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

Citation: *B. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 421

Tribunal File Number: AD-17-68

BETWEEN:

B. C.

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 30, 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, 2015.

[2] On January 17, 2016, the Applicant submitted an incomplete application requesting leave to appeal to the Appeal Division. Following a request for further information, the Applicant's legal counsel completed his application on February 8, 2017.

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.

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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

[10] In the application requesting leave to appeal, the Applicant's counsel made the following submissions:

> **Erroneous Findings of Fact**
>
> (a) The General Division wrote that Dr. Al-Beer found that the Applicant's impairment limited her ability to engage in heavy lifting. In fact, Dr. Al-Beer clearly stated in his report dated September 24, 2016 that the Applicant required a permanent work modification so as to do no lifting.
>
> (b) The General Division based its decision, in part, on the Applicant's ability to ride her bike. In fact, the Applicant made it clear in her testimony that her ability to ride her bike was limited; she rode her bike infrequently and was able to travel only a half mile before shoulder pain forced her to stop.
>
> (c) The General Division placed undue weight on the Applicant's testimony that she spends much of her day reading, which it found was "indicative of an ability to learn new things and skills in order to obtain employment." The Applicant's evidence was that, although she reads, she does not watch TV or own a computer, and she passes the time doing exercises recommended by her doctors. There is no evidence that her hobby translates into a capacity to work.
>
> (d) The General Division failed to consider or give proper weight to:
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> - the Applicant's testimony that she experiences constant pain in her shoulder and has difficulty sleeping, which leaves her feeling fatigued throughout the day; and
> - the fact that the Applicant is right-hand dominant and that she has difficulty getting dressed, putting on her shoes, and completing normal household chores such as washing the dishes and taking out the garbage.

Errors of Law

(a) At paragraph 38 of its decision, the General Division correctly cited the principles set out by the Federal Court of Appeal in *Villani v. Canada*,[3] but it failed to properly consider the Applicant's age, level of education, and past work and life experience when determining whether, "in a real world context," she was employable. The General Division heard evidence that the Applicant has limited transferrable skills with which to seek out new employment. For her entire adult life, she has driven a bus or van with a focus on transporting individuals with physical disabilities. Prior to operating a bus for the City of X, she drove a taxi cab specifically designed for transporting disabled individuals. The Applicant is 58 years old, has a grade 10 education and has no experience with computers or software. She has never worked in an office or administrative setting. No reasonable interpretation of the evidence tendered before the General Division can support the conclusion that her work history leaves her with transferrable skills.

(b) The General Division member failed to consider *MNH v. Mohring*,[4] a decision that was specifically brought to its attention in oral argument and in the Applicant's written submissions dated October 20, 2016. *Mohring* involved a 56-year-old practical nurse who injured her lower back while lifting a heavy patient. The Pension Appeals Board (PAB) concluded that the applicant was disabled because she was unable to obtain any substantially gainful occupation, given her age and the nature of her impairments. The Applicant in the present case has similar impairments and is older, less educated and less skilled, yet the General Division concluded that her disability was not severe.

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[3] *Villani v. Canada (Attorney General)*, 2001 FCA 248.
[4] *MNH v. Mohring* (Mar. 19, 1989) CP 1691 (PAB).

ANALYSIS

Heavy Lifting

[11] The Applicant is correct to note that Dr. Al-Beer said she was barred from lifting, but I have been unable to see where, in its decision, the General Division mischaracterized this opinion. In fact, the General Division accurately relayed Dr. Al-Beer's injunction against lifting in paragraph 27 and again in paragraph 33 of its decision. While the General Division later found that the Applicant's impairments limited "her ability to engage in *heavy* lifting, pushing pulling or above the shoulder work [my emphasis]," it did not link Dr. Al-Beer to this determination, which was arrived at following consideration of all evidence, including testimony, regarding her functional limitations. The General Division was not obliged to rely exclusively on Dr. Al-Beer's findings, and it was within its authority, as trier of fact, to draw on other sources of information in finding that the Applicant was not precluded from all forms of substantially gainful employment.

[12] I do not see a reasonable chance of success on this ground of appeal.

Bicycle Riding

[13] In paragraph 16 of its decision, the General Division wrote, "She is able to bike ride for about ½ mile." In paragraph 33, it again referred to this recreation in finding that she continued to be active: "She is still able to otherwise function in activities such as walking, bicycle riding, driving her motor vehicle."

[14] The Applicant suggests that the General Division neglected evidence that qualified her continued ability to ride a bicycle, but I see no reasonable chance of success for this argument. The General Division allegedly disregarded the Applicant's testimony that she rides her bike infrequently and that shoulder pain prevents her from riding longer than half a mile, but the Applicant has not disputed the essential fact that she *can* ride a bicycle for half a mile, despite her shoulder impairment. The context in which the General Division described the Applicant's bicycling and, in particular, its use of the word "able," suggests that it was cognizant that her capacity was in some way constrained by her impairments.

Recreational Reading

[15] The Applicant objects to the General Division's reliance on the fact that she reads for pleasure, which it found was "indicative of an ability to learn new things and skills in order to obtain employment." The Applicant's evidence was that, although she reads, she does not watch TV or own a computer, and she passes the time doing exercises recommended by her doctors. There is no evidence that her hobby translates into a capacity to work.

[16] While the General Division, as trier of fact, has broad discretion to make findings, it must do so within the parameters defined by paragraph 58(1)(*c*) of the DESDA. The General Division suggests that recreational reading suggests a capacity to learn skills, but I do not think this proposition is obvious, and a case can be made that it was "perverse or capricious" or "without regard for the material." If the General Division wanted to draw conclusions from a claimant's reading habits, then it may have been obliged to ask her about the kinds of printed materials she consumes. Technical manuals and great works of literature are one thing; gossip magazines and comic books are another. I note that there is nothing in the decision about *what* the Applicant reads in her spare time and, having not yet listened to the audio recording of the hearing, I am unsure whether the General Division attempted to adduce evidence on that question.

[17] I see a reasonable chance of success on this point.

Weighting of Evidence

[18] 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.

[19] 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*,[5] the appellant's counsel identified a number of medical reports that she said the PAB ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the application for judicial review, the Federal Court of Appeal held that:

> [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[…]

[20] Contrary to the Applicant's submissions, the General Division noted that she is right-hand dominant (in paragraph 20), and I see no indication that the General Division ignored or minimized her evidence of functional limitations resulting from her right shoulder injury.

Villani

[21] The Applicant submits that the General Division failed to properly apply the "real world" test as set out in *Villani*, which requires a decision-maker, in assessing disability, to specifically consider an applicant's background, including factors such as age, education, language proficiency, and work and life experience. In this case, the Applicant alleges that the General Division merely cited *Villani* without actually considering her employability in light of her impairments and personal factors.

[22] I see an arguable case on this ground. Although the General Division correctly summarized *Villani* in paragraph 38 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 39, the General Division wrote:

> The Appellant was 58 years of age at the time of the MQP […] She testified that she does not have language barriers and is able to read, write and speak English without difficulties. She has an employment history and had the ability to obtain a specialty license to operate a bus. This work history gives her some transferable skills. There is insufficient medical evidence and evidence of employment efforts to finds on a balance of probabilities she suffers from a severe disability as defined in

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

> the CPP in a real world context. Although the Appellant is 58 years of age she has the health and mental ability to pursue any substantially gainful occupation within the restrictions of her shoulder/arm injury. The Tribunal does not agree with the submission of the Appellant's solicitor that the Appellant is of such an advanced age that she is not capable of entering the workforce.

[23] I note that the General Division found that the Applicant had transferrable skills, although there was no evidence that she had done anything other than a form of manual labour during her working life. Her skills, such as they are, are for a narrow subset of jobs for which her shoulder injury would appear to be a significant impediment. 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 sedentary work.

Mohring

[24] The Applicant submits that the General Division erred in law by failing to refer *Mohring*, a case that involved a claimant whose injuries and personal characteristics were comparable to hers.

[25] In my view, this submission highlights an alleged breach of natural justice, rather than an error of law. Still, I am not convinced that there is an arguable case here. The Applicant's counsel referred to approximately 15 cases in its written submissions. The General Division addressed some of them, and fairness did not require it to address each and every one of the remainder. This is especially so where *Mohring*, the case in question, is nearly 30 years old and emanated from the now defunct PAB, whose decisions do not bind the General Division.

CONCLUSION

[26] I am granting leave to appeal on two grounds:

- The General Division may have based its decision on an erroneous finding of fact by ascribing capacity to learn new skills to the Applicant's reading habit;
- The General Division may have erred in law by failing to properly apply the *Villani* "real world" test in assessing the severity of the Applicant's disability.

[27] 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.

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

Member, Appeal Division