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

Citation: *K. L. v. Minister of Employment and Social Development*, 2017 SSTADIS 366

Tribunal File Number: AD-17-133

BETWEEN:

K. L.

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 25, 2017

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the General Division's decision dated December 27, 2016, which determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan*. The General Division found that her disability had not been "severe" on or before the end of her minimum qualifying period on December 31, 2013.

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 any of 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. The Applicant submits that the General Division erred in law and that it also based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it.

[5] The Applicant submits that the General Division failed to consider her personal characteristics, such as her age, educational level and language proficiency, in a "real world" context in determining whether she was severely disabled and incapable regularly of pursuing any substantially gainful occupation. This is the test that was articulated by the Federal Court of Appeal in *Villani v. Canada (Attorney General),* 2001 FCA 248.

[6] *Villani* requires that a decision-maker adopt a "real world" approach, i.e. that he or she takes into account an appellant's particular circumstances, such as his age, education level, language proficiency, and past work and life experience, when assessing whether an appellant is incapable regularly of pursuing any substantially gainful occupation. The Federal Court of Appeal also stated that the assessment of an appellant's circumstances is a question of judgment with which one should be reluctant to interfere. Hence, if the General Division conducted the "*Villani*" test and an appellant (in this case the Applicant) simply disagrees with the manner of the assessment, I should refrain from interfering with that assessment.

[7] The Applicant argues that had the General Division considered her age, education and limited ability to speak English, in addition to her psychiatric disability, it would have been apparent that her medical condition prevents her from performing any work.

[8] The Applicant notes the following medical opinions:

- On March 4, 2011, her psychiatrist diagnosed her with a major depressive disorder with psychotic features.

- In February 2014, another psychiatrist indicated that the Applicant reported weekly panic attacks. He diagnosed her with a panic disorder and a major depressive disorder, with a poor prognosis.

[9] The Applicant notes that she experiences side effects—such as fatigue and dizziness—from taking psychiatric medication. The Applicant argues that past psychiatric treatments with a third psychiatrist (O'Brien) do not appear to have helped and "therefore, more intensive psychiatric treatments at this point would not be appropriate." From this, I understand that the Applicant is essentially arguing that the General Division failed to

consider the reasonableness of her non-compliance with treatment recommendations. In *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211, the Federal Court of Appeal determined that the "real world" context also means that a decision-maker must consider whether a claimant's refusal to undergo treatment is reasonable and what impact that refusal might have on his or her disability status should the refusal be considered unreasonable.

[10] The General Division wrote:

> [40] [...] Because of her limitations in expression, however, the Tribunal agrees with the Appellant's submission that the principle outlined in *Villani* would have some applicability to this Appellant when assessing severity.
>
> [41] However, a careful review of the evidence leads the Tribunal to conclude that a detailed analysis of the "real world" context outlined in *Villani* is not necessary in this case. Even if the Appellant were to be successful in establishing a *prima facie* severe disability, she would still have a duty to mitigate her condition through the pursuit of appropriate and recommended treatment. For the reasons that follow, the Tribunal concludes that the Appellant has failed to mitigate her condition and therefore cannot be found to be severely disabled.
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> [42] The duty of mitigation in the context of CPP disability benefit claims has been affirmed in various ways by federal courts, the Tribunal itself, and by the Tribunal's predecessors. In *Kambo* v. *The Minister of Human Resources Development*, 2005 FCA 353, the Federal Court of Appeal affirmed that claimants have a personal responsibility to cooperate in their health care. In that case, the claimant had consistently received medical advice to increase her physical exercise and activities but had unreasonably failed to do so and had adopted an almost completely sedentary lifestyle.

[11] The General Division noted that the Applicant's health caregivers indicated that she was compliant with therapy, taking her medications and attending appointments, but the General Division also noted that several health caregivers had recommended that she exercise and undergo rehabilitation with an occupational therapist. It noted that "exercise [had] been recommended on more than one occasion." The General Division also noted that at least two different psychiatrists had recommended some form of vocational upgrading or training, including language training. The General Division indicated that, most importantly, the Applicant had discontinued and was no longer pursuing psychiatric treatment "with any

vigour for many months." Although the Applicant had left two messages with a psychiatrist, the General Division found that this was inadequate and unreasonable in the circumstances.

[12] The Applicant has addressed the issue as to why she no longer pursues any psychiatric treatment. She explains that she does not see any utility and does not find that it would even be "appropriate" to continue with any psychiatric treatment, as she perceives that there has been little improvement to date. Apart from the fact that there does not appear to have been any evidence before the General Division to support her claim that it would be futile to continue with any psychiatric treatments, there is still the issue of whether the General Division considered whether the Applicant's explanations for her non-compliance with other treatment recommendations were reasonable and what impact that refusal to undergo treatment might have on her disability status.

[13] The General Division considered whether the Applicant's explanations for why she failed to exercise were reasonable. It was unconvinced that the Applicant's purported foot pain was a reasonable explanation for failing to exercise. Besides, it noted that the Applicant had indicated in September 2015 that she could walk for 45 minutes and that she could still exercise without necessarily exacerbating her foot pain. The General Division noted that the Applicant was unable to explain why she had discontinued treatment with an occupational therapist. In May 2014 and July 2015, her psychiatrist had recommended involving a rehabilitation specialist to further assess her readiness for work, but she has not been assessed since 2012. He had also considered referring her to the Mental Health Day Program at a local hospital, although this was never arranged. Although the Applicant may have expected the psychiatrist to arrange the referrals to a rehabilitation specialist and to the Mental Health Day Program, it is clear that, overall, the General Division determined that the different forms of treatment—particularly exercise—had the Applicant pursued them, would have been beneficial to her, and that it was unreasonable for her not to pursue them. The General Division cited examples where the Applicant "repeatedly either failed to pursue recommended programs, made an inadequate effort, or has not followed up on potential referrals." The General Division noted that her doctors found that she had been compliant with appointments, but the General Division found that her compliance did not extend to the recommendations or suggestions made during the appointments.

[14] The General Division was aware of and applied the legal principles set out in both *Villani* and *Lalonde.* Accordingly, I am not satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[15] Given the considerations above, the application for leave to appeal is refused.

Janet Lew
Member, Appeal Division