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

Citation: *K. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 419

Tribunal File Number: AD-17-128

BETWEEN:

K. M.

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 18, 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 November 29, 2016. The General Division had earlier conducted a hearing by teleconference 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, 2012.

[2] On February 9, 2017, 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;

(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.

[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.

---

[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 66 of its decision, the General Division described the Applicant as a "vague historian who had great difficulty recalling and providing evidence concerning significant events." The Applicant maintains that she does not have trouble with significant events but merely had difficulty remembering certain details.

(b) In paragraph 67, the General Division found no medical evidence of depression until Dr. Miller's May 2015 report. In fact, the Applicant testified that she attended group counselling in 2010.

(c) In paragraph 69, the General Division found that the Applicant could not provide any explanation for why she had not had back surgery. In fact, the Applicant testified that she had consulted orthopedic specialists, who had advised her that she was not a surgical candidate. They did not explain, or the Applicant could not remember, how they had reached their conclusions; either way, the Applicant should not have been penalized for her inability to answer the General Division's question.

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 *Canada v. 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 *Atkinson v. Canada*[6] by disregarding evidence that the Applicant had been accommodated by a "benevolent employer" permitting her to remain in the workforce despite her disability.

(d) It failed to apply the CPP disability test, as set out in subparagraph 42(2)(*a*)(i), by disregarding case law[7] that obliges consideration of "regularity," which has been defined as the capacity to attend work predictably or with consistent frequency.

(e) It failed to apply *Inclima v. Canada*[8] by finding that the Applicant had some capacity to return to work at the end of her MQP;

(f) It disregarded *Bungay v. Canada*[9] by failing to consider all the Applicant's conditions and their collective impact on her functionality in a "real world" context.

ANALYSIS

[12] At this juncture, I will address only the arguments that, in my view, offer the Applicant her best chances of success on appeal.

---

[3] *Garrett v. Canada (Minister of Human Resources Development)*, 2005 FCA 84
[4] *Villani v. Canada* (*Attorney General)*, 2001 FCA 248
[5] *Canada (Attorney General) v. St. Louis*, 2011 FC 492
[6] *Atkinson v. Canada (Attorney General)*, 2014 FCA 187
[7] *D'Errico v. Canada (Attorney General)*, 2014 FCA 95; *Atkinson v. Canada (Attorney General)*, [2014] FCJ 840 (QL); *Canada (Minister of Human Resources Development) v. Gallant* CP 06612; *Eddy v. Minister of Human Resources Development* (2000) 8586 PAB; *M.T. v. Minister of Human Resources and Social Development* 28161
[8] *Inclima v. Canada (Attorney General)*, 2003 FCA 117
[9] *Bungay v. Canada (Attorney General)*, 2011 FCA 47

"Vague Historian"

[13] The Applicant maintains that, contrary to the General Division's finding, she does not have difficulty recalling significant events—only specifics about them. The following are examples of details that she could not remember:

- The names of all the pain management clinics she attended (at the 19 minute mark of part 3 of the audio recording of the hearing);
- The exact date when she applied for the CPP disability benefits (at 12 minutes of part 1 of the recording);
- Her income from her time as a taxi driver (at 5 minutes of part 2 of the recording);
- The names of medications that she was prescribed in December 2012;
- The number of pain flare ups she had in December 2012 (at 2 minutes of part 3 of the recording).

[14] The Applicant argues that the General Division should not be permitted to "place greater reliance on the medical evidence" than on her testimony simply because her cognitive problems impeded her memory for details. Indeed, the General Division should value testimony and objective medical evidence equally.

[15] I see an arguable case on this ground of appeal. There is no one formula that prescribes how a trier of fact is to weigh evidence, but case law has consistently held that all evidence must be considered, and no particular form of evidence is inherently worthy of lesser or greater weight.[10] I would not go so far as to agree with the Applicant that oral and written evidence must be given equal weight, but it is clear that both must be taken into account, and if one or the other is to be discounted to any significant degree, then the trier of fact must put forward a defensible reason for doing so. In this case, the Applicant alleges that the General Division in effect dismissed the entirety of her testimony for reasons that were (i) unfounded in fact or (ii) trivial.

---

[10] *Canada (Attorney General) v. MacRae*, 2008 FCA 82 (CanLII); *Arthurs v. Canada (Minister of Social Development)*, 2006 FC 1107 (CanLII); and *Grenier v. Canada (Minister of Human Resources Development)*, 2001 FCT 1059 (CanLII)

[16] Paragraph 66 of the General Division's decision reads as follows:

> The Appellant was a vague historian who had great difficulty recalling and providing evidence concerning significant events. The Tribunal accepted that this was to a large extent because of her present condition, and that she was not attempting to be evasive and/or to avoid what she may have considered to be troubling questions. This does, however, make the Tribunal's task more challenging, and in such circumstances the Tribunal is require [*sic*] to place greater reliance on the medical evidence. The Tribunal also has to take into consideration that the hearing was almost four years after the MQP, and that the Appellant's condition as of the hearing date may not necessarily represent her condition as of the MQP.

[17] The General Division was careful to not impute dishonesty to the Applicant, but it did suggest that her testimony *as a whole* was unreliable because of "vagueness" and "difficulty" in recall. Having dealt with the Applicant's oral evidence, General Division then made no reference to any of it in the remainder of its analysis, dwelling entirely on documentary medical evidence. While the General Division has wide discretion to weigh evidence as it sees fit, it cannot simply disregard the Applicant's testimony without good reason and, in my view, that may have happened here.

[18] Although the General Division noted the Applicant's difficulty in recalling her pain medications and the frequency with which she drove her taxicab, it otherwise offered few specific examples of memory lapse. Indeed, I note that the decision contains a section summarizing her testimony that is both lengthy and detailed, suggesting that Applicant did retain something more than minimal powers of recall. I have also cursorily reviewed the audio recording of the hearing and have not as yet heard anything to suggest that the Applicant's memory is extraordinarily poor. The Applicant has highlighted those instances where the Applicant could not remember certain details, and I think it is worth investigating whether, as she implies, those details were inconsequential and whether her failure to remember them warranted a finding of unreliability.

Effort to Remain Employed

[19] The Applicant criticizes the General Division's treatment of her final years of work, alleging that it failed to conform with case law that governs vocational mitigation. In particular, the Applicant submits that the General Division ignored *Atkinson* and *Gallant et al.* by failing to

consider evidence that her last job as a taxicab driver showed that she could not offer regular performance and was made possible only by the benevolence of her employer. From this, the Applicant submits that the General Division misapplied *Inclima* by finding residual work capacity and drawing an adverse inference from the Applicant's purported failure to pursue alternative work during the MQP.

[20] I see at least a reasonable chance of success on appeal for these grounds, all of which turn on how the General Division characterized the Applicant's most recent job. The Applicant's record of employment (GD8-4) does not indicate that the Applicant made any above-threshold earnings working as a taxicab driver, which she has done sporadically since leaving Ontario Lottery and Gaming at the end of 2010. Nevertheless, the General Division found:

> [76] […] While optimism is not the same thing as work capacity, the Appellant clearly had some residual work capacity. This is evidenced by her intermittent work as a taxi driver, which, incidentally, appears not to respect her restrictions against prolonged sitting.

[21] Having reviewed the decision against selected passages from the recording, I see an arguable case that the General Division may have failed to adequately consider the possibility that the Applicant's job as a taxicab driver constituted a genuine, if failed, attempt to mitigate her impairments as a means of remaining in the workforce. There was evidence that the job was easier on her back and permitted unusual flexibility in her working hours, yet the General Division regarded it as evidence of capacity, rather than as a fulfillment of her obligation under *Inclima* to seek work better suited to her limitations.

CONCLUSION

[22] I am granting leave to appeal on all grounds sought by the Applicant.

[23] 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.

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

Member, Appeal Division