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

Citation: *M. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 445

Tribunal File Number: AD-16-1195

BETWEEN:

M. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Request for Extension of Time and Leave to Appeal Decision by: **Meredith Porter**

Date of Decision: **September 3, 2017**

Canada

REASONS AND DECISION

BACKGROUND

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated June 29, 2016, denying the Applicant a disability pension under the *Canada Pension Plan* (CPP). The General Division found that the Applicant had failed to demonstrate that he suffered a "severe" disability as set out in paragraph 42(2)(*a*) of the CPP.

[2] Pursuant to paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESD Act), applicants have 90 days after the day on which the General Division decision is communicated to file an application for leave to appeal with the Tribunal's Appeal Division. Based on the expected postal delivery times for mail in Canada, decisions are generally deemed received ten days after the date on which they are rendered. In this case, the decision was deemed received on July 9, 2016, which means the application for leave to appeal had to be filed by October 7, 2016. An incomplete application requesting leave to appeal was not received until October 13, 2016, which appears to be beyond the 90 days allowed to file the application.

[3] The Tribunal sent correspondence to the Applicant's counsel requesting him to submit missing information, which was a signed declaration from the Applicant confirming that the contents of the application were true to the best of the Applicant's knowledge. The letter indicated that, should the declaration be received by November 18, 2016, the application would be deemed received and complete on October 13, 2016. The Tribunal received the signed declaration on November 10, 2016. The late application was deemed received on October 13, 2016.

[4] The Tribunal received correspondence from the Respondent dated December 15, 2016, conceding that the application ought to be considered "communicated" to the Applicant on the date on which the Applicant's counsel confirms the decision was actually received, i.e. July 15, 2016, as opposed to July 9, 2016. As a result, the Respondent concedes, the application was received within the 90 days allowed under the DESD Act and the Applicant should not be

required to request an extension of time to file the application. The Applicant's counsel has also filed a copy of the letter from the Tribunal with the General Division decision enclosed, which, he confirms, his law firm date-stamped on the date it was received. The date-stamped letter reflects that counsel's office received the letter on July 15, 2016.

[5] In light of the parties' agreement that the General Division decision was communicated to the Applicant on July 15, 2016: not July 9, 2016, as well as their further agreement that the application was filed within the 90-day time limit allowed, I do consider it necessary to provide an analysis on whether an extension of time should be allowed. I find that the Application was filed within the time limit allowed under the DESD Act, and a request for an extension of time to file the application under subsection 57(2) of the DESD Act is not necessary.

ISSUE

[6] The only issue before me is whether the appeal has a reasonable chance of success.

THE LAW

[7] 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 and is an initial hurdle for an applicant to meet. However, the hurdle is lower than the one that must be met at the hearing stage of an appeal on the merits.

[8] 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).

[9] 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
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> (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

[10] The Applicant has submitted that the General Division made several errors of law, pursuant to paragraph 58(1)(*b*) of the DESD Act. Specifically, the Applicant submits:

i. that the General Division erred in failing to qualify M. G., a lawyer and college professor, as an expert in assessing the Applicant's ability to read and write;

ii. that the General Division erred in how it applied the court's decisions in *Inclima v. Canada (Attorney General)*, 2003 FCA 117, and in *Villani v. Canada (Attorney General)*, 2001 FCA 248, in finding that the Applicant had failed to demonstrate that he had attempted to find employment within his limitations and that he had failed to demonstrate that he had pursued retraining opportunities; and

iii. that the General Division failed to properly consider what work the Applicant was suited for in light of both his personal circumstances and his health condition.

ANALYSIS

Did the General Division err in failing to qualify M. G. as an expert?

[11] The evidentiary record included a letter dated May 10, 2013, from M. G., who confirms that he has known the Applicant since 1997. Mr. M. G. assists the Applicant in reading correspondence sent to him, as well as in completing written documents such as forms and applications. The Applicant requires assistance, as he cannot read and write as a result of his dyslexia. Counsel for the Applicant has argued that the General Division ought to have qualified M. G. as an expert. He further argues that the evidence contained in the May 2013 letter should have been admitted into the record and that any weaknesses in Mr. M. G.'s qualifications for being considered a witness should properly have gone to the weight attributed to his evidence rather than the admissibility of that evidence. In making these arguments, the Applicant's counsel relies on *R. v. Marquard*, [1993] 4 SCR 223, 1993 CanLII 37 (SCC), in which the court, citing *R. v. Béland*, [1987] 2 SCR 398, 1987 CanLII 27 (SCC), stated that "[t]he only requirement for the admission of expert opinion is that the "expert witness possess special knowledge and experience going beyond that of the trier of fact."

[12] The Applicant's counsel further draws from *The Law of Evidence in Canada* (1992), at pages 536–37:

> The admissibility of [expert] evidence does not depend upon the means by which that skill was acquired. As long as the court is satisfied that the witness is sufficiently experienced in the subject-matter at issue, the court will not be concerned with whether his or her skill was derived from specific studies or by practical training, although that may affect the weight to be given to the evidence.

[13] As a result of the foregoing jurisprudence on the issue of expert-witness evidence, the Applicant's counsel argues that the General Division should have considered Mr. M. G. an expert as a result of his experience as a lawyer and college professor. As a college professor, he has extensive experience, according to counsel, assessing adults' reading and writing abilities. Although Mr. M. G. lacks formal training in the area of assessing an individual's ability to read and write, as well as of assessing their capacity to be trained to read and write, counsel argues

that he should be considered an expert as a result of his ten years of experience as a college professor. Additionally, he argues that his evidence should be afforded considerable weight.

[14] Considering counsel's position on whether Mr. M. G. should be considered an expert, I refer to the more recent decision that the Supreme Court articulated in *R. v. Mohan*, [1994] 2 SCR 9, 1994 CanLII 80 (SCC). In that decision, the Supreme Court set out the legal test for someone to be qualified with respect to providing expert testimony in a criminal trial. The same legal test should be applied in this case. Determining expert testimony depends on the following four criteria, namely:

a) relevance;

b) necessity in assisting the trier of fact;

c) the absence of any exclusionary rule; and

d) a properly qualified expert.

[15] Considering these four criteria in this case, I do find that the evidence proposed to be presented by Mr. M. G. was clearly relevant to the General Division's findings. His opinion related to the Applicant's inability to read and write independently, as well as his capacity to be trained to do so in the future.

[16] I also find that Mr. M G.'s evidence had some probative value with respect to assisting the General Division in determining whether the Applicant had capacity to retrain for more sedentary employment in the future. Mr. M. G. had been assisting the Applicant for over 16 years with his personal affairs, which does bring some special knowledge relevant to the General Division's determination. Mr. M. G. had some knowledge that would not otherwise be available.

[17] The relevancy of the evidence, however, is not the only factor to consider with respect to determining the admissibility of Mr. M. G.'s evidence as an expert opinion and its necessity in assisting the General Division. The Supreme Court in *Mohan* cautioned that "[t]here is a danger that expert evidence will be misused and will distort the fact-finding process." On this issue, the General Division notes, at paragraph 50 of the decision, that a psychovocational

assessment and a 2-day Functional Abilities Evaluation—which, according to Dr. Alpert in his March 2012 assessment report, had been prepared for insurance purposes—had not been included in the evidentiary record. The reports were not filed as a result of the Applicant's counsel deciding to forego including them, as they were, in his opinion, "biased." Given the fact that two relevant reports were excluded from the record, as well as the fact that Mr. M. G.'s opinion was the only evidence stating that the Applicant lacked capacity for gainful employment or retraining, I am mindful that Mr. M. G.'s opinion should not be given undue weight. As counsel withheld the other two reports, it is impossible to both objectively assess the worth of Mr. M. G.'s evidence and to find that Mr. M. G.'s evidence was necessary in the sense that the General Division would be unable to come to a satisfactory conclusion without his opinion.

[18] I do not find that there is an exclusionary rule that ought to apply.

[19] Finally, both the *Marquard* and the *Mohan* decisions set out that, for a witness to be qualified as an expert, he or she needed to have information that was not available to the trier of fact; it is not necessary that he or she have an extensive or highly sophisticated résumé and extensive academic qualifications in the relevant subject. However, the court in *Mohan* stated that in order to be properly qualified expert evidence, "[…] the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify."

[20] Mr. M. G. may be qualified as a lawyer and as a college professor to assess adults' reading and writing ability at the college level. However, there is no evidence that he possesses any "special or peculiar" knowledge with respect to the reading and writing abilities of individual's suffering from dyslexia, or their capacity to be trained to read and write. In light of the *Mohan* decision, I do not find that he was qualified to be an expert on the issue of the implications of the Applicant's dyslexia on his capacity to work or his ability to retrain.

[21] Although the Applicant's counsel has submitted that the General Division erred in failing to admit Mr. M. G.'s evidence as an expert opinion, 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 incorrectly apply *Inclima* and *Villani*?

[22] The Applicant's counsel has submitted that the General Division erred in law by incorrectly applying *Inclima* and *Villani*. He argues that the General Division, when applying *Inclima*, assessed the Applicant's capacity to work against an unreasonably high standard.

[23] Counsel also argues that the General Division improperly applied *Villani*, as it failed to consider how the Applicant's particular circumstances, together with his health condition, impact his capacity regularly to pursue gainful employment.

[24] *Villani* sets out the test for determining disability under the CPP. According to *Villani*, the test for determining the severity of a disability is not that a disability be "total," but rather that the disability be assessed in a "real world" context. Factors such as an applicant's age, education level, language proficiency, and past work and life experience should be considered in determining whether an applicant is disabled under the CPP. It is not sufficient, however, to simply state that the *Villani* factors have been carefully considered. The General Division's careful consideration of the *Villani* factors in light of an applicant's particular circumstances must be evident in reading the decision. A person's employability must be assessed in light of all the circumstances, including the *Villani* principles, and an applicant's medical condition must be assessed in its totality (*Bungay v. Canada (Attorney General)*, 2011 FCA 47). The Federal Court of Appeal further articulated the *Villani* principles in *Inclima*, stating that applicants seeking to demonstrate that they suffer from a severe disability under the CPP must adduce evidence of a serious health problem and, where there is capacity to work, applicants must also show that efforts to obtain and maintain employment have failed because of that health problem. It is not an applicant's inability to do his or her particular job that matters, but rather any "gainful employment" at all. (*Klabouch v. Canada (Minister of Social Development)*, 2008 FCA 33)

[25] In this case, at paragraphs 47, 48 and 51 of the decision, the General Division finds as follows:

> [47] The evidence establishes that the Appellant suffers from longstanding chronic back pain which precludes him from pursuing his previous physically demanding employment as a carpet and flooring installer. The evidence also establishes that for the past ten years his condition has been relatively stable and that he is working part-time as a

> self-employed house painter earning approximately $10,000 per year. He works 10-15 hours per week, is able to work on his own schedule, and does not move the furniture or do taping.
>
> [48] The Appellant has acknowledged that he has not pursued less physically demanding work and states that this is because he is not suited for any other job. He relies primarily on his inability to read or write because of his dyslexia but also on his narrow work history confined to physical type labour as well as his limited education.
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> […]
>
> [51] The Appellant has not established that he lacks the residual regular capacity to pursue alternative more moderate work than his self-employment as a house painter. He has acknowledged that he has not made any efforts in this regard and the Tribunal accordingly finds that he has failed to satisfy the test set out in *Inclima*, supra.

[26] Applicants seeking a disability pension under the CPP must first be found to have a capacity to work, and that capacity must be found to be regular. It is the capacity to work—not the employment itself—that must be regular. The Applicant's counsel argues that the General Division's finding that the Applicant had not demonstrated efforts to obtain and maintain employment was contrary to the evidence. He has argued that this is an error of law, but it more properly appears that he is arguing that the General Division based its finding on an erroneous finding of fact without regard for the material before it, pursuant to paragraph 58(1)(*c*) of the DESD Act. Counsel further argues that the Applicant's efforts to maintain his light-duty occupation as a part-time painter have failed because of his recognized health problem.

[27] I find that this argument holds weight. Prior to sustaining a snowmobile accident, the Applicant worked full-time as a flooring and carpet installer, and sometimes he was required to "throw" a 200-pound roll of carpet onto his shoulders. He had attempted to return to his chosen employment as a carpet installer on a part-time basis following the accident, but he found the work too physically demanding. As of 2010, the Applicant began working part-time as an interior house painter. He works at a rate of $15 per hour, and he can usually work 10–15 hours per week. The Applicant indicated that sometimes he is unable to work that many hours because of his back. He reported his income to be $10,000 per year. He also reported losing some customers because he had been unable to complete some work as quickly as they had wanted him to.

[28] While I note that there is medical evidence in the record that reflects that the Applicant retains some capacity to perform part-time, light-duty employment, there is also some evidence that he has attempted to do this type of work since 2010 as a house painter. I also note that there is evidence in the record that suggests that the Applicant is not capable regularly of pursuing his occupation as a house painter because some weeks he can work 10–15 hours while other weeks he is forced, because of his back, to work fewer hours.

[29] Even if the Applicant continued as a part-time house painter, the income that he is able to earn may not be considered "substantially gainful." In its decision, the General Division has not addressed this criterion for determining disability under the CPP. The Applicant's counsel has not argued this issue either but, pursuant to paragraph 58(1)(*b*) of the DESD Act, grounds for appeal before the Appeal Division include errors of law, regardless of whether they appear on the face of the record.

[30] As I have noted above, in paragraph 24 in *Villani*, the court stated that determining disability under the CPP requires that disability be assessed in a "real world" context. A careful consideration of the *Villani* factors, in light of an applicant's particular circumstances, must be evident in reading the decision. The Applicant's counsel has argued that the General Division, when finding that the Applicant retained some capacity to work, did not consider the Applicant's personal circumstances, together with the objective medical evidence in the record.

[31] Counsel argues that the General Division failed to consider the medical evidence in the record, which confirms that the Applicant is unable to sit or stand for any longer than 15 minutes at a time. In addition to his functional limitations, the Applicant is 55 years old and suffers from dyslexia, a learning disability, which renders him illiterate. He has a grade 9 education, and his school transcripts indicate that he barely completed courses such as English, Math and History, but that he did well in vocational courses. As an adult, he confirms that he cannot read street signs, but that he is "capable of doing numbers". There were no issues identified with his language proficiency. Regarding his past work and life experience, he worked full-time for over 20 years as a flooring and carpet installer.

[32] The General Division, at paragraph 51 of the decision, finds that:

> [51] The Appellant has not established that he lacks the residual regular capacity to pursue alternative more moderate work than his self-employment as a house painter […].

[33] This finding, however, does not reflect a careful consideration of the *Villani* factors or any assessment of the factors in light of the Applicant's particular circumstances. I have already noted that the court in *Villani* stated that a careful consideration of the factors must be evident in reading the decision. There is little analysis—including the *Villani* principles—of the Applicant's employability in light of all the circumstances, and the Applicant's medical condition assessed in its totality is not reflected in the General Division's decision (*Bungay*).

[34] I find that the General Division may have erred in law, pursuant to paragraph 58(1)(*b*) of the DESD Act. This is a ground on which I am granting leave to appeal.

CONCLUSION

[35] The Application is granted.

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

[37] The parties are invited to provide further submissions within the 45-day time limit allowed.

Meredith Porter
Member, Appeal Division