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

Citation: *S. H. v. Minister of Employment and Social Development*, 2017 SSTADIS 404

Tribunal File Number: AD-16-1349

BETWEEN:

S. H.

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

Canada

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated September 28, 2016. The General Division had earlier conducted an in-person hearing and determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP), because her disability was not severe during her minimum qualifying period (MQP), which ended on December 31, 2015.

[2] On December 6, 2016, within the specified time limitation, the Applicant submitted an application requesting leave to appeal to the Appeal Division.

THE LAW

Canada Pension Plan

[3] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

(a) be under 65 years of age;

(b) not be in receipt of the CPP retirement pension;

(c) be disabled; and

(d) have made valid contributions to the CPP for not less than the MQP.

Department of Employment and Social Development Act

[4] 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.

[5] 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.

[6] 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;
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> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

[7] 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]

[8] 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.

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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.

ISSUE

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

SUBMISSIONS

Erroneous Findings of Fact

[10] The Applicant's representative submits that the General Division based its decision on erroneous findings of fact made in a perverse and capricious manner or without regard for the material before it:

(a) At paragraph 12 of its decision, the General Division notes that the Applicant "testified she was on Ontario Disability benefits (ODSP) for about six years (medical reports indicate 16 years)." In fact, she testified during the first part of her hearing that she started receiving Ontario Disability Support Program (ODSP) benefits after she separated from her husband in about 2001.

(b) Also at paragraph 12, the General Division states that the Applicant re-entered the workforce, first working in a secretarial position typing minutes and then, in 2009, working in a jewelry store. However, during the hearing, the Applicant gave a lengthy history of her work experience, which included brief episodes of secretarial work (at 3:25 of the audio recording of the hearing) and six years with Charm Diamond Centre that *ended* in 2009. It appears that that General Division member was either not attentive during the September 20, 2016, teleconference or distracted by technical difficulties, which are evidenced at minutes 34, 40, 43, 44, 48 and 52 of the recording.

(c) In paragraph 43, the General Division finds that the Applicant did not fulfill her personal responsibility to cooperate in her health care: "She […] failed to follow up appointments with a psychologist despite testifying she suffers from anxiety." However, the General Division failed to recognize that the Applicant's family physicians treated her for her anxiety and delusional episodes for years and, as her primary care providers, were qualified to do so. In addition, the General Division neglected to consider the Applicant's evidence that her psychologist's

pain management program negatively affected her well-being, as it involved group therapy listening to other people complaining about their problems.

(d) During the hearing, the Applicant described in detail her various medical conditions—including chronic pain in her lower back and left leg, as well as hand tremors and anxiety—and the negative impact they have had on her life. However, the General Division failed to give this evidence due weight, even though it was corroborated by her medical providers and thereby improperly assessed the severity of the Applicant's disabilities in light of subparagraph 42(2)(*a*)(i) of the CPP.

Errors of Law

[11] The Applicant's representative submits that, in making its decision, the General Division erred in law, whether or not the error appeared on the face of the record:

(a) It failed to apply *Garrett v. Canada*[3] by not considering the factors set out in *Villani v. Canada.*[4]

(b) It failed to apply *Attorney General of Canada v. Dwight-St. Louis*[5] by giving insufficient consideration to the available evidence that the Applicant's disability was severe in the context of her personal circumstances.

(c) It failed to apply *E.J.B. v. Canada*[6] by inadequately considering all of the Applicant's conditions and their collective impact on her functionality in a "real world" context.

(d) It failed to apply *Inclima v. Attorney General*[7] by finding that the Applicant had had some capacity to return to work at the end of her MQP on December 31, 2015.

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[3] *Garrett v. Canada (Minister of Human Resources Development)*, 2005 FCA 84.
[4] *Villani v.* Canada (*Attorney General)*, 2001 FCA 248.
[5] *Attorney General of Canada v. Dwight-St. Louis*, 2011 FC 492.
[6] More commonly known as *Bungay v. Canada (Attorney General)*, 2011 FCA 47.
[7] *Inclima v. Attorney General*, 2003 FCA 117.

[12] The Applicant also referred to the recent case of *Karadeolian v. Canada*[8] to caution the Appeal Division, in its function as gatekeeper, against mechanistically applying the language of section 58 of the DESDA when deciding whether to grant leave to appeal: "If important evidence has been arguably overlooked or possibly misconstrued, leave to appeal should ordinarily be granted notwithstanding the presence of technical deficiencies in the application for leave."

ANALYSIS

Errors of Fact

[13] Under subsection 58(1) of the DESDA, a factual error by itself is insufficient to overturn a decision; the General Division must have also *based* its decision on that error, which itself must have been "made in a perverse or capricious manner or without regard for the material before it." In other words, the error must be material *and* egregious.

Receipt of ODSP Benefits

[14] The evidence on when, and for how long, the Applicant was on ODSP benefits was ambiguous. I have reviewed the audio recording of the hearing and did not hear the Applicant say, contrary to the General Division's finding, that she had been on ODSP for six years. I am prepared to concede that the General Division erred on this point, except that it did allow there was documentary medical evidence[9] showing the duration was instead 16 years. In doing so, the General Division was in effect acknowledging that there was uncertainty on this question. As an illustration of the General Division's inaccuracy, the Applicant claimed that she testified that she started receiving ODSP benefits after she had separated from her husband around 2001, but my review of the recording[10] suggests that she actually said that she had gone on ODSP before the end of her marriage.

[15] In the end, even if the General Division did err on this point of fact, I do not think it was capricious, perverse or without regard for the record. More importantly, I see no indication that

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[8] *Karadeolian v. Canada (Attorney General),* 2016 FC 615.
[9] As indicated in Dr. MacCullum's and Dr. Pursley's reports at GD2-89 and GD4-95 respectively.
[10] At the 8:55 mark, where the Applicant indicates she began receiving ODSP benefits after her first nervous breakdown.

the General Division ultimately based its decision, in whole or in part, on whether the Applicant had collected provincial disability benefits and, if so, when she had done so.

[16] I am not convinced this ground would have a reasonable chance of success on appeal.

Tenure at Jewelry Store

[17] In paragraph 12 of its decision, the General Division writes:

> She re-entered the work force first in a secretarial position typing minutes and then in 2009 worked for a retail jewelry store. She testified she was fired because her boss was having an affair and this made the Appellant anxious so her boss reacted by terminating her employment.

[18] This passage implies that the Applicant worked at the jewelry store for only a brief period before being fired in 2009. The audio recording of the hearing confirms that this is wrong; the Applicant clearly testified that she worked at Charm Diamond Centre from 2003 to 2009.

[19] I see a reasonable chance of success on this ground. The General Division's analysis suggests that it placed considerable weight on the extent and variety of the Applicant's past work experience, noting at paragraph 46: "She obtained significant work experience including some skills from self-employment. She has worked in a secretarial position, retail, self-employment selling water systems, and helping her husband's business."

[20] If the General Division overlooked the Applicant's six years as a retail worker at Charm Diamond Centre, then it may have assumed those years were instead spent in secretarial positions, thereby exaggerating her experience in white-collar positions and giving rise to a distorted picture of her employability. I see an arguable case that the General Division may have based its decision on an erroneous finding of fact. Whether it did so in a "perverse or capricious manner" or "without regard for the material" is a matter best left for further consideration.

[21] As for the alleged technical difficulties, I heard a few split-second digital beeps—likely aural artefacts of the teleconference—in the recording but detected no indication that they distracted General Division member.

Lack of Treatment for Anxiety

[22] The Applicant criticizes the General Division for drawing an adverse inference from her failure to attend psychologist appointments, on the premise that it ignored evidence that she had received mental health treatment from her family physicians.

[23] I do not see a reasonable chance of success on this ground. There is a line of case law that requires CPP disability applicants to take all reasonable steps to seek treatment, with a view to regaining as much capacity as possible.[11] The Applicant's disability claim is founded, in part, on anxiety and depression, which are listed prominently in the questionnaire accompanying application for benefits. In paragraph 14 of its decision, the General Division writes:

> The Appellant testified that she has not seen a Psychiatrist, Psychologist or other mental health provider since 2003 (Psychologist report is dated 2014). She testified that the report by Dr. Pursley that she declined to pursue counselling was incorrect. She further stated she did decline a counselling group as this would be a negative experience due to people sitting around complaining.

[24] Later, in paragraph 43 the General Division writes:

> She stated she saw a Psychologist on one occasion and was "discharged." The Psychologist Dr. Pursley wrote the she was aware she was welcome to book an appointment in the future should the need arise. The evidence indicates the Appellant did not book another appointment after the two appointments in May and June 2014.

[25] A mental health specialist, whether he or she is a psychiatrist or psychologist, presumably has expertise in treating anxiety and depression that goes beyond what a general practitioner can offer. In discharging the Applicant on May 16, 2014, Dr. Pursley wrote, "S. H. feels she is coping okay independently and she does not wish to pursue counselling at this time." If the Applicant did not feel she required the services of a specialist, then the General Division could fairly say that she had declined counselling, and it was not unreasonable for it to conclude that her psychological issues were less than severe. In my view, the General Division had a rational basis for drawing an adverse inference from the fact that the Applicant declined counselling from a mental health specialist. As for the Applicant's participation in the

[11] *Bulger v. Minister of Human Resources Development* (May 18, 2000), CP 9164 (PAB).

recommended pain management program, the decision shows that the General Division was aware of her explanation for refusing to do so. It was open to the General Division, in its capacity as trier of fact, to decide whether that explanation was reasonable.

Weighting of Evidence

The Applicant argues that the General Division failed to give due weight to testimony in which she described her various medical conditions and their impact on her functionality.

I do not see a reasonable chance of success on this ground, which is based on the premise that the General Division attached insufficient importance to a certain type of evidence. While the Applicant may not agree with the General Division's conclusions, it is open to an administrative tribunal to sift through the relevant facts, assess the quality of the evidence, determine what evidence, if any, it chooses to accept or disregard, and decide on its weight. The courts have previously addressed this issue in other cases where it has been alleged that administrative tribunals failed to consider all the evidence. In *Simpson v. Canada*,[12] the appellant's counsel identified a number of medical reports that she said the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the application for judicial review, the Federal Court of Appeal held:

> [A]ssigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact…

[26] The General Division's reasons indicated a clear preference for the documentary medical evidence, but I see nothing unreasonable—or contrary to the law—in this approach. Contrary to the applicant's submissions, the General Division did not disregard the Applicant's testimony but made explicit reference to it, finding it unreliable for defensible reasons clearly stated in paragraph 41 of its decision.

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[12] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

Errors of Law

***Failure to Apply* Garrett**

[31] The Applicant submits that the General Division failed to apply *Garrett* by inadequately considering the *Villani* factors. The Applicant acknowledges that the General Division correctly cited *Villani* at paragraph 45 of its decision, and that it noted aspects of her personal background and characteristics, including her age (50 at the time of her MQP), education (a high school diploma and a six-month secretarial course) and language proficiency (as a native-born English speaker). However, the Applicant alleges that the General Division erred in concluding that there was "no indication of cognitive barriers to retraining or upgrading [the Applicant's] education to enhance her employable skills." The Applicant submits that the General Division ignored her testimony that she was incapable of retraining or returning to the workforce in a sedentary job because of tremors, anxiety and low back and left leg pain.

[32] I will grant this ground of appeal to proceed only to the extent that it dovetails with the allegation, for which I have already granted leave to appeal, that the General Division misconstrued the Applicant's work history. As I have noted above, I think it is possible that the General Division had an exaggerated view of the Applicant's secretarial experience. Otherwise, the Applicant alleges that the General Division misrepresented the Applicant's personal characteristics, but she does not identify any specific error; she only repeats her overarching argument that the General Division paid insufficient attention to her testimony that her medical conditions rendered her incapable of desk work.

***Failure to Apply* Dwight-St. Louis**

[33] The Applicant referred to this precedent in arguing that it is not enough for a tribunal to merely cite *Villani*; it must actively assess the severity of a claimant's disability in the context of her personal circumstances and the real world of employment.

[34] On this question, I see no error in law. After duly summarizing the ratio of *Villani*, the General Division made what appears to me to be a wholehearted effort to apply it to the facts at hand:

> The Appellant was only 50 years of age at the time of the MQP. She obtained significant work experience including some skills from self-employment. She has worked in a secretarial position, retail, self-employment selling water systems, and helping her husband's business, thus obtaining a variety of skills and experience. She does not suffer from any barriers with regards to language proficiency and obtained a high school education as well as some secretarial courses. She testified she can sit for an hour on the right chair and there is no indication of cognitive barriers to retraining or upgrading her education to enhance her employable skills. The Tribunal finds the Appellant did not prove on a balance of probabilities she suffered from a severe disability as defined in the CPP at the time of the MQP in a real world context.

[35] The Applicant also quoted a passage from *Dwight-St. Louis* that emphasized the necessity of discussing a piece of evidence before discounting it. The Applicant then specifically criticized the General Division for failing to address how her medical conditions affected her ability to engage in any form of regular gainful occupation. I have already concluded that the General Division discharged its obligation to consider the Applicant's background and personal factors, and I have already determined that General Division addressed the material aspects of the Applicant's physical and psychological conditions. It is true that the General Division's reasons do not contain a comprehensive and detailed discussion of the relative weights it assigned to every item of evidentiary minutiae, but there is nothing in the law—and certainly nothing in *Dwight-St. Louis* as I read it—that required the General Division to do so. I conclude that the General Division adequately discharged its obligation to apply the *Villani* real-world test and complied with refinements introduced by *Dwight-St. Louis*. I see no arguable case for this ground of appeal.

***Failure to Apply* Bungay**

[36] In *Bungay*, the Federal Court of Appeal held that employability was not to be assessed in the abstract, but rather in light of all the circumstances, including the claimant's: (i) background; and (ii) overall medical condition, which comprises all the impairments that could affect employability—not just the "biggest" or "dominant" impairments. The Applicant submits that the General Division erred in law by failing to take into account the totality of her condition in determining that her impairments were less than severe. Specifically, the General Division is

alleged not to have considered the Applicant's medical conditions, which include chronic pain and anxiety, as well as hand tremors.

[37] I have already addressed the issue of whether the General Division adequately considered the Applicant's *Villani* factors and found no arguable case that it failed to do so. In the end, the Applicant's submissions on this ground amount to no more than an argument that the General Division ignored, or failed to give adequate consideration to, the several ailments that she claims comprise her disability.

[38] The bulk of the General Division's decision consists of summaries of most—if not all—of the medical evidence, which documented, to varying degrees, the Applicant's medical conditions and associated symptoms. As held in *Simpson v. Canada*,[13] an administrative tribunal is presumed to have considered all the evidence and need not refer to each and every piece of evidence before it in setting out its reasons. It was within the General Division's authority to make its own determination about which of the Applicant's claimed impairments were significant and which were not. That said, the decision strongly suggests that the General Division not only recognized its obligation under *Bungay*:

> [44] A claimant's condition is to be assessed in its totality. All of the possible impairments are to be considered, not just the biggest impairments or the main impairment (*Bungay v. Canada (Attorney General)*, 2011 FCA 47). The Appellant indicated there are a number of symptoms that result in her being unable to retrain or pursue any substantially gainful occupation. The subjective evidence of the Appellant as to her impairments is not supported by the medical providers. Dr. Pursley noted in June 2014 the Appellant had significant improvement in her pain, mood and generally is coping well. Dr. Shoop completed a Current Functional Limitation: Degree of Limitation report dated in December 2015. There was only slight cognition and sensation degree of limitation. She could walk for up to an hour, stand up to an hour and sit for 15 minutes. Dexterity was normal and could lift up to 5 pounds. There was only moderate psychological degree of limitation. Poor focus due to pain and the need to move around slightly was noted. The limitations noted by Dr. Shoop do not constitute a severe disability that renders the Appellant incapable of "any" substantially gainful occupation. The limitations noted indicate a capacity to engage in sedentary occupations that do not require lifting more than 5 pounds or

[13] *Supra.*

> standing/walking for more than hour. Dr. Shoop opined the Appellant could not return to work however the functional limitations noted by her do not support her opinion. There are not any opinions on file by specialists indicating the Appellant is precluded from regularly pursuing any substantially gainful occupation. The Tribunal finds the Appellant did not prove on a balance of probabilities that all of the possible impairments in their totality constitute a severe disability as defined in the CPP.

[39] Here, I see a full and genuine attempt to sort through the Applicant's various complaints to determine whether, in total, they constituted a "severe" disability prior to the end of the MQP. In my view, I see no arguable case that the General Division ignored the Applicant's secondary complaints or that it failed to give consideration to her whole condition.

Failure to Consider **Inclima**

[40] The Applicant submits that the General Division failed to follow the directive of the Federal Court of Appeal on the issue of mitigation:

> [A]n 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.

[41] The Applicant alleges that the General Division erroneously concluded that she was able to engage regularly in a substantially gainful occupation as of December 31, 2015. She submits that there was in fact no evidence of capacity, as confirmed by three reports from Dr. Shoop:

- There was a letter dated July 8, 2014, stating that the Applicant had been advised not to return to work at this time. Her prognosis was unclear.
- There was an attending physician's statement dated March 25, 2015, noting that the Applicant had been diagnosed with myofascial pain of the left hamstring, as well as musculoskeletal lower back pain. A recovery or return to work date was not expected, and she was barred from returning work on a gradual basis. Her prognosis for recovery was unclear.
- There was a clinical note dated December 14, 2015, declaring the Applicant's prognosis for recovery "poor." She was not expected to be able to return to work.

[42] I am not convinced that the Applicant has an arguable case on this ground. All but one of the above documents were summarized in the General Division's decision, which also referred to several other reports that Dr. Shoop prepared. As noted, an administrative tribunal is presumed to have considered all the evidence and does not need to refer to each and every piece of evidence before it in setting out its reasons.

[43] Paragraph 42 reads in full as follows:

> [42] 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 (*Inclima v. Canada (A.G.),* 2003 FCA 117). The Appellant has not made any effort to engage in retraining or any effort at obtaining employment. She indicates she suffers from anxiety however she does not attend with a Psychologist despite the invitation by the Psychologist to make an appointment as needed. Dr. Ostofe, chiropractor noted the subjective complaints of the Appellant however she was at a loss to explain these complaints. In October 2013 the Family Doctor (Dr. Shoop) noted there was no medical basis for the ongoing sick leave. Dr. McCallum noted back pain with a favourable prognosis. The Appellant has some limitations however she has not shown any motivation to pursue upgrading or an occupation within her limitations. Dr. Pursley recommended she increase her activity level. Dr. McCallum in a consultation report indicated a favourable prognosis and did not note any significant limitations or restrictions. The Tribunal finds the lack of effort of the Appellant in obtaining or maintaining employment is not due to her health condition.

[44] I acknowledge that merely citing *Inclima* is insufficient, and there must also be some indication that the decision-maker has correctly applied facts to principle. The Applicant alleges that there was no evidence she had capacity, and the General Division erred in concluding that she was able to work at the time of her MQP, but of course, the entire purpose of the hearing was to determine whether she had such capacity, and the General Division was within its authority to weigh the evidence and make findings on that question within the confines of the law. Dr. Shoop's opinion that the Applicant was unlikely to return to work was not necessarily determinative, and the General Division was within its authority to assign weight to competing evidence in finding that the Applicant has residual capacity.

[45] *Inclima* demands that where there is evidence of *some* work capacity (as opposed to none at all), the decision-maker must investigate whether an applicant has taken steps to find work that is suitable to his or her health condition. If the applicant has failed to do so or has stopped working for reasons other than that health condition, the tribunal may be justified in drawing an adverse inference. In this case, having reviewed the evidence, the General Division found that, while the Applicant suffered from back pain and anxiety, she did have some residual functionality that warranted an *Inclima* inquiry. Paragraph 42 indicates that the General Division relied on the Applicant's testimony to determine that her effort to find alternative employment was insufficient.

CONCLUSION

[46] I am granting leave to appeal on the sole basis that, by overlooking the Applicant's six years of work as a retail worker at a jewelry store from 2003 to 2009, the General Division may have based its decision on an erroneous finding of fact. I also see an arguable case that this misapprehension, if that is what it was, may have had affected the General Division's assessment of the Applicant's *Villani* factors and their impact on her employability. In confining the appeal to these two grounds, I am satisfied, as required by *Mette v. Canada*,[14] that they are sufficiently discrete in subject matter to be adjudicated separately from the grounds that I have disposed of at leave.

[47] 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.

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

Member, Appeal Division

[14] *Mette v. Canada (Attorney General)*, 2016 FCA 276.