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

Citation: *F. A. v. Minister of Employment and Social Development*, 2017 SSTADIS 374

Tribunal File Number: AD-16-879

BETWEEN:

F. A.

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 26, 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 24, 2016, which determined that the Applicant had failed to establish, on a balance of probabilities, that she had suffered a severe and prolonged disability on or before her minimum qualifying period (MQP) and, as a result, 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 Division on June 29, 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 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." In order for leave to appeal to be granted, the Applicant must establish that there is some arguable ground upon which the proposed appeal might succeed (*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 (*Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *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, in failing to consider the Applicant's credible testimony and the medical evidence in the record based its decision on an erroneous finding of fact.

[7] The General Division made an erroneous finding of fact in determining that the Applicant had failed to follow the treatment recommendations of several health professionals.

[8] The General Division erred in law by failing to properly apply *Villani v. Canada (Attorney General)*, 2001 FCA 248, to the facts of this case.

ANALYSIS

Did the General Division fail to consider credible evidence in the record?

[9] The Applicant has contended that, despite her credible testimony that her limitations stemming from her health condition prevent her from pursuing any substantially gainful occupation, the General Division erred in failing to find the Applicant suffered from a severe disability. The Applicant argues that the General Division should have considered that several health professionals had confirmed her incapacity to work and that this constitutes an erroneous finding of fact pursuant to paragraph 58(1)(*c*) of the DESD Act.

[10] I do not find that this argument holds much weight. The General Division summarized the Applicant's testimony and the medical evidence in the record in paragraphs 8 to 21 of the

decision. The General Division accepts that the Applicant suffered a workplace injury that resulted in some lingering health conditions that have created some functional restrictions and that have affected the Applicant's ability to work. However, the General Division also references the opinions of several health professionals, including several of the physicians whose opinions the Applicant asserts the General Division overlooked.

[11] The Applicant's MQP date was December 31, 2015. She had suffered a workplace injury in May 2013. On reading the record, I note that Dr. Lucas had diagnosed her with lower back pain and chronic pain syndrome in July 2013. In September 2013, Dr. Chow had found her to be functionally restricted, but tests completed at that time showed only mild physical health conditions, and the treatment advised by Dr. Chow was "conservative." Dr. Siddiqui reported in January 2014 that the Applicant complained of low back pain with radiation to the right leg, made worse by walking and standing. Dr. Schacter reported in July 2014 that the Applicant suffers low back pain and lower extremity radiculopathy, but that her major disability is her non-physical response to a fairly mild back injury. He did not believe that she was capable of working **at that time** (my emphasis), and I note that the Applicant self-imposed limitations with respect to her range of motion during specific assessments. She did not want to cause further physical injury or pain to herself. In April 2015, Dr. Chase confirmed that the Applicant's health condition had been made worse with weight-bearing and right-hip girdle movements, and that she was not capable of working in the capacity that she had previously.

[12] The General Division also considered that the medical evidence in the record reflected the following overall assessment of the Applicant's health condition:

> Her treating physicians indicate the lack of clinically based anatomical findings that would explain her ongoing symptoms. There are no defined pathologic findings in the spine or specific neurologic findings that correlate her clinical symptoms. There were no abnormalities identified in a lumbar spine MRI dated May 3, 2013 or in pelvis and sacroiliac joint x-rays dated May 3, 2013.

[13] All the above evidence is found in the General Division's decision. In completing a thorough review of the evidentiary record, I do not find that the General Division overlooked any relevant medical information, reports or opinions. The General Division's decision does not

reflect the fact that the General Division based its decision on an erroneous finding of fact without regard for the material before it as set out in paragraph 58(1)(*c*) of the DESD Act. Alternatively, pursuant to the same section of the DESD Act, the Applicant must demonstrate that the General Division based its decision on an erroneous finding of fact and that the General Division did so in a perverse or capricious manner. The Federal Court in *Rouleau v. Canada (Attorney General*), 2017 FC 534, concluded that "merely showing that the findings of fact are debatable does not reach the high bar of 'perverse or capricious or without regard for the material […]'" The General Division found that there was not sufficient medical evidence in the record to support the Applicant's subjective, self-assessed capacity to work. Although this fact may be debatable, such an argument does not meet the requirements of paragraph 58(1)(*c*) of the DESD Act.

[14] 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 that the General Division has already considered. The General Division has the discretion to consider evidence before it and, where the General Division finds certain evidence more reliable than other evidence, it must give reasons for preferring that evidence (*Canada (Attorney General) v. Fink*, 2006 FCA 354). The General Division's decision, in this case, has provided reasons for the General Division's reliance on the medical evidence in the record.

[15] The Applicant may disagree with the General Division's findings, but the Applicant's disagreement with the General Division's findings is not a ground for appeal enumerated in subsection 58(1) of the DESD Act. The Appeal Division does not have broad discretion in deciding leave to appeal pursuant to the DESD Act. It would be an improper exercise of the delegated authority conferred upon the Appeal Division to grant leave to appeal on grounds not included in subsection 58(1) of the DESD Act (*Canada (Attorney General) v. O'keefe*, 2016 FC 503). Leave to appeal is not granted on the ground that the General Division failed to properly consider the Applicant's testimony regarding her limitations, or the medical opinions of attending physicians.

Did the General Division err in finding that the Applicant had failed to comply with recommended treatment?

[16] The Applicant has submitted that the General Division erroneously determined that the Applicant had failed to follow through with Dr. Schacter's recommended treatments, which included intensive psychological counselling. Specifically, the Applicant's counsel has submitted that:

i. The Appellant testified that she would have participated in such a program if the Workplace Safety and Insurance Board (WSIB) had offered one, but that the WSIB had not done so.

ii. The Appellant also testified that she does not have the financial resources to pay for psychological counselling on an ongoing basis.

iii. The Appellant did attend at a pain clinic for treatment and co-operated fully.

iv. There is no evidence that an intensive psychological program would have any effect on the severity of her condition within any defined period of time.

[17] The submissions of the Applicant's counsel on this issue appear at odds with the evidence that the General Division relied on in making its findings on this issue, which were primarily based on the oral evidence that the Applicant have given during her hearing before the General Division. Paragraph 31 of the General Division's decision reads (in part):

> […] Similarly, in *Bulger* v. *MHRD*, (May 18, 2000, CP 9164 (PAB), the Pension Appeals Board stated that an applicant for a disability pension is obligated to abide by and submit to treatment recommendations and, if this is not done, the applicant must show the reasonableness of his or her noncompliance.[…]
>
> Dr. Schacter reported on January 26, 2015 that she was assessed at the Rothbart Pain Management Centre, **but did not follow their suggestions for treatment as there was no guarantee**. Dr. Schacter also noted that she is very depressed, but has not been treated by a psychologist or psychiatrist. He found that her major disability is based on her non-physical response to a fairly mild back injury and recommended a very intense psychological and psychiatric approach to her ongoing symptoms and a supervised exercise program.

> Dr. Schacter clearly stated in his report that she requires a very intense psychological or psychiatric approach. The Appellant testified that she was asked to see a psychologist and psychiatrist, but that **the idea of doing so depressed her and therefore she did not follow through on this recommendation. She also did not follow through on the recommendation to pursue swimming because she worries she will get worse**. [emphasis added]

[18] The Applicant's counsel submits that the Applicant failed to comply with Dr. Schacter's recommended treatment because she did not have the financial resources to do so. He further submits that she would have engaged in counselling if it had been offered through WSIB, and that there is no evidence that intensive psychological programming would alleviate the severity of her condition. All these arguments are contrary to the evidence that the Applicant gave at her hearing, and I cannot find that this results in an error on the part of the General Division.

[19] Leave to appeal is not granted on the basis that the General Division based its decision on an erroneous finding of fact in determining that the Applicant had failed to follow through with recommended treatment, and that she had also failed to provide a reasonable explanation for failing to comply with her physician's advised treatment. Leave to appeal is not granted on this ground.

Did the General Division fail to properly apply the *Villani* factors?

[20] The Applicant has submitted that the General Division failed to properly apply *Villani* to the Applicant's specific circumstances in this case. The Applicant argues that this is an error of law.

[21] Disability is not assessed in accordance with the Applicant's medical diagnosis or health condition (*Klabouch v. Canada (Social Development)*, 2008 FCA 33). The test for determining disability under the CPP has been articulated by the Federal Court of Appeal in *Villani*:

> [50] This restatement of 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."

[22] *Villani* sets out the test for determining disability under the CPP. According to *Villani*, the test for determining the severity of a disability is not that a disability be "total," but that it should be assessed in a "real world" context. Factors such as the applicant's age, education level and language proficiency, as well as past work and life experience, should be considered in determining whether an applicant is disabled under the CPP. It is not sufficient, however, to simply state that the *Villani* factors have been carefully considered. The General Division's careful consideration of the *Villani* factors in light of an applicant's particular circumstances must be evident in reading the decision. A person's employability must be assessed in light of all the circumstances, including the *Villani* principles and the applicant's medical condition assessed in its totality (*Bungay v. Canada (Attorney General)*, 2011 FCA 47). The Federal Court of Appeal further articulated the *Villani* principles in *Inclima v. Canada (Attorney General)*, 2003 FCA 117, stating that applicants seeking to demonstrate that they suffer from a severe disability under the CPP must adduce evidence of a serious health problem and, where there is capacity to work, must also show that efforts to obtain and maintain employment have failed because of that health problem. It is not the applicant's inability to do their particular job that matters, but any "gainful employment" at all. (*Klabouch*)

[23] The Applicant submits that her health condition, assessed in a real-world context, renders her unemployable at any gainful occupation. The Applicant asserts that, with only a Grade 12 education and English being her second language, she is incapable regularly of pursuing any substantially gainful occupation because she has limited functional ability for three or four hours at which time she needs to lie down for 60 to 90 minutes. The Applicant argues that, although she may have been able to function for three or four hours at a time before having to lie down, when the time to get ready for work and the commuting time are factored into that brief timeframe, there is little time allowed for actually working. Essentially, she argues, no employer would hire or retain an employee who needs to lie down within two hours after arriving to work. The Applicant asserts that only a benevolent employer would accommodate her functional precautions.

[24] The General Division did consider her health condition in the context of the *Villani* factors. At paragraph 25 of the decision, the General Division writes:

> […] the Tribunal considered that the Appellant was only 41 years old as of the MQP with a good education (grade 12 and hair stylist trade certificate). She is able to communicate in English. She has worked in various types of jobs, including in a beauty store, as a server, in a bakery and doing food preparation in a kitchen.

[25] The General Division considered that the Applicant was relatively young at the time of her MQP date. Although English was her second language, she had no language proficiency issues identified that would interfere with her ability to communicate or function in a workplace. In fact, she had successfully functioned in various jobs prior to her MQP date with the language proficiency that she has. In terms of her education, she has completed high school and has obtained an additional trade certificate as a hairstylist. She was gainfully employed for several years.

[26] There is no evidence in the record that demonstrates that the Applicant is incapable of retraining or of furthering her education. There are no significant cognitive limitations noted in the evidence that would prevent the Applicant from learning skills that would facilitate finding an occupation within her limitations. The General Division, at paragraph 30, acknowledges that the Applicant has some functional limitations that prevent her from engaging in certain occupations. However, the General Division did not find, in considering her health condition in a real-world context, that she was rendered incapable regularly of pursuing any substantially gainful occupation. She retained some capacity to work and, where there is capacity to work, she must demonstrate efforts to obtain employment. (*Inclima*) She did not demonstrate that she had made any efforts to obtain employment within her limitations, and she did not demonstrate that she had attempted to retrain for employment opportunities within her functional limits either. Her evidence before the General Division, as stated at paragraph 11, of the decision was as follows:

> She has not attempted to look for any other work since then. She does not feel capable of working because she needs to lie down after 1-1.5 hours and requires breaks. She does not feel that anyone would hire her given her difficulty bending. She has not looked into retraining because she already has degrees.

[27] The Appeal Division does not find that the Applicant's argument that her transferable skills "are not of assistance in finding regular home-based work" holds much weight. The evidence does not support this claim.

[28] Leave to appeal is not granted on this ground.

CONCLUSION

[29] The Application is refused.

Meredith Porter
Member, Appeal Division