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

Citation: *K. K. v. Minister of Employment and Social Development*, 2017 SSTADIS 390

Tribunal File Number: AD-16-947

BETWEEN:

K. K.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Jennifer Cleversey-Moffitt

Date of Decision: August 3, 2017

REASONS AND DECISION

INTRODUCTION

[1] On May 16, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) had determined that a disability pension under the *Canada Pension Plan* was not payable. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division, which received it on July 19, 2016.

ISSUE

[2] The Member must decide whether the appeal has 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."

[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."

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

[6] The process of assessing whether to grant leave to appeal is a preliminary one. The review requires an analysis of the information to determine whether there is an argument that would have a reasonable chance of success on appeal. This is a lower threshold to meet than the one that must be met on the hearing of the appeal on the merits. The Minister does not have to prove the case at the leave to appeal stage: *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC). The Federal Court of Appeal, in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success.

SUBMISSIONS

[7] The Applicant's representative submits that the General Division erred in law in making its decision, as the Member did not apply proper legal principles in determining whether the disability was severe and prolonged under CPP. The Applicant's representative argues that the General Division failed to adjudicate CPP disability based on "performance, productivity, and profitability" in the context of determining a person's ability to work (AD1-3). Furthermore, it is submitted that the General Division erred by not properly considering the Applicant's capacity of pursuing any substantially gainful employment in a "real world" context as required in *Villani v. Canada*, 2001 FCA 248.

[8] The Applicant's representative submits that the General Division decision relied on erroneous findings of fact. Specifically, the submissions are that the cumulative impact of the multiple medical conditions was not considered. Additionally, the submissions argue that improper weight was placed on certain medical opinions—notably, that no weight was placed on the medical evidence confirming the "CS-6 disc herniation which required surgery noted as anterior cervical discectomy and fusion using a cornerstone graft and anterior Atlantis plating in addition to a left shoulder impingement syndrome." (AD1-3) As well, the submissions argue that the General Division did not consider the Applicant's general complaints of pain and that there was a lack of consideration of overall functionality and capacity. Finally, with respect to the issue of work capacity, the Applicant's representative submits that the General Division did not properly assess the capacity to "perform, be productive and achieve profitability in any type

of employment" (AD1-3) by not considering the permanent restrictions recommended for both the shoulder and neck disability, as well as the limitations they caused.

ANALYSIS

[9] The Applicant's representative submits that the General Division, in neglecting to consider the Applicant's personal characteristics such as her age, level of education, language proficiency, past work experience and life experience, did not apply *Villani*. At paragraph 38 of *Villani*, the Federal Court of Appeal stated:

> [38] This analysis of subparagraph 42(2)(a)(i) strongly suggests a legislative intention to apply the severity requirement in a "real world" context. Requiring that an applicant be incapable regularly of pursuing any substantially gainful occupation is quite different from requiring that an applicant be incapable at all times of pursuing any conceivable occupation. 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.

[10] It is clear that the General Division decision did not cite *Villani* specifically; however many of the Applicant's personal characteristics are mentioned in paragraph 8 of the decision—the Evidence portion of the decision. One does not need to cite *Villani*, but an analysis considering the *Villani* factors is required. Merely stating the personal characteristics in the evidence portion of the decision, however, is not sufficient. A meaningful analysis must be conducted. In the Analysis portion of the decision, the General Division conducted a very thorough review of the evidence and in paragraph 51 concludes:

> [51] The Tribunal determined the conservative nature of the Appellant's treatment subsequent to surgery in September 2012, the absence of any specialist seen subsequent to December 2012, the absence of any report from the Appellant's family physicians addressing the Appellant's work capacity contemporaneous to the Appellant's MQP, or at all, the absence of any investigative reports subsequent to an MRI scan in August 2012, the medical evidence that the Appellant's shoulder and neck condition improved significantly following surgeries in 2010 and 2012,

> respectively, the absence of any medical evidence the Appellant suffered from or was treated for significant headache pain, the evidence the Appellant returned to work following surgeries, the absence of medical evidence the Appellant's condition worsened significantly, or at all, subsequent to stopping work in October 2014 and prior to her MQP, and the absence of evidence that obtaining and maintaining employment has been unsuccessful by reason of the Appellant's health condition, led to the conclusion the Appellant did not have a severe disability prior to the end of her MQP of December 31, 2014.

[11] Although the review referenced much of the evidence, it failed to give consideration to how personal characteristics would have impacted her capacity regularly of pursuing any substantially gainful occupation in a "real world" context. This does not mean that the Applicant would necessarily be found disabled for the purposes of the CPP, but rather that, without a proper analysis, it is difficult to determine whether the General Division properly discharged its duty. This potential error in law has a reasonable chance of success on appeal. Leave to appeal is granted on this ground.

[12] With respect to assessing capacity to work, the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration, or if it is likely to result in death. (s. 42(2) of the CPP) Furthermore when assessing capacity to work, the General Division turned its analysis to the decision in *Inclima v. Canada (Attorney General),* 2003 FCA 117, which states:

> Consequently, an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.

[13] The General Division cited *Inclima* and then went on to search for evidence that the Applicant had attempted work but that, because of her health condition, she could not regularly pursue substantially gainful employment. Paragraphs 38–45 outline the synopsis of evidence related to the Applicant's work capacity. In paragraph 45, the Member states: "There are no medical reports contemporaneous to the Appellant's MQP, and accordingly, no medical reports

that address the Appellant's work capacity contemporaneous to her MQP." After a review of the information, the General Division Member concludes in paragraphs 47 and 48:

> [47] The Tribunal determined the conservative nature of the Appellant's treatment during the period subsequent to surgeries in 2010 and 2012, prior to her MQP, and thereafter, being essentially medication, the absence of any medical report contemporaneous to the Appellant's MQP suggesting the Appellant was incapable of working, the evidence the Appellant returned to work in January 2013 subsequent to neck surgery, and continued to work a considerable period of time thereafter, constituted evidence of work capacity.
>
> [48] The Appellant has not looked for work not precluded by her functional shoulder limitations since she stopped working in October 2014, and has not attended any educational upgrading or retraining program since 2006, which would permit her to obtain skills necessary to acquire work not precluded by her functional limitations.

[14] Ultimately, the General Division Member assessed the evidence on file and at the hearing, and he was unable to find that the Applicant had established, on a balance of probabilities, her entitlement to CPP disability benefits. However, because the *Villani* analysis was not conducted appropriately, perhaps there is an impact on the capacity to work analysis. *Inclima* stands for the principle that where there is evidence of some work capacity, one needs to determine whether the Applicant has attempted to find work that is suitable given their health condition. Additionally, *Klabouch v. Canada (Social Development)*, 2008 FCA 33, has established that it is not the Applicant's inability to do his or her particular job that matters, but rather that they cannot obtain and maintain "gainful employment" at all. The General Division did a thorough review of the evidence on file and concluded that there was some work capacity but that the Applicant had not attempted to find work. This could be impacted by the *Villani* analysis, and leave to appeal has been granted on that ground.

[15] The Applicant's representative has raised other grounds of appeal as well, but as the Federal Court of Appeal in *Mette v. Canada (Attorney General)*, 2016 FCA 276, indicated, it is unnecessary for the Appeal Division to address all the grounds of appeal that an applicant has raised. The Federal Court of Appeal stated that subsection 58(2) of the DESD Act "does not require that individual grounds of appeal be dismissed. Indeed, individual grounds may be so

inter-related that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave."

[16] Given the relative strength of the grounds upon which I have granted leave to appeal, I find it unnecessary to address these other grounds.

CONCLUSION

[17] The application for leave to appeal is allowed.

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

Jennifer Cleversey-Moffitt
Member, Appeal Division