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

Citation: *N. D. v. Minister of Employment and Social Development,* 2017 SSTADIS 450

Tribunal File Number: AD-16-1163

BETWEEN:

N. 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

REASONS AND DECISION

INTRODUCTION

[1] On July 28, 2016, having found that the Applicant's disability was not severe as of his minimum qualifying period (MQP) of December 31, 2011, 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 with the Tribunal's Appeal Division on September 28, 2016.

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 based its decision on an erroneous finding of fact that it made in a perverse or capricious manner without regard for the material before it, because there was overwhelming medical documentation to support a finding of severe and prolonged disability at the time of the MQP, specifically:

a) The Applicant was involved in a workplace accident in May 2006 where he suffered a head and neck injury, post traumatic back and neck pain, a concussion, Grade II Whiplash Associated Disorder, and injury to his lumbar and cervical spine. He attempted to resume work; however, he was unable to do so without the use of copious amounts of opiate-based narcotic painkillers, which left him cognitively compromised, unsafe to work and a hazard to others. He attempted to return to light duties and he retrained as a heavy equipment instructor; however, he was unable to keep up with the physical demands due to pain and the medication that was required to manage his pain made him a danger to himself and others.

b) An MRI taken after his injury showed that he suffered intervertebral foraminal narrowing at the C5/6 level and C6 nerve impingement, and, as a result, Dr. Leclair, the family physician, concluded that the Applicant was completely disabled from any form of gainful employment.

c) Dr. Mantle, neurosurgeon, concluded that the Applicant has mechanical neck pain and stiffness due to trauma and possible bilateral nerve entrapment at the elbows.

d) The Applicant was left in agonizing and constant pain. He suffers from severe headaches, great difficulty with concentration, restricted range of motion in his lumbar and cervical spine, bilateral carpal tunnel syndrome and depression. Physical activity aggravates his symptoms. He is fatigued and has difficulty sleeping. The pain prevents him from standing for more than 10 minutes. His injuries are permanent and severe.

e) The Applicant left high school at the age of 13. He has limited reading and writing ability. His work history includes working on equipment or as a truck driver. At his advanced age and with his poor academic history and his reliance on opiate-based narcotic painkillers, which compromise his cognitive functioning, he is not a candidate to retrain for sedentary employment. He is precluded from any form of employment due to his pain medication, physical limitations, headaches, fatigue and difficulty sleeping.

f) The Applicant has attempted physiotherapy and drug regimens without any improvement.

g) Dr. Leclair is of the opinion that the Applicant is permanently and severely disabled from any form of work.

h) Dr. Cisa, orthopaedic surgeon, indicated that the Applicant would not improve and would not be able to return to his previous employment or retrain for a sedentary trade, given his limited education and dependence on pain medication.

i) Neither the Respondent nor the General Division could point to a single medical doctor that stated that the Applicant could work. Further, there is no document that states that the Applicant can work at any position for which he could reasonably be expected to retrain. He also did not meet the demands of a job as a driving instructor, which was a sedentary position.

[9] The Applicant submits that the General Division erred in law when it did not appropriately weigh the medical evidence. Specifically, he submits that the General Division used a higher evidentiary standard than was required, given there was overwhelming medical evidence indicating that the Applicant cannot work. To support this argument, the Applicant cited *Moore v. Minister of Human Resources Development* (September 10, 2001), CP 12106 (PAB), which held that proof of the alleged disability beyond a reasonable doubt is not required. All that is required is a balance of probabilities.

[10] The Applicant submits that the General Division erred in law by failing to apply the principles set out in *Villani v. Canada (Attorney General)*, 2001 FCA 248; *Leduc v. Minister of National Health and Welfare* (January 29, 1988), CP 1376 (PAB); *Petrozza v. Minister of Social Development* (October 27, 2004), CP 12106 (PAB); *Moore*; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54; *Hunter v. Minister of Social Development* (February 6, 2007), CP 23431 (PAB); and *G.B. v. Minister of Human Resources and Social Development* (May 27, 2010), CP 26475 (PAB) when it denied his application. Specifically, the Applicant argues:

a) According to *Villani*, the severe criterion must be assessed in a real-world context and the Tribunal must consider the Applicant's personal characteristics such as age, education, language skills, work record and life experience. The Applicant argues that he has worked his entire life in physically demanding employment and that he has little office or computer skills that could be used in a non-labour work environment. Further, he is restricted as he is dependent on pain medication, which impacts his cognition; he suffers from severe headaches making concentration more difficult; and, because he has to change positions frequently, he is a poor candidate for a sedentary position.

b) In *Leduc*, the Tribunal stated:

> [...] despite the handicaps under which the Appellant is suffering, there might exist the possibility that he might be able to pursue some unspecified form of substantially gainful employment. In the abstract und theoretical sense, this might well be true. However, the Appellant does not live in an abstract and theoretical world. He lives in a real

> world, peopled by real employers who are required to face up to the realities of commercial enterprise. The question is whether it is realistic to postulate that, given all of the Appellant's well documented difficulties, any employer would even remotely consider engaging the appellant.

The Applicant submits that, given his well-documented difficulties, it is not remotely realistic to expect that he would be able to find employment.

c) According to *Petrozza*, it is not the diagnosis of a condition or disease that automatically precludes someone from working, rather it is the effect of the condition on the person that must be considered.

d) *Moore* held that proof of the alleged disability beyond a reasonable doubt is not required. All that is required is a balance of probabilities. It must be more likely than not that the Applicant meets the minimum statutory requirements.

e) *In Martin,* it is stated:

> There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing lime for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real.

f) In *Hunter* it is noted that the importance of the *Martin* judgement is that the Supreme Court of Canada has recognized chronic pain as a compensable disability.

g) *In G.B.* it is stated:

> Chronic pain cannot be proven by objective evidence and there is no medical test that can measure pain or take a picture of pain, and the main evidence that must be relied on is subjective evidence or the claimant's verbal description of his pain. The statutory criteria for a disability claim do not require proof of level of objective medical evidence.

ANALYSIS

[11] In respect of the Applicant's submission in subparagraphs 8(a), (d) and (e), above, he has not specifically pointed to an error in the General Division decision. Rather, he has provided a summary of his accident and the injuries he suffered, his use of opiate based medications, his work after the accident, his ongoing challenges and his work history. This summary is included in the record before the Tribunal and the General Division referenced these details throughout its decision. For example, in the evidence portion of the decision, paragraph 10 describes the initial claim through the Workplace Safety and Insurance Board, which includes details on his post- accident work; paragraphs 11 and 12 reference his work history and his limited education; paragraph 13 describes the workplace accident in 2006 in significant detail; and paragraphs 14 and 15 provide information about his post-accident work. In its analysis, the General Division noted the Applicant's limited formal education in paragraph 41 and his post-accident work and medication issues in paragraph 42. It referenced Dr. Leclair's perspective on the Applicant's condition in paragraphs 43 to 45. The General Division did take particular note of the information that the Applicant submits in these subparagraphs. Insofar as these details are concerned, the Applicant does not have a reasonable chance of success on appeal.

[12] In respect of the Applicant's submission that the General Division did not give regard to the medical evidence in subparagraphs 8(b), (c), (f), (g) and (h), above, I find that the Applicant does not have a reasonable chance of success on appeal on any of these points. In each of these submissions, the General Division referenced the medical information in the evidence portion of its decision. It did not specifically refer to each of these in the analysis portion of the decision; however, it considered the Applicant's medical condition insofar as the medical condition did not change from when he was working in the trainer position. The General Division then examined his capacity to work and whether this precluded him from regularly seeking employment. Specifically, the General Division examined the following:

- The MRI taken, as per subparagraph 8(b), above, is referenced numerous times in the General Division's decision. It notes that the Applicant had an MRI following his accident (paragraph 14) where Dr. Mantle "expressed surprise that he was able to work." Further, at paragraph 26, the decision reproduced the results of the MRI conducted by

Dr. Struck. And in paragraph 30, the General Division noted that the MRI was considered in the Functional Abilities Capacity Evaluation (FAE). In the analysis portion of the decision, the General Division did not specifically mention the MRI; however, it gave regard to the Applicant's condition.

- The General Division did give regard to Dr. Mantle, neurosurgeon, who concluded that the Applicant has mechanical neck pain and stiffness due to trauma and possible bilateral nerve entrapment at the elbows. This is specifically referenced and reproduced by the General Division in paragraph 25 of its decision. Similar to the MRI, this is not specifically referred to in the analysis portion of the General Division decision; however, it gave regard to Applicant's condition.

- In regard to the Applicant attempting physiotherapy and drug regimens, I make the same comments as above in the two previous paragraphs: the General Division considered the medical evidence and it specifically referred to physiotherapy as well as to the medication regimens and their effect on the Applicant's ability to seek work.

- In regard to the Applicant's submission that Dr. Leclair is of the opinion that he is permanently and severely disabled from any form of work, the General Division specifically addressed this point in its analysis in paragraph 45, noting Dr. Leclair's opinion and then weighing this against the CPP requirements of "severe" and the capacity to seek employment.

- In regard to Dr. Cisa's opinion that the Applicant would not improve and would not be able to return to his previous employment or retrain for a sedentary trade, given his limited education and dependence on pain medication, the report is referenced in paragraph 36 of the General Division decision.

[13] The General Division gave regard to the Applicant's medical condition and noted that he had "employment capacity for some two years following the accident through the use of this pain management strategy." It relied on *Inclima v. Canada (Attorney General)*, 2003 FCA 117, stating that where "there is evidence of work capacity, [a person] must also show that effort at obtaining and maintaining employment has been unsuccessful by reason of that health

condition." The General Division noted that the Applicant continued to work with his medical condition. As a result, I find this does not have a reasonable chance of success on appeal.

[14] I have also considered the several submissions that the General Division erred when it did not consider the medical evidence from a collective perspective. I make the same conclusion that the General Division did consider the medical evidence in its totality. It then went to consider the Applicant's condition within the context of the CPP requirements for "severe" and his capacity to regularly pursue employment. I find that the Applicant does not have a reasonable chance of success on appeal.

[15] It is not necessary that every piece of evidence be considered. "[A] tribunal need not refer in its reasons to each and every piece of evidence before it, but it is presumed to have considered all the evidence. Second, assigning weight to evidence, whether oral or written, is the province of the trier of fact"—*Simpson v. Canada (Attorney General)*, 2012 FCA 82. In this case, the General Division considered the medical evidence before it and weighed it against the requirements of the CPP.

[16] In respect of the Applicant's submission, at subparagraph 8(i), that neither the Respondent nor the General Division could point to a doctor or to any document that indicates that the Applicant was able to work at any position or be reasonably expected to retrain, I find this does not have a reasonable chance of success on appeal.

[17] First, the General Division did make specific mention of the Applicant's ability to work. In paragraph 32, in the evidence section of the decision, it noted that the conclusion of the first FAE in August 2007 indicated that the Applicant "should not be subjected to jobs and/or tasks requiring elevated work." Further, in respect of the second FAE in July 2011, the General Division noted, at paragraph 33, that the Applicant did not meet the demands of the occupational driving instructor position. Further, at paragraph 34 of its decision, the General Division noted that, in the opinion of the therapists who tested the Applicant, he "would be safe to work within a sedentary demand of work." In respect of the ability to retrain, the General Division observed, in its analysis at paragraph 41 of its decision, that the Applicant was candid in his testimony and that he demonstrated the ability to retrain after his accident. The General Division then went on to consider the Applicant's capacity to regularly pursue employment.

The General Division did point to documents that indicated that the Applicant was able to work in a sedentary position. Further, although the therapists who tested the Applicant are not medical doctors, they are health professionals with specific knowledge of occupational capabilities and testing.

[18] Second, the burden of proof is on the Applicant to show that he meets the requirements of the CPP. The Federal Court in *Bagri v. Canada (Attorney General)*, 2006 FCA 134, stated: "It is trite law in this court that claimants for long term disability benefit must prove their entitlement" (paragraph 8).

[19] In respect of the Applicant's submission that the General Division erred in law when it did not appropriately weigh the medical evidence, citing *Moore*, and specifically that it relied on a higher evidentiary standard when there was overwhelming medical evidence to support that the Applicant was not able to work, I find this does not have a reasonable chance of success on appeal.

[20] As indicated above, the General Division reviewed the medical evidence. It took into account the subjective and objective evidence and it weighed this evidence against the requirements of the CPP when it determined that the disability was not "severe" as required. It considered the Applicant's impairments as provided in the medical reports as well as the opinions of the medical doctors and therapists who conducted the FAE in 2007 and 2011. It considered the Applicant's post-accident work history. It weighed the subjective evidence and the objective medical evidence. There is no indication that the General Division placed a higher evidentiary standard on the Applicant. At paragraph 39 of its decision, the General Division noted that the Applicant was required to prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2011. The fact that the General Division found that the Applicant did not meet the test for severity does not mean that it used a higher evidentiary standard than a balance of probability.

[21] In respect of the Applicant's submission that the General Division erred in law when it did not apply the seven legal cases it referred to, I find that these do not have a reasonable chance of success on appeal. I will provide my reasons for each case that the Applicant has identified below.

[22] The Applicant argues that the General Division did not consider *Villani*, *supra.* At paragraph 40 of its decision, it specified that it must assess the severe criterion in a real-world context. It then considered his lack of formal education; however, it commented that he had demonstrated the ability to retrain. It noted that his language proficiency and varied work and life experiences could be suitable in other forms of employment. It further commented on his strong work ethic where, after the accident, he was able to work as a parts employee and as a heavy equipment operator. These are all characteristics that reflect the Applicant's real world context. The General Division concluded that the Applicant possessed the skills and abilities to retrain and to work in a sedentary position, noting that the Applicant had two years of employment capacity following his accident.

[23] In respect of his submission that he is restricted due to his pain medication and related cognition, his severe headaches and his requirement to change positions frequently, the General Division noted that the Applicant had endured these conditions when he worked post-accident and that he had not provided any evidence that he entered into a rehabilitation plan as suggested by Dr. Graham or participated in a pain clinic or other strategies other than those overseen by Dr. Leclair. It cited *Kiraly v. Canada (Attorney General)*, 2015 FCA 66, where the Federal Court stated that "*Villani* does not stand for the proposition that the Minister or the [Tribunal] is required to identify what other employment may be within the applicant's limitations." Accordingly, I find this does not have a reasonable chance of success on appeal, as *Villani* was considered.

[24] The Applicant argues, according to *Leduc*, *supra*, that he does not live in an abstract world and given the real world in which he does live, with his disabilities, no employer would even remotely consider hiring him. The General Division observed that he had worked post-accident and that he stopped working at the urging of Dr. Leclair and not of his employer. While it recognized that the employer was not aware of the medications, it observed that the Applicant did not seek further work. Indeed, the company kept the Applicant working until he stopped working. The General Division noted that the Applicant did not make an effort to seek employment in spite of the fact that he had retrained for a different role. Its citation of *Kiraly*, *supra*, applies here as well. I find this does not have a reasonable chance of success on appeal.

[25] The Applicant argues that according to *Petrozza*, *supra*, it is not the diagnosis of a condition or disease that automatically precludes someone from working, rather it is the effect of the condition on the person that must be considered. The General Division considered the evidence of the Applicant's impairments and indicated that although Dr. Leclair was very supportive of a finding of permanent disability, it noted the findings of the 2011 FAE, which concluded that the Applicant was able to seek some forms of employment. The General Division did consider the effect of his condition on his ability to seek work, finding that the Applicant did have the capacity, within limits. I find his does not have a reasonable chance of success on appeal.

[26] The Applicant included *Moore*, *supra,* again as an error of law, submitting that a balance of probabilities is the proper standard. I addressed this above at paragraph 18, and I do not need to make further comment here other than that there is no indication that the General Division placed a higher evidentiary standard on the Applicant. The fact that the General Division found that the Applicant did not meet the test for severity does not mean that it used a higher evidentiary standard than a balance of probability. I find this does not have a reasonable chance of success on appeal.

[27] The Applicant argued that the General Division did not correctly apply *Nova Scotia*, *supra*. Further, he argued that *Hunter*, *supra*, stated that the Supreme Court of Canada has recognized chronic pain as a compensable disability. The Applicant did not articulate how either of these cases were not appropriately applied, as he merely included a case quote and reference. However, I have presumed that his argument is that his chronic pain was not considered or not adequately considered by the General Division. I note that in the General Division decision, there are only two references to "chronic pain": one by the Respondent at paragraph 38, where it argued that there was no indication that the Applicant attended a chronic pain program; and, another at paragraph 48 in a quote by the Court in *Miller v. Canada (Attorney General)*, 2007 FCA 237. Though the Applicant did not bring up the term chronic pain specifically, it was specifically addressed by the General Division. Certainly, the Applicant's ongoing challenge with his pain was recognized, as were his attempts to deal with it through medications. The General Division focused on the Applicant's work capacity, as articulated in the above paragraphs herein, and it ultimately weighed in favour of the

Applicant’s capability to regularly pursue employment, finding that he demonstrated a capacity to work post-accident and had not tried to find employment since then, nor had he attempted to enter into a rehabilitation program or into a pain clinic or attempted strategies other than those overseen by Dr. Leclair. I find this does not have a reasonable chance of success on appeal.

[28] The Applicant also argues that the General Division did not appropriately apply *G.B.*, *supra*. He did not articulate his reasoning for this and merely included an excerpt from the case, which held that chronic pain cannot be proven by objective evidence and that there is no medical test. In his case, the Applicant did not specifically claim chronic pain as being a reason for his incapability to regularly pursue employment, per my comments in the paragraph above. The General Division considered both the objective and subjective evidence presented, including the pain suffered by the Applicant. It looked to the Applicant’s testimony and ultimately found that the Applicant did show a capacity to work and, in fact, that he did work post-accident. Further, it found that the Applicant had the capacity to regularly pursue employment. It recognized the Applicant’s pain and his attempts to manage it with medication. I find this does not have a reasonable chance of success on appeal.

[29] To recapitulate, in respect of the Applicant’s submission that the General Division erred in law by not considering the seven legal cases cited, I find there is no reasonable chance of success on any of these, individually or collectively, for the reasons given.

[30] In overall summary, I have examined each of the submissions and arguments that the Applicant has put forward and I find that none of them have a reasonable chance of success on appeal from an independent perspective or from a collective perspective and I refuse the application.

CONCLUSION

[31] The application for leave to appeal is refused.

Peter Hourihan
Member, Appeal Division