, requiring that the claimant's condition be assessed in its totality. All of the possible impairments of the claimant that affect employability are to be considered, not just the biggest impairments or the main impairment.

[23] On reading the General Division decision, at paragraph 9, the *Villani* principles are stated but there is no meaningful analysis that follows. At paragraph 31, the General Division notes only the Applicant's depression and the fact that she had been prescribed medication to treat her depression. Leaving this fact, the General Division then concludes that the Applicant's family life is the primary factor in her inability to work, despite medical evidence that the Applicant's health condition prevented her from working and that her difficult family life was an aggravating factor which exacerbated her health condition. There is, in fact, no indication that the General Division considered both the Applicant's background factors and medical condition in its totality within the context of her employability as contemplated by the Court in *Garrett* and *Bungay*. There is no evidence that the General Division considered whether the Applicant's health condition was affected by her life experiences at home. An applicant's "past work and life experience" ought to be considered in a real world context. The General Division failed to provide a meaningful analysis of this particular *Villani* factor. This may be an error of law, which, if proven on its merit, has a reasonable chance of success on appeal. Leave to appeal is granted on this ground.

CONCLUSION

[24] The Application is granted.

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

Meredith Porter
Member, Appeal Division