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

Citation: *T. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 453

Tribunal File Number: AD-17-200

BETWEEN:

T. 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: September 13, 2017

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated January 27, 2017. 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 did not become severe during her minimum qualifying period (MQP), which, by application of the proration provision, spanned from January 1 to 31, 2012.

[2] On March 8, 2017, within the specified time limitation, the Applicant's authorized representative 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] The Appeal Division must decide whether the appeal has 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 and level of education—in addition to her disability—when it determined that she was not incapable of work.

[13] Counsel further submits that the Applicant takes pain medications, which produce significant side effects, including fatigue and dizziness. In paragraph 33, the General Division notes that Dr. Williamson certified her Disability Tax Credit, noting marked restrictions in walking, feeding and dressing. As well, impact statements from the Applicant's family members support her claim that her disability was severe and prolonged as of March 2011 and that it has remained so continuously since then.

[14] In addition to statements from her children (both dated March 2017), the Applicant also submitted a medication history from her pharmacy detailing her prescriptions from February 2011 to January 2017.

ANALYSIS

[15] The Applicant in this case was faced with the daunting challenge of having to show that her disability became "severe and prolonged" according to the statutory definition of those terms set out in paragraph 42(2)(*a*) of the CPP during the very narrow window of time spanning the month of January 2012. The Applicant has not criticized the Respondent's application of the proration period in defining her period of eligibility, nor the General Division's endorsement of it. I have reviewed the calculation of the proration period and see no error in the law or its application to the Applicant's circumstances.

Villani

[16] Although the Applicant does not specifically cite *Villani v. Canada,*[3] it is clear that a major component of her submissions is the General Division's purported failure to apply the precepts of this leading case and consider her background and personal characteristics in assessing her impairments. However, its decision indicates that, while the General Division was aware of *Villani*, it saw no need to apply it in this case:

> [60] The Federal Court of Appeal has stated that "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." *(Villani* v. *Canada (Attorney General), 20*01 FCA 248 *[Villani],* at para. 50). In the present case, there is no indication that the Appellant became disabled in January 2012. She did not visit her family doctor between October 2011 and February 2012 for anything but routine matters. Surely if there had been a dramatic deterioration in her condition in January 2012, she would have gone to his office. However, there is no record that she did so, or that she visited a walk-in clinic or an emergency department in that month. Nor are there any indications of any change in her medication at that time.
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> […]
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> [72] As the Appellant has not demonstrated that she became disabled in January 2012, it is not necessary to consider the "real world" test in *Villani* in relation to the period to which proration applies *(Giannaros v. Canada (Minister of Social Development), 20*05 FCA 187 at paras 14-16).

[17] The remainder of the analysis is an investigation into whether the Applicant's medical conditions, which the General Division acknowledged included longstanding joint pain and depression, happened to cross the threshold to "severity" between January 1 and 31, 2012. I see that the General Division paid close attention to the medical evidence in and around that brief period, in particular, Dr. Ballyk's physiatry report of January 17, 2012, but that it saw no new development in the Applicant's condition, or exacerbation of her pain, that might have occurred since the beginning of the New Year.

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

[18] In dispensing with a *Villani* analysis, the General Division relied on *Giannaros v. Canada*,[4] in which the Federal Court of Canada engaged in a close reading of *Villani*, before concluding as follows:

> [14] I now turn to the applicant's last submission, which is based on our Court's decision in *Villani, supra*. Specifically, the applicant argues that the Board erred in omitting to consider her personal characteristics, such as age, education, language skills, capacity to retrain, etc. In my view, in the circumstances of this case, this last submission cannot possibly succeed. In *Villani, supra*, at para. 50, our Court stated unequivocally that a claimant must always be in a position to demonstrate that he or she suffers from a severe and prolonged disability which prevents him or her from working […]

[19] Here, the Court is clear that an assessment of age, education and work experience in the context of a claimant's employability will not be worthwhile unless at least some medical evidence suggesting severity is first present. In my view, the General Division correctly applied the principle from *Giannnoros* to find no evidence of the onset of a severe disability during the first 31 days of 2012. I see no need to interfere with a finding of the General Division, where, as it has done in this case, it appropriately exercised its authority as trier of fact to weigh the available evidence from the relevant period and come to a defensible conclusion.

[20] I see no reasonable chance of success on this ground.

Weighting of Selected Evidence

[21] The Applicant suggests that, in dismissing her appeal, the General Division failed to give appropriate emphasis to certain aspects of her evidence, but I see no arguable case on these grounds:

- The General Division's decision contains a detailed and comprehensive summary of the significant medical reports, which documented the evolving efforts of her treatment providers to find a combination of medications that would relieve her pain while minimizing side effects such as fatigue and grogginess. In paragraph 60, the General Division explicitly finds no indication

[4] *Giannaros v. Canada (Minister of Social Development)*, 2005 FCA 187.

of any change in the Applicant's medications that pointed to the onset of a severe disability during the month of January 2012.

- Although Dr. Williamson may have certified the Applicant's Disability Tax Credit, the General Division gave the accompanying report limited weight for defensible reasons that it explains in paragraph 67 of its decision:

> [67] In June 2013, Dr. Williamson reported that the Appellant had experienced marked difficulty in walking since 2012. He did not state, however, that this problem arose in January 2012, and the medical evidence does not indicate that it did. Nor did it show that the Appellant started having trouble feeding and dressing herself at that time.

[22] 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 administrative tribunals have been accused of failing to give due weight to specific items of evidence. In *Simpson v. Canada*,[5] the claimant identified a number of medical reports that, she said, the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the application for judicial review, the Federal Court of Appeal held that assigning 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…"

[23] As well, impact statements from the Applicant's family members support her claim that her disability was severe and prolonged as of March 2011 and has remained so continuously since then.

New Documents

[24] The request for leave to appeal was accompanied by documents, including a prescription medication printout and letters from the Applicant's family members, that were not prepared until after the General Division had already issued its decision. I note that, from the

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

time of her initial application for CPP disability benefits in July 2014 to the hearing before the General Division nearly 2½ years later, the Applicant had ample time in which to gather relevant evidence.

[25] In any case, given the constraints of subsection 58(1) of the DESDA, the Appeal Division does not hear arguments on the merits of disability, nor does it ordinarily consider evidence that was, or could have been, submitted to the General Division. Once a hearing is concluded, there is a very limited basis upon which any new or additional information can be raised, although an applicant does have the option of making an application to the General Division to rescind or amend its decision. However, in that event, an applicant would need to comply with the requirements set out in section 66 of the DESDA and sections 45 and 46 of the *Social Security Tribunal Regulations*, which impose strict deadlines and require an applicant to demonstrate that any new facts are material and could not have been discovered at the time of the hearing without exercise of reasonable diligence.

CONCLUSION

[26] As the Applicant has not identified any grounds of appeal under subsection 58(1) of the DESDA that would have a reasonable chance of success on appeal, the application for leave to appeal is refused.

Member, Appeal Division