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

Citation: *R. D. v. Minister of Employment and Social Development*, 2017 SSTADIS 402

Tribunal File Number: AD-17-154

BETWEEN:

R. D.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: August 11, 2017

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated November 10, 2016. The General Division had earlier conducted a hearing by videoconference and determined that the Applicant was ineligible for the disability benefit under the *Canada Pension Plan* (CPP) because her disability was not "severe" prior to the minimum qualifying period (MQP), which ended on December 31, 2009.

[2] On February 16, 2016, within the specified time limitation, the Applicant's representative submitted an application requesting leave to appeal to the Appeal Division.

THE LAW

[3] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Appeal Division may be brought only if leave to appeal is granted, and the Appeal Division must either grant or refuse leave to appeal.

[4] Subsection 58(2) of the DESDA provides that leave 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 DESDA, 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] Some arguable ground upon which the proposed appeal might succeed is needed for leave to appeal to be granted: *Kerth v. Canada.*[1] The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success: *Fancy v. Canada.*[2]

[7] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for an applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the applicant does not have to prove the case.

ISSUE

[8] The Appeal Division must decide whether the appeal has a reasonable chance of success.

SUBMISSIONS

[9] In her application requesting leave to appeal, the Applicant alleges that the General Division erred in law as follows:

(a) It misapplied the principle from *Inclima v. Canada*[3] by giving inadequate consideration to evidence that the Applicant had unsuccessfully attempted to hold on to a series of jobs prior to applying for CPP disability benefits.

(b) It misapprehended *Villani v. Canada*[4] in determining that the Applicant's age, education, language skills and work experience did not pose significant barriers to her return to work.

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[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (QL).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.
[3] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.
[4] *Villani v. Canada (Attorney General)*, 2001 FCA 248.

ANALYSIS

Inclima

[10] The Applicant submits that the General Division misapplied *Inclima* by disregarding evidence that she has tried and failed to remain employed. Specifically, the Applicant alleges that the General Division found she had not discharged her obligation to pursue alternative work, despite evidence that she had asked her last employer about a different job, although none was available. The General Division also ignored her enrollment in college courses in 2012-13 and two unsuccessful attempts to do different types of jobs—one as a retail worker, the other as a cleaner.

[11] In my view, this ground does not carry a reasonable chance of success on appeal. *Inclima* stands for the proposition that, where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition. In this case, the General Division correctly cited *Inclima* and noted the Applicant's testimony about her efforts to continue in the workforce:

> [23] The Tribunal was told that the Appellant asked her employer about a different job due to her difficulties but there was none available. In order to try and find a job that was less physical she tried to take courses in 2012-13 but she was not successful at completing them.
>
> [26] It was documented that the Appellant attempted a short return to work when she tried to working a retail store and making an attempt at cleaning a neighbour's house and both of these attempts were unsuccessful. The Appellant told the Tribunal she was unsure how she was going to clean her neighbour's home since she was unable to clean her own home.

[12] I have reviewed the relevant sections of the audio recording of the hearing and confirmed that the General Division accurately relayed the substance of the Applicant's testimony on these points. I also heard the General Division actively questioning the Applicant to determine: (i) whether she had in fact enrolled in college courses (she replied that she had made inquiries and was dissuaded from taking them by an admissions officer); (ii) whether she had actually worked in a retail store (she stated that she had only submitted an application to a

Winners store) and (iii) whether she had really attempted to clean her neighbour's house (she said that her symptoms would have made such a project impossible).

[13] The General Division then relied on these facts, once established, to find that the Applicant had made insufficient effort to pursue work that would accommodate her medical conditions:

> [36] The Tribunal noted that the Appellant testified that she had attempted to find work at Winner's however she was never called for that job. The Appellant also stated that she had tried to clean her neighbour's house however since she was unable to clean her own home she had to tell her neighbour that she was unable to do that job. The Tribunal finds that while the Appellant has indicated that she is unable to maintain any type of employment due to her symptoms the reality is that she has not proven an inability to obtain and maintain employment due to her symptoms as per the factors in the *Inclima* case.

[14] I concede that the General Division's explanation of its reasoning on this point is fragmentary, but the result is consistent with the evidence, and I do not see how the General Division has misapplied *Inclima* to the facts at hand. The General Division, as trier of fact, was within its authority to weigh the evidence and make findings within the confines of the law. Having found that the Applicant made a less than wholehearted attempt to retrain or find suitable work, the General Division was entitled to draw an adverse inference, notwithstanding the Applicant's claims of chronic pain and depression.

Villani

[15] The Applicant submits that the General Division misapplied *Villani* when it concluded that the Applicant's disability fell short of severe, even in face of evidence that her personal factors would impede her ability to retrain or find alternative employment. In particular, the Applicant took issue with the General Division's finding that the Applicant had "transferable skills that would allow her the opportunity to find alternate employment," even though her Canadian work history had been confined to domestic labour. The Applicant also notes that she was 59 years old at the time of the hearing, and English is her second language, which she learned as an adult. Although she was able to answer questions in English at the hearing, it was not an indication that she is sufficiently proficient to be able to maintain "office" work.

[16] I see an arguable case on this ground. Although the General Division correctly summarized *Villani* in paragraph 31 of its decision, I think it is fair to ask whether the General Division properly applied it in considering the Applicant's work history. In paragraph 35, the General Division wrote:

> The Appellant is nearing the end of her work career as she was 59 years of age at the time of the appeal hearing. She had received her education in Brazil and had been involved as a sales person during her time living in that country. Upon arriving in Canada the Appellant had found work doing domestic cleaning and helping her husband with the requirements around his church. She indicated to the Tribunal that she had taken ESL courses upon arriving in Canada and had requested an interpreter during the appeal hearing but the Tribunal found that the Appellant's level of English was very good and the interpreter was not pressed into service for most of the hearing. The Tribunal found that the Appellant was an intelligent individual who had a good understanding of the English language and was able to answer all the questions posed to her by her Representative. The Tribunal took into account the *Villani* factors and found that the Appellant had transferable skills that would allow her the opportunity to find alternate employment however the Tribunal does note that the Appellant's work history in Canada has been one of domestic labour and given the Appellant's symptoms is hesitant that the Appellant could find alternate employment outside of this area.

[17] Let me observe that, while the Applicant may have been nearly 60 at the time of the hearing, she was only 52 when her coverage period ended on December 31, 2009. Still, I note the General Division found that the Applicant had transferrable skills, although there was no evidence that she had done anything other than manual labour since coming to Canada in 2001. Oddly enough, the General Division then undercut its own finding by expressing doubt that anyone would hire the Applicant for "alternate" employment, which I assume means sedentary work in sales or clerical positions. As the concept of "employability" is intrinsic to any consideration of the *Villani* factors, I am satisfied that the Applicant has a reasonable chance of success on appeal in arguing that the General Division failed to take a realistic look at her prospects for finding lower impact work.

CONCLUSION

[18] I am granting leave to appeal on the sole ground that the General Division may have erred in law by failing to apply *Villani v. Canada* in assessing the severity of the Applicant's disability.

[19] Should the parties choose to make further submissions, they are free to offer their views on whether a further hearing is required and, if so, what format is appropriate.

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

Member, Appeal Division