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

Citation: *B. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 400

Tribunal File Number: AD-17-288

BETWEEN:

B. C.

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: August 9, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant is seeking leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated December 30, 2016, which determined that he was not entitled to disability pension benefits pursuant to the *Canada Pension Plan* (CPP). The General Division found that the Applicant had failed to establish that he suffered from a "severe" disability on or before his minimum qualifying period (MQP) date, which in this case was December 31, 2014.

[2] Pursuant to section 55 of the *Department of Employment and Social Development Act* (DESD Act), "Any decision of the General Division may be appealed to the Appeal Division […]." The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on April 4, 2017.

ISSUE

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

THE LAW

[4] According to subsections 56(1) and 58(3) of the 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. It is an initial hurdle for an application to meet, but it is lower than the one that must be met at the hearing stage of an appeal on the merits.

[5] 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." The Applicant must establish that there is some arguable ground upon which the proposed appeal might succeed in order for leave to appeal to be granted (*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).

[6] 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

[7] The Applicant's counsel submits that the General Division based its decision on an erroneous finding of fact, which is a ground of appeal pursuant to paragraph 58(1)(*c*) of the DESD Act. Specifically, counsel argued that the General Division failed to consider:

(i) that the Applicant's back condition is inoperable;

(ii) that the Applicant suffers from a severe psychological condition, despite the fact that he did not seek counselling until after his MQP;

(iii) that the Applicant, in addition to his back condition, suffered from arthritis in both of his hips, which required hip replacement surgery; and,

(iv) that the medical opinion stating that the Applicant was "doing quite well" related only to his hip surgery and not to his back condition.

[8] The Applicant's counsel further submits that the General Division erred in law, pursuant to paragraph 58(1)(*b*), in failing to properly analyze the severity of the Applicant's capacity to work based on the totality of the evidence and in a real-world context.

ANALYSIS

Did the General Division base its decision on erroneous findings of fact?

[9] The Applicant's counsel submits that the General Division based its decision on several erroneous findings of fact with respect to both the Applicant's physical and mental health conditions. Specifically, the Applicant's counsel alleges that the General Division failed to consider that it is the Applicant's back condition that renders him incapable of working, and that he suffers from a severe psychological condition. Counsel submits that "the Applicant's back condition is so severe that it drops him to the floor, is inoperable and continues to deteriorate." Further, counsel submits that "the General Division based its decision on erroneous findings of fact made in a perverse manner by concluding that the applicant's disability was not severe because it was inoperable," and that "the back disability is MORE severe than the hip disability is inoperable and continues to deteriorate."

[10] With respect to the Applicant's mental health, counsel submits that the Applicant suffers from a severe psychological condition that the General Division erroneously discounted because the Applicant did not seek counselling or treatment until after his MQP date.

[11] I have reviewed the General Division's decision in its entirety, and I have also reviewed the material in the record that was before the General Division. Although the Applicant's counsel argues that a finding of severe disability should have been made based on the serious nature of the Applicant's diagnosed back condition and his mental health condition, I am mindful that disability under the CPP is not assessed in accordance with an applicant's medical diagnosis or health condition but is determined in accordance with an applicant's capacity to work (*Klabouch v. Canada (Social Development)*, 2008 FCA 33). The test for determining disability under the CPP was articulated by the Federal Court of Appeal in *Villani v. Canada (Attorney General*), 2001 FCA 248, at paragraph 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.

[12] The Federal Court of Appeal further articulated the *Villani* principles in *Inclima v. Canada (Attorney General)*, 2003 FCA 117, stating:

> […] an 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.

[13] Despite the Applicant's submissions that he should be found severely disabled because of his back problems, I do not find that his counsel's arguments hold weight for several reasons. Firstly, while I note that the Applicant testified that he had collapsed to the floor at one point in March 2011 because of the pain in his back, I have reviewed the medical evidence in the record and cannot find any evidence to support the Applicant's assertion that his back problem is in fact "inoperable." In a letter dated October 12, 2012, from the orthopaedic surgeon, Dr. Van Vliet, to the Applicant's family doctor, Dr. Logan, it is noted that the Applicant did consult a "spine specialist," Dr. Wilson, about his back problem but that the Applicant was determined not to be a "surgical candidate" (GD2-346). The letter does not provide any reason why he was not recommended for back surgery. At that time, according to the opinions expressed by his attending physicians, the Applicant's hip problems appeared to be causing the Applicant greater discomfort and it was acknowledged that he would likely require hip surgery in the future. He eventually did have both hips replaced.

[14] The Applicant also argues that his back problem is "MORE" severe than his hip problem, and that his back problem continues to deteriorate. There is no evidence in the record to substantiate this position. None of the physicians or other health professionals who provided treatment or care to the Applicant stated that his back problem was more serious from a medical perspective, and none of his attending physicians stated that his back problem was more debilitating than his hip problems.

[15] In order to qualify for disability pension benefits under the CPP, the Applicant must demonstrate that he suffered from a severe disability on or before his MQP date. At the time of his MQP date, the Applicant had been diagnosed with osteoarthritis in both of his hips and

lumbar degenerative disc disease in his back. His functional limitations at that time included sitting and standing for up to 15 to 30 minutes at a time, walking up to 15 minutes at a time lifting up to 10 pounds and carrying for 50 feet at a time, but he could not bend. He was able to drive for up to 30 minutes at a time, but he was limited in the household chores he could do. No bowel or bladder problems were noted, and there were no cognitive limitations noted. There was no evidence that the Applicant suffered from any psychological problems prior to his MQP date. The General Division did note that the Applicant suffered from some depression and mood problems following his MQP date, in July 2015, but a medical note dated September 29, 2015, from the Great Northern Family Health Team notes that the Applicant had been prescribed Amitriptyline and that "movement, pain, sleep all improved." (GD6-10). At that time, his only stress was due to financial reasons. Counsel has submitted, at paragraph 7(b) above, that the Applicant should be found to suffer from a severe psychological condition, however, at the time of his MQP there is no evidence to support this argument.

[16] The fact that his doctors had diagnosed the Applicant with hip and back problems does not in and of itself establish the severity of a disability. The General Division is required to consider other factors as well, including how those problems impact his ability to pursue any substantially gainful occupation and whether the Applicant has made reasonable efforts to mitigate his health condition. The General Division acknowledged that the Applicant had undergone hip replacement surgery on both his left and right hips, despite the Applicant's counsel alleging that the General Division had failed to consider this evidence. At paragraph Paragraph 33 of the decision reads as follows:

> The Appellant had a major medical problem with both his left and right hip. The Appellant underwent a total hip arthroplasty in April 2014. Dr. Van Vliet, noted on July 11, 2014, the Appellant was doing quite well, was happy with the results, and was not using a cane or walking aid. In June 2015 the Appellant underwent a right hip arthoplasty and the operation was completed without complication. The objective medical evidence indicates the Appellant recovered well after both his hip surgeries.

[17] Although the Applicant's counsel has argued, in paragraph 7(iii) above, that the General Division erred in failing to consider that the Applicant suffered arthritis in both of his hips, in addition to his back problems, but I do not find that the General Division overlooked the

Applicant's hip problems or the fact that he required hip replacement surgery for both his left and right hip.

[18] The Applicant's counsel argues, in paragraph 7(iv) above, that Dr. Van Vliet's comment that the Applicant was "doing quite well" was in reference to his recovery from hip surgery and not to his continued back problem. However, the medical evidence in the record does not reflect that the Applicant's back problem renders him incapable of pursuing gainful employment, and the General Division considered this evidence at paragraph 33, stating:

> Dr. Logan noted the Appellant has lumbar degenerative disc disease with L5-S1 disc herniation and spinal stenosis. This has caused the Appellant pain however it is being treated conservatively. There are not any functional evaluations or opinions that indicate the Appellant is unable to engage in any substantially gainful occupation. Dr. Lewis recommended weight loss and core strengthening and surgery was not recommended.

[19] Another factor that the General Division is required to consider is whether the Applicant has made reasonable efforts to follow the advice of his attending medical professionals regarding prescribed medications and other types of treatment intended to mitigate troublesome health conditions. Where applicants do not follow recommended treatment options, they must demonstrate that there is a reasonable explanation for not doing so (*Kambo v. Canada (Human Resources Development)*, 2005 FCA 353). On this issue, the General Division considered Dr. Lewis' opinion and acknowledged that it is difficult to lose weight and maintain a regular exercise routine, but the fact that it is difficult to do so does not constitute a reasonable explanation for not following his doctors' advice. Although at one point the Applicant had lost weight and completed some physiotherapy, he had not made reasonable efforts to continue his treatment.

[20] Finally, at set out in paragraph 12 above, *Inclima* obligates applicants to make efforts to return to the workforce. The General Division found that the Applicant retained some capacity to work; there were no functional evaluations or opinions that indicated that the Applicant was unable to engage in any substantially gainful occupation. Although the Applicant contemplated returning to the workforce, using March of Dimes as a resource, he never did make efforts to seek or obtain any employment within his limits and did not engage in any type of retraining.

[21] The Applicant's counsel argues that the General Division based its decision on several erroneous findings of fact, but I do not find that this argument has a reasonable chance of success. Leave to appeal is not granted on this ground.

Did the General Division err in law in failing to properly analyze the severity of the Applicant's capacity to work based on the totality of the evidence and in a real world context?

[22] The Applicant's counsel submits that the General Division failed to consider the totality of the evidence in the record (*Bungay v. Canada (Attorney General)*, 2011 FCA 47), specifically, the General Division found that the Applicant retained some capacity to work despite the medical evidence that he has been diagnosed with disc herniation at L5-S1 and spinal stenosis. He argues that the Applicant's back condition is severe and continues to deteriorate. The Applicant had only ever been employed as a labourer and, in a real-world context, he is incapable of gainful employment due to his back problem (*Villani*).

[23] The General Division considers the *Villani* factors at paragraphs 35 and 36 of the decision. The General Division considered that the Applicant was 50 years old at the time of his MQP. He had completed high school as well as further education and training as an auto mechanic. He was very successful in his chosen field, and he had worked for many years, which had provided him with transferrable skills. There were no issues with his language proficiency, and he did not suffer from any cognitive issues that would prevent him from learning new skills in order to pursue employment options within his limits.

[24] The Applicant's counsel argues that the Applicant's back problem, when assessed in a real-world context, substantiates a finding of severe disability. I do not find that this argument holds weight. An applicant's medical condition is not a personal characteristic considered by the Federal Court of Appeal in *Villani*. In order for an applicant to be found disabled under the CPP, he must first demonstrate that he suffers from a serious and possibly debilitating medical condition. Then, a decision-maker assesses the severity of the claimed disability in the context of the *Villani* factors, which include personal characteristics. The General Division has done this.

[25] The Federal Court of Appeal, in *Villani*, stated at paragraph 49 that, "the assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere." I am also reluctant to interfere with the determination of the General Division with respect to its assessment of the *Villani* factors unless a specific error of law is identified by the Applicant's counsel. I do not find that an error appears on the face of the record.

[26] I am not satisfied that the appeal has a reasonable chance of success on this ground.

CONCLUSION

[27] The Application is refused.

Meredith Porter
Member, Appeal Division