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

Citation: *M. D. v. Minister of Employment and Social Development*, 2017 SSTADIS 449

Tribunal File Number: AD-17-78

BETWEEN:

M. D.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Peter Hourihan

Date of Decision: September 12, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On October 28, 2016, having found that the Applicant's disability was not severe, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on January 27, 2017.

ISSUE

[2] I must decide whether the appeal has a reasonable chance of success.

THE LAW

[3] 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.

[4] Subsection 58(1) of the DESDA identifies the following as the only grounds of appeal available to the Appeal Division:

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.

[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] In determining whether leave to appeal should be granted, I am required to determine whether there is an arguable case. The Applicant does not have to prove the case at this stage; rather, he has to prove only that there is a reasonable chance of success, that is, "some arguable ground upon which the proposed appeal might succeed"—*Osaj v. Canada (Attorney General)*, 2016 FC 115, at paragraph 12.

[7] The Federal Court of Appeal concluded that the question of whether a party has an arguable case at law is akin to determining whether that party, legally, 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.

SUBMISSIONS

[8] The Applicant submits that the General Division erred in law in making its decision, whether or not the error appears on the face of the record, and that it 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. She takes the position that the General Division erred when considering the Applicant's age, level of education, language proficiency, and past work and life experiences and when considering and applying the "whole of the evidence" and the "real world context" to her medical evidence and testimony, by determining her disability was not severe according to the CPP.

[9] Although it is not directly stated by the Applicant, in respect of the error in law, I have determined that the Applicant is essentially arguing that *Villani v. Canada (Attorney General)*, 2001 FCA 248, was not appropriately applied by the General Division in determining that the Applicant's disability was not severe and this is a valid ground of appeal according to paragraph 58(1)(*b*) of the DESDA.

[10] Although it is not directly stated by the Applicant, I have determined that the Applicant is arguing that the error of fact is that the General Division did not appropriately consider the "whole of the evidence" in determining that the Applicant' disability was not severe as required by the CPP and this is a valid ground of appeal according to paragraph 58(1)(*c*) of the DESDA.

ANALYSIS

[11] In respect of the Applicant's submission that the General Division did not consider a "real world context," and thereby did not give appropriate consideration to *Villani*, I find that this does not have a reasonable chance of success on appeal. My reasoning follows.

[12] The evidence presented to the General Division included some background information concerning the Applicant: she was 53 at the time of the hearing; she has an elementary education from Portugal; she has a limited command of spoken English; she worked in a factory for 15 years prior to being laid off; she worked for a short time in an auto parts company; and, she became a waitress in August 2008, which she did until August 2012 when back pain prevented her from continuing (paragraph 2 of the General Division decision).

[13] The Applicant testified that she was a machine operator in factories prior to working in a bakery that also served meals. She stated that she stopped working there because of pain in her back, hands and neck. She was not able to tolerate being on her feet all day and bending and lifting. There were no light duties available at the bakery and she did not look for work after she stopped working in August 2012 (paragraph 21 of the General Division decision).

[14] The Applicant testified that she did not think she could handle any job requiring standing. Further, she could not work in an office due to her lack of English skills. She has never taken any English as a second language classes or programmes. In her work history, she stated that she always worked in a Portuguese environment.

[15] The General Division looked at the evidence, relying on *Villani*, *supra*, stating at paragraph 48 of its decision that the severe criterion must be assessed in a real-world context and that "[t]his 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."

[16] It recognized that the Applicant has limited education and English skills. It observed that she had worked in a variety of jobs, albeit in Portuguese environments. It also recognized that the Applicant did not feel she was able to work in an office environment. However, the General Division also made the point that the Applicant had not attempted to find alternate work in a

similar language environment that would be suitable to her limitations. Further, the General Division indicated that there was insufficient medical evidence to demonstrate that the Applicant was unable to perform some work within her limitations.

[17] The General Division did consider the Applicant's age, level of education, language proficiency, and past work and life experiences. It considered these and applied them to her "real world" with rationale. As a result, I find that this ground of appeal does not have a reasonable chance of success on appeal.

[18] In respect of the Applicant's submission that the General Division erred when it did not consider the totality of the evidence, I find that this does not have a reasonable chance of success on appeal for the following reasons.

[19] The General Division reviewed the evidence presented, inclusive of the medical evidence on record and the Applicant's testimony. The medical evidence presented included Dr. Goldstein's findings in 2009 where the Applicant was diagnosed with mild carpal tunnel syndrome and mild C6 radiculopathy with normal nerve conduction. He referred her to a chiropractor and provided wrist splints. Her family physician, Dr. Pinto, continued to treat her with anti-inflammatory medication, which provided little benefit. Further, none of the diagnostic imaging revealed a serious pathology that would prevent the Applicant from working within some limitations.

[20] The General Division considered that the Applicant saw Dr. Handelsman, but not until April 2013, after the minimum qualifying period (MQP) date of December 31, 2012. He diagnosed mechanical back pain and gave her some back exercises and encouraged her to engage in an exercise program. He advised her to take acetaminophen as required. The General Division concluded that this was not indicative of a condition that prevented her from all types of work.

[20] The General Division observed that Dr. Pinto treated the Applicant for several years and did not refer her for further, specialized treatment. She noted that the Applicant's condition worsened in September, 2013; however, this was well after the MQP and could not be taken into account in respect of determining the severity of her disability.

[21] The General Division considered *Klabouch v. Canada (Social Development)*, 2008 FCA 33, which held that the measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether his or her disability prevents him or her from earning a living. It is not premised upon a person's inability to perform his or her regular job, but rather on his or her inability to perform any work. The General Division was not convinced that the Applicant demonstrated this.

[22] The General Division also looked at the evidence as it related to the Applicant's work capacity, relying on *Inclima v. Canada (Attorney General)*, 2003 FCA 117, which held that where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reasons of the person's health condition. The General Division found on the evidence, that the Applicant did not attempt to find any employment and therefore did not meet the test.

[23] As a result, on the evidence, the General Division found that the Applicant's condition on her MQP date of December 31, 2012, was not so disabling as to prevent her from regularly pursuing any substantially gainful occupation as required by the CPP.

[24] Paragraphs 19–23 above show that the General Division conducted a meaningful analysis of the evidence before it when it made its findings. It is not my role to reweigh the evidence, nor is an appeal a chance to reargue the case to come to a more desirable conclusion.

[25] As a result, I find that this ground of appeal does not have a reasonable chance of success upon appeal.

[26] As neither ground of appeal presented by the Applicant has a reasonable chance of success on appeal, this matter is refused.

CONCLUSION

[27] The Application is refused.

Peter Hourihan
Member, Appeal Division