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

Citation: *J. D. v. Minister of Employment and Social Development*, 2017 SSTADIS 430

Tribunal File Number: AD-17-116

BETWEEN:

J. 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 23, 2017

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 December 14, 2016. The General Division had conducted a hearing based on the documentary record and determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP), because her disability was not severe as of her minimum qualifying period (MQP), which is due to end on December 31, 2017.

[2] On February 8, 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.

[4] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[5] Paragraph 42(2)(*a*) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

[6] 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.

[7] 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.

[8] 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.

[9] 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]

[10] 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

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

SUBMISSIONS

[12] In the application requesting leave to appeal, the Applicant's counsel submits that the severe criterion must be assessed in an overall context. He alleges that the General Division failed to take into account the Applicant's age, limited transferable skills and educational level in determining that her disability did not prevent her from working. She was 55 as of the hearing date, with only a Grade 12 education and limited ability to speak English. As recognized by Dr. Perera, family physician, in her letter dated July 13, 2016, the Applicant's lack of transferrable skills, combined with her right-arm weakness, would negatively impact her ability to seek alternative, or part time, employment.

ANALYSIS

[13] Although the Applicant has not specifically pleaded any case law, her submissions closely align with the principles set out by the Federal Court of Appeal in *Villani v. Canada*,[3] which requires disability to be assessed in a "real world" context, bearing in mind background factors such as a claimant's age, education, language proficiency and work and life experience.

[14] I see an arguable case on this ground for two interrelated reasons. First, there is a question of natural justice and a party's right to be heard. It must be acknowledged that the Applicant has submitted little documentary medical evidence in support of her disability claim; the file contains the CPP medical report that accompanied her application for benefits, Dr. Perera's very terse follow-up letter of July 13, 2016 and nothing else. This dearth of material may have influenced the General Division's decision to conduct the hearing entirely on the basis of the existing documentary record, but it could just as easily have served as a rationale for calling supplemental oral evidence.

[15] A CPP disability claimant bears the burden of proving, on a balance of probabilities, that his or her disability is severe and prolonged according to the criteria set out in paragraph

[3] *Villani v. Canada (Attorney General)*, 2001 FCA 248.

42(2)(*a*). In this case, the General Division relied on the absence of information about the Applicant's vocational history:

> [18] The severe criterion must be assessed in a real world context (*Villani v. Canada (A.G.)*, 2001 FCA 248). This means that when deciding whether a person's disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. The appellant was fifty-three years old at the time of her application had a grade 12 education. The tribunal at acknowledges that the appellant has few transferable skills from her job as a school crossing guard <u>but it is unknown what her previous work experiences have been</u>. Nonetheless, keeping in mind the appellant's personal circumstances, along with her medical condition, the tribunal has concluded that her personal circumstances would not negatively impact on her ability to seek, and if necessary, retrain for part-time employment [emphasis added].

[16] Here, the General Division in effect penalized the Applicant for not offering full particulars about her previous work experience, but I note that: (i) the Applicant had an earnings record of more than 30 consecutive years, the last five of which were spent working as a crossing guard; and (ii) there was nothing in the CPP application materials that asked her to disclose her employment history beyond those previous five years.

[17] One can argue that, if the General Division intended to rely on the absence of particular evidence that was not required by the law or demanded by the Respondent, then it was only fair to offer the Applicant an opportunity to supply that evidence—by means of either an oral hearing or written questions and answers. I am ordinarily reluctant to interfere with the General Division's discretionary authority to decide on an appropriate form of hearing, but there may be cause to make an exception in this case.

[18] Second, although the General Division correctly summarized *Villani* in its decision, I think it is fair to ask whether the General Division properly applied it in considering the Applicant's background. The available evidence indicated that the Applicant was in her mid-fifties as of the hearing date and that she had last worked in a job that required few, if any, skills. 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 alternative work.

CONCLUSION

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

- The General Division may have failed to observe a principle of natural justice by denying the Applicant an oral hearing.
- 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.

[20] 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.

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

Member, Appeal Division