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

Citation: *M. P. v. Minister of Employment and Social Development*, 2017 SSTADIS 349

Tribunal File Number: AD-16-1051

BETWEEN:

M. P.

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: July 20, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant is seeking to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated May 30, 2016, which determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on August 25, 2016.

ISSUE

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

THE LAW

[3] 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." Determining leave to appeal is a preliminary step to a hearing on the merits and it is an initial hurdle for an applicant to meet; however, the hurdle is lower than the one that must be met at the hearing stage of an appeal on the merits.

[4] 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." The Applicant must establish that there is some arguable ground upon which the proposed appeal might succeed in order for leave to appeal to be granted (*Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630). An arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success (*Fancy v. Canada (Attorney General)*, 2010 FCA 63).

[5] 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

[6] The Applicant submits that the General Division ignored certain evidence in the record before it and failed to attribute proper weight to the medical evidence, particularly with respect to the Applicant's psychological impairment.

[7] The General Division also dismissed certain medical evidence without providing reasons for doing so, including the opinions of Dr. Kleinman, of her psychologist and her physiatrist, with respect to her ability to work. The Applicant submits that, as a result, the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner and without regard for the material before it.

ANALYSIS

[8] In *Villani v. Canada (Attorney General)*, 2001 FCA 248, the Federal Court of Appeal set out the criteria for assessing the severity of a disability under the CPP and stated that the criteria must be assessed in a "real world" context, as follows:

> [50] […] the approach to the definition of disability does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation". Medical evidence will still be needed as will evidence of employment efforts and possibilities.

[9] It is the Applicant's capacity to work, and not the diagnosis of her disease, that determines the severity (*Klabouch v. Canada (Social Development)*, 2008 FCA 33), and where

there is evidence of work capacity, the Applicant must demonstrate her efforts to obtain employment. Where those efforts have failed, the failure must be attributable to the medical condition (*Inclima v. Canada (Attorney General)*, 2003 FCA 117). I further note that the determination of the severity of the disability is not premised upon an applicant's inability to perform her regular job, but rather on her ability to perform any work (*Klabouch*).

[10] In this case, the Applicant's minimum qualifying period (MQP), or the date by which she must be found to have a severe and prolonged disability, is December 31, 2008. The Applicant had been involved in a motor vehicle accident in January 2007 and she attributes her deteriorated health condition to that accident.

[11] Prior to her accident, the Applicant had finished grade 12 and had gained experience working part-time in a bakery for three months and full-time as a janitor at an apartment building for approximately three years. Her language proficiency was good.

[12] Three months following the motor vehicle accident, in April 2007, the Applicant attempted to work as a general labourer on an assembly line. She worked at this occupation for six or seven weeks and states that she missed work periodically during that time as a result of her health condition. She also consistently sought help from her coworkers in order to perform job- related tasks. She eventually left this employment. At paragraphs 22 to 24 of its decision, the General Division notes that since leaving this job, the Applicant has not attempted to find other employment within her limits and has not attempted to retrain for lighter or sedentary work due to her inability to concentrate, sit at a desk or use a computer.

[13] The Applicant's counsel takes issue with the General Division's finding that the Applicant has capacity for gainful employment. It is counsel's position that the medical evidence and the opinions of attending physicians and specialists in the record contradict the General Division's findings. The Appeal Division is not in a position to reweigh the evidence that the General Division has already considered. As set out above in paragraph 5, the grounds for which the Appeal Division may grant leave to appeal do not include a reconsideration of evidence already considered by the General Division. The General Division has discretion to consider the evidence before it and, where the General Division finds certain evidence more reliable than other evidence, it must give reasons for preferring that evidence. However, the

Applicant has submitted that the General Division failed to provide adequate reasons for preferring certain evidence and for dismissing the opinions of certain health professionals. The Applicant has also submitted that the General Division erroneously found that the opinions stated in certain medical evidence were contrary to those in other evidence. It is the Applicant's assertion that the medical evidence in the record is consistent.

[14] On review of the evidentiary record in its entirety, I do not find that the General Division has overlooked evidence or failed to consider the evidence in light of the legal framework for determining disability pursuant to the provisions of the CPP and relevant jurisprudence. The General Division provides a summary of the medical evidence it finds most persuasive in paragraphs 28 to 39 of the decision. The General Division's reasoning is not arbitrary. The date range for the medical evidence in the record spans from 2007—prior to the MQP date—to 2015, which is nearly eight years post-MQP. At paragraph 50, the General Division states that medical evidence that is dated shortly after the expiration of the MQP date is preferred as it best reflects the Applicant's health condition at the time of her MQP date, which I have already clarified is the date by which the Applicant must be found disabled.

[15] The Applicant argues that the General Division ought not to have found that Dr. Kleinman's opinion lacked objectivity merely because his expert medico-legal assessment was commissioned for litigation purposes. The Applicant's counsel submits that Dr. Kleinman's report was written shortly after the Applicant's MQP date and further argues, at page of the written submissions, that:

> Dr. Kleinman was asked for his opinion in the normal course whereby counsel may request an expert opinion pursuant to the Rules of Civil Procedure. The very foundation of determinations of disability in tort matters centers upon the assumption that expert medical assessors are providing a fair and unbiased opinion. Determination of disability and damages are routinely formulated at all judicial levels based on the evidence presented by expert medical assessors. Their opinions are not to be dismissed or diminished without justification.

[16] I note that the General Division states that less weight is being placed on Dr. Kleinman's report because it was commissioned by the Applicant's counsel for the purposes of litigating the motor vehicle accident, and it provides no further reasons, explanation or examples from the

report to substantiate that finding. I also note that Dr. Kleinman's report was dated October 19, 2009, which was 10 months after the MQP date. Although the General Division may have erred in failing to provide adequate reasons for dismissing Dr. Kleinman's opinion, I must consider whether this ground of appeal has a reasonable chance of success.

[17] I am proceeding on the assumption that the General Division found Dr. Kleinman's report to lack objectivity on the basis that reports written by medical experts are considered 'third party reports.' As third party reports, they are prepared for a third party process (e.g. legal proceeding), instead of for the provision of health care. I also note that, in civil proceedings before a court, experts can be cross-examined and their findings scrutinized for objectivity, impartiality, scope of expertise, comprehensiveness and accuracy. I assume that this is also a factor that the General Division based its findings on, although it ought to have explained why it could not find Dr. Kleinman's report objective in this context.

[18] On careful reading of Dr. Kleinman's report, which was completed nine months after the Applicant's MQP date, I note that his findings in the context of the criteria for determining disability under the CPP support the General Division's findings in any respect. At page 10 of his medico-legal report, Dr. Kleinman states:

> It has now been over 2 years since the time of her accident. Her test of disability would therefore include whether she is completely disabled from any occupation for which she is reasonably suited by education, training or experience. I note that Ms. Palacios has a high school level of education and limited vocational skills. I do not believe that it is reasonable to expect that she could return to gainful employment **at this time** given the significant deconditioning and her chronic pain complaint. I believe that she is totally disabled and not employable in her current state. [my emphasis]
>
> As noted, I believe that she should be seen for a chronic pain program. At the completion of such a program, consideration can be given to a vocational evaluation so as to determine whether there is an employment cluster for which she is reasonably suited based on education, training and experience. I do not believe that she will ever likely be able to return to any type of physically demanding jobs and that **consideration will need to be given to vocational retraining to a more sedentary type of occupation**. [my emphasis]

[19] The above opinion is that the Applicant is incapable of working at the time that the report was completed, but it does not state that the Applicant's disability is both severe and

prolonged. In Dr. Kleinman's opinion, the Applicant is probably not capable of returning to a physically demanding job but, with some retraining, she may be able to find employment within her limits. This opinion does not support a finding that the Applicant suffers from a severe and prolonged disability.

[20] The opinions of the other treating physicians, Dr. Kapoor and Dr. Patel, were also completed shortly after the Applicant's MQP date. Their evidence, which was dated January 2009 and October 2009 respectively, was that the diagnostic imaging of the Applicant's cervical and lumbar spine was normal. At that time, the Applicant was diagnosed with myofascial pain syndrome and some depression. Dr. Kapoor recommended treatment for the pain syndrome, which included physical therapy, Baclofen and attendance at a pain management clinic for their opinion. Dr. Patel, a pain management expert, found that the Applicant's spine was within "normal limits" and that there were no motor or sensory deficits in both the upper and lower extremities. His recommended treatment included aqua therapy, yoga, physiotherapy and massage therapy. He also advised that she should reduce her weight to help control her pain and seek psychiatric therapy. However, the Applicant did not pursue the recommended counselling. She did not seek any kind of mental health support for over two years, until 2011. The General Division did not find that the recommended conservative treatment for the Applicant's physical impairments, paired with the fact that she did not follow through with recommended treatment for her psychological impairment, was evidence of a severe disability. The reports of Dr. Kleinman, Dr. Kapoor and Dr. Patel, which were all completed in close proximity to the Applicant's MQP date, did not support a finding that the Applicant was incapable regularly of pursuing any substantially gainful occupation at the time of the her MQP date and continuously thereafter.

[21] I do not find that the Applicant has raised a ground of appeal that has a reasonable chance of success. Even though the General Division failed to fully explain why Dr. Kleinman's opinion wasn't as persuasive as the evidence of the other treating physicians closer to the MQP date, it was consistent with the opinions of the other physicians who provided medical evidence shortly following the Applicant's MQP date, with respect to the General Division's determination of disability pursuant to the CPP. Ultimately, the conclusion that the General Division reached would be the same regardless of whether Dr. Kleinman's opinion was

afforded equal consideration. I have also found that the General Division gave consideration to the entire evidentiary record and I cannot find where relevant evidence was overlooked (*Bungay v. Canada (Attorney General)*, 2011 FCA 47. I also cannot find that the General Division misconstrued any evidence, oral testimony or documentary evidence, in the decision.

[22] Leave to appeal cannot be granted on the ground that the General Division based its decision on an erroneous finding of fact.

CONCLUSION

[23] The Application is refused.

Meredith Porter
Member, Appeal Division