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

Citation: *Minister of Employment and Social Development v. M. H.,* 2017 SSTADIS 358

Tribunal File Number: AD-16-1094

BETWEEN:

Minister of Employment and Social Development

Applicant

and

M. H.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: July 24, 2017

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada rendered on May 31, 2016, which determined that the Respondent had a severe and prolonged disability in August 2012, when she stopped working. The General Division also determined that she was therefore entitled to a Canada Pension Plan disability pension, with payments effective December 2012.

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] The Applicant submits that the General Division erred under paragraphs 58(1)(*b*) and (*c*) of the DESDA.

[5] Before granting 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 endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

Alleged errors of law

a. Incapable regularly of pursuing any substantially gainful occupation

[6] The Applicant argues that the General Division erred in law by failing to consider whether the Respondent was incapable regularly of pursuing any substantially gainful occupation, rather than just her former occupation.

[7] At paragraph 39, the General Division explained why it had found that the Respondent had a severe disability "that rendered her incapable regularly of pursuing any substantially gainful occupation." Its reasons included the fact that a psychologist, a counsellor and the Respondent's family physician were of the opinion that the Respondent was not ready to return to her work at any time in the near future because of her pain and emotional issues, because she had failed an attempt to return to work and because her pain would prevent her from returning to work. The General Division noted that the Respondent's family physician had confirmed that she had functional limitations with standing and walking. At paragraph 40, the General Division found that the Respondent's fibromyalgia, post-traumatic stress disorder, depression and chronic adjustment disorder "work together to create limitations with respect to her mood and ability to cope with stress as well as physical limitations (walking and standing) that have rendered the [Respondent] incapable regularly of pursuing any substantially gainful occupation since she stopped working in August 2012."

[8] The General Division relied, in part, on evidence that indicated that the Respondent was not ready to return to her former workplace. Despite this, given that on at least two separate occasions—at paragraphs 39 and 40—the General Division specifically stated that it had considered whether the Respondent was "incapable regularly of pursuing any substantially gainful occupation," I am not satisfied that the appeal has a reasonable chance of success on the allegation that the General Division failed to consider whether the Respondent was incapable regularly of pursuing any substantially gainful occupation.

[9] The Applicant's submissions suggest that the General Division should have examined whether the Respondent had complied with *Inclima v. Canada (Attorney General)*, 2003 FCA 117; in other words, whether she had demonstrated that her efforts at obtaining and maintaining employment had been unsuccessful because of her health. The Applicant argues that the Respondent could not have met the requirements under *Inclima*, as she had failed in her attempt to find work outside of her former employment. However, the Federal Court of Appeal indicated that there must be some evidence of work capacity if a claimant is to show that efforts at obtaining and maintaining employment have been unsuccessful by reason of his or her health condition. Here, the General Division determined that the Respondent lacked any work capacity and, therefore, it was unnecessary for it to determine whether her efforts at obtaining and maintaining employment had been unsuccessful because of her health.

b. Villani

[10] The Applicant argues that the General Division erred in law by failing to cite *Villani v. Canada (Attorney General)*, 2001 FCA 248, and by failing to conduct a "real world" analysis by considering the Respondent's particular circumstances such as her age, past work and life experience, education and language proficiency. The Applicant also cited *Garrett v. Canada (Attorney General)*, 2005 FCA 84, where the Federal Court of Appeal wrote:

> In the present case, the majority failed to cite the *Villani* decision or conduct their analysis in accordance with its principles. This is an error of law. In particular, the majority failed to mention evidence that the applicant's mobility problems were aggravated by fatigue and that she would have to alternate sitting and standing; factors which could effectively make her performance of a sedentary office or related job problematic. This is the 'real world' context of the analysis required by *Villani*.

[11] The Applicant notes that the Respondent was 47 years old at the time of her application and that her record of contribution indicates that she has worked almost continuously throughout her life. The Applicant also notes that the evidence indicates that the Respondent had a variety of jobs, including as a manager at McDonald's Restaurants.

The Applicant contends that the Respondent therefore had a variety of transferrable skills and work experience. The Applicant argues that, had the General Division considered the Respondent's previous work and life experience, it would have likely found that she was not severely disabled.

[12] I do not find it necessary for a decision-maker to cite *Villani*, provided that he or she conducts a "real world" analysis when assessing the severity of a claimant's disability. However, it is not readily apparent that the General Division conducted such an analysis. On this basis, I am prepared to grant leave to appeal. However, the Federal Court of Appeal appears to have contemplated a "real world" approach in giving large and liberal construction to the *Canada Pension Plan*. At paragraph 29, it wrote, "the meaning of the words used in that provision [subparagraph 42(2)(a)(i) of the *Canada Pension Plan* must be interpreted in a large and liberal manner, and any ambiguity flowing from the [*sic*] *those* words should be resolved in favour of a claimant for disability benefits." The Applicant should be prepared to address why *Villani* should be applied in as restrictive a manner as it proposes.

c. Prolonged test

[13] The Applicant further argues that, although the General Division correctly cited the test for a prolonged disability, it erred by failing to *de facto* consider the "indefinite" portion of the prolonged test under paragraph 42(2)(*a*) of the *Canada Pension Plan.*

[14] The Applicant submits that a disability is prolonged only if it is likely to be long continued and of indefinite duration or is likely to result in death. The Applicant argues that the medical condition must be of indefinite duration to meet the "prolonged" branch of the test for a disability.

[15] The Applicant asserts that the General Division appears to have focused on the "long continued" portion of the test, without analyzing the "indefinite" portion of the test. The Applicant contends that this is particularly significant, in light of various reports from the Respondent's physician and psychiatrist, indicating that she is currently unable to work.

[16] Under subparagraph 42(2)(*a*)(ii) of the *Canada Pension Plan*, a disability is prolonged "only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death."

[17] At paragraph 45, the General Division set out its analysis under the prolonged test.

> The Tribunal finds that the Appellant has a prolonged disability for the following reasons:
>
> a) her mental health condition has not improved despite treatment, including a trial of medication and counselling since 2010;
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> b) her mental health condition has been long continued with medical evidence as early as 2003 that the Appellant was having emotional difficulties in coping; and
>
> c) even if her mental health condition does improve there is no indication in the evidence on file that the Appellant's fibromyalgia pain will improve to the point where she will regain capacity to work.

[18] Under paragraph 45c), although the General Division did not use the words "indefinite duration," it appears to have addressed the "indefinite duration" portion of the prolonged test, as it contemplated what the Respondent's condition might be for an unstated or unknown period of time. For this reason, I am not satisfied that the appeal has a reasonable chance of success on this issue.

Alleged erroneous findings of fact

[19] The Applicant also argues that the General Division based its decision on several erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it, but as I have already granted leave to appeal, I need not address them at this juncture.

CONCLUSION

[20] The application for leave to appeal is granted. This decision granting leave to appeal does not in any way prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division