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

Citation: *P. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 353

Tribunal File Number: AD-16-638

BETWEEN:

P. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: July 20, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated March 14, 2016, which determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan*, as the General Division had found that his disability had not been "severe" by the end of his minimum qualifying period on April 30, 2012, the month before he began receiving a retirement pension. The Applicant filed an application requesting leave to appeal on May 3, 2016, invoking several grounds of appeal.

ISSUE

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

ANALYSIS

[3] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to 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.

[4] Before I can grant leave to appeal, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[5] The Applicant alleges that the General Division erred under each of these grounds of appeal. Essentially, he argues that the General Division erred in law and, in particular, that it failed to apply *Villani v. Canada (Attorney General)*, 2001 FCA 248, and to consider his circumstances.

[6] The Applicant sustained injuries to his lower back following a work-related accident in 2006. He claims that, since then, he has been unable to sit for more than 15 minutes at a time. However, the General Division noted the medical evidence, including the opinion of Dr. Ivanov, who had indicated in March 2012 that the Applicant was able to work in a sitting position for limited periods. The General Division determined that the Applicant exhibited residual work capacity for occupations other than his past employment as an airline pilot and, as such, he was required to have undertaken efforts to obtain and maintain employment or should have shown that such efforts had been unsuccessful because of his health condition.

[7] The Applicant asserts that the General Division, when assessing the severity of his disability under the *Canada Pension Plan*, should have considered his residency and age. He has been residing in Luxembourg for at least the past 25 years. He fails to qualify for a work permit because he is not a European Union citizen and therefore is unable to work in the country. He also claims that, in any event, he does not have the requisite language skills (Luxembourgish, French and German) for any employment in Luxembourg. He argues that his age and residency hinder his employability, much like a limited education can, and that this hindrance thereby renders him severely disabled for the purposes of the *Canada Pension Plan*.

[8] Although the General Division did not conduct an extensive analysis of the Applicant's particular circumstances in a "real world" context, it is clear that it considered his age, language proficiency, education, and past work and life experience. The General Division determined that these factors were not relevant in a "real world" context when it assessed the severity of the Applicant's disability. Despite the brevity of its analysis, I see no reason to interfere with the member's assessment. After all, the Federal Court of Appeal

cautioned against interfering with a decision-maker's assessment of an applicant's circumstances, provided that he or she applies the correct legal test for severity.

[9] The General Division was aware that the Applicant resides in Luxembourg. At paragraph 22, it noted that the Applicant was unable to work in Luxembourg and that he did not look for work outside that jurisdiction. The General Division also concluded that the evidence was clear that there was a strong financial disincentive against working, as the Applicant would then be disentitled to a generous pension from the Luxembourg government. The General Division noted that the Applicant also felt tied to Luxembourg, as his daughter resides in France. However, the General Division considered the Applicant's residency in the context of whether he met the requirements under *Inclima v. Canada (Attorney General)*, 2003 FCA 117, that an appellant who exhibits work capacity is required to show that efforts at obtaining and maintaining employment have been unsuccessful by reason of the person's health condition.

[10] The General Division did not consider the Applicant's residency when it conducted the real-world analysis set out in *Villani.* However, the Federal Court of Appeal in *Villani* did not contemplate residency as one of the types of particular circumstances to be considered when assessing the severity of one's disability. At paragraph 38, the Federal Court of Appeal listed some of the relevant factors, "such as age, education level, language proficiency and past work and life experience."

[11] *Canada (Minister of Human Resources Development) v. Rice*, 2002 FCA 47, is of some relevance. The Minister sought judicial review of a decision of the Pension Appeals Board, which found Mr. Rice disabled. The Federal Court of Appeal considered whether the Pension Appeals Board erred in law in having regard to socio-economic considerations. Mr. Rice resided in a small community where fishing was the primary industry, and the possibility of him obtaining employment in that community was remote, if not impossible. The Federal Court of Appeal determined that Mr. Rice's residence and the possibility of him obtaining employment were irrelevant; it agreed with the Minister that "socio-economic factors such as labour market conditions" are irrelevant in determining whether an appellant is severely disabled.

[12] At paragraph 10, the Federal Court of Appeal continued and determined that Isaac J.A.'s reference in *Villani* to the "hypothetical occupation" makes it clear that "what is relevant is any substantially gainful occupation having regard to the individual's personal circumstances, but not whether real jobs are available in the labour market."

[13] I am cognizant of the obvious factual differences between *Rice* and the Applicant's situation. In Mr. Rice's situation, employment was unavailable in his community. Here, the Applicant claims that, because of his residency in Luxembourg, work is unavailable to him. However, I find that the Federal Court of Appeal in *Rice* clearly determined that residency and the possibility of employment there are irrelevant considerations and, in that regard, find this decision applicable to the Applicant's circumstances.

[14] In *Canada (Minister of Human Resources Development) v. Angheloni*, 2003 FCA 140 at paras 13 to 14, and in *Canada (Minister of Human Resources Development) v. Harmer*, 2002 FCA 321, the Federal Court of Appeal held that economic conditions are not a relevant consideration when assessing the severity of a claimant's disability. In both cases, the Court determined that subparagraph 42(2)(a)(i) of the *Canada Pension Plan* refers to the capability of the individual regularly of pursuing any substantially gainful occupation and not to whether, in the context of the labour market, it is possible to get a job. Similarly, in the proceedings before me, the Applicant argues that he is severely disabled, largely in the context of his residency, when the focus should be on his capability regularly of pursuing any substantially gainful occupation. I see parallels between these authorities and the proceeding before me.

[15] I find also that that, from an employment perspective, there are no compelling reasons why the Applicant is unable to relocate to another jurisdiction, including Canada, where he would be free to regularly pursue a substantially gainful occupation suitable to his physical limitations. The fact that relocating may jeopardize the pension he currently receives from Luxembourg, or the fact that his daughter also resides in Europe, is of no relevance when assessing the severity of his disability under the *Canada Pension Plan*.

[16] Finally, to support his claim for a disability pension, the Applicant refiled a medical report dated May 7, 2014, prepared by Dr. Ranney, an orthopaedic consultant. However, neither an application for leave to appeal nor an appeal to the Appeal Division allows for a reassessment or a redetermination of the evidence that was before the General Division unless there is a reviewable error in connection with that evidence. The Applicant does not allege that to be the case. The General Division has already tried this evidence. As the Federal Court held in *Tracey*, when determining whether leave to appeal should be granted or refused, the Appeal Division has no role under the DESDA in reassessing the evidence or reweighing the factors considered by the General Division.

CONCLUSION

[17] Given the considerations above, the application requesting leave to appeal is refused.

Janet Lew
Member, Appeal Division