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

Citation: *P. V. v. Minister of Employment and Social Development*, 2017 SSTADIS 475

Tribunal File Number: AD-16-726

BETWEEN:

P. V.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Jennifer Cleversey-Moffitt

Date of Decision: September 22, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] In a decision dated February 15, 2016, 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, which was received on May 24, 2016.

ISSUE

[2] The Member 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 only be brought if leave to appeal is granted" and "The Appeal Division must either grant or refuse leave to appeal."

[4] Subsection 58(2) of the DESDA provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[5] 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.

[6] The process of assessing whether to grant leave to appeal is a preliminary one. The review requires an analysis of the information to determine whether there is an argument that

would have a reasonable chance of success on appeal. This is a lower threshold to meet than the one that must be met on the hearing of the appeal on the merits. The Applicant does not have to prove the case at the leave to appeal stage: *Kerth v. Canada (Applicant of Human Resources Development)*, 1999 CanLII 8630 (FC). The Federal Court of Appeal, in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success.

SUBMISSIONS

[7] The Applicant's representative submits that the General Division erred in the following ways:

a) The General Division breached the principles of natural justice by failing to afford the Applicant an opportunity to provide it with the reports of the surgery she attended the day after the hearing (December 9, 2015), as well as an opportunity to provide it with additional specialists' reports and findings. The Applicant's representative submits that the absence of these reports prevented the General Division from properly assessing matters critical to the appeal.

b) The General Division erred in law by assuming that pursuing further medical treatment would have resulted in an improvement of her condition(s). The Applicant's representative submits that these treatments have not improved her condition(s).

c) The General Division erred in law by failing to consider the "real world approach" in evaluating whether the Applicant's disability was severe, in particular by finding at paragraph 55 of the decision that the Applicant was "young" at age 51.

d) The General Division erred in law by concluding that the Applicant would have been physically or mentally capable of "alternate employment in between flare-ups even on a part-time basis in employment that is less stressful."

e) The General Division erred in law at paragraph 67 of the decision by considering Dr. Bacchus' recommendation in January 2013 that the Applicant apply for short-

term disability benefits as an opinion that the Applicant needed to be "tied over" only for a temporary period.

ANALYSIS

Did the General Division fail to observe a principle of natural justice?

[8] The Applicant's representative submits that the General Division breached the principles of natural justice by not allowing the Applicant to submit reports from the surgery she attended a day after the hearing had been held.

[9] After an extensive file review, which included listening to the recording of the videoconference hearing held on December 8, 2015, I was unable to find a reference to the December 9, 2015, scheduled surgery. Additionally, I failed to locate where the General Division Member had been notified that this surgery was to be held the day after the hearing. In listening to the recording, I found that at no time during the videoconference on December 8, 2015, was the December 9, 2015, surgery discussed, nor was there a request that the hearing be adjourned for the purposes of ascertaining more medical information post-surgery. The record was also reviewed to determine whether the Applicant (or the Applicant's representative) had tried to file the report and/or submission post-hearing, and there is no evidence on the record that this was attempted.

[10] If the December 9, 2015, surgery had been known to the Tribunal, then perhaps information post-surgery could have been helpful. However, if the information about the December 9, 2015, surgery was never communicated to the Tribunal before the December 8, 2015, hearing, then unfortunately the Member cannot be expected to make accommodations for an event she knew nothing about. The Applicant bears the onus of proving her case and, if she thought there was relevant information missing, then it was up to her to file those documents, raise the issue and/or ask for an adjournment. Nothing on the record provides any evidence that this surgery was communicated to the Tribunal. Additionally, in submissions filed on May 24, 2016, the Applicant's representative has not referred to any evidence on the record that would suggest that the General Division Member was aware of the scheduled surgery.

[11] The submissions of May 24, 2016, go on to further provide reports after the conclusion of that surgery. Dr. Bacchus prepared a report dated March 13, 2016, and Dr. Atkinson prepared a report dated February 25, 2016. Both reports are new evidence, and the Appeal Division cannot consider them.

[12] The Appeal Division cannot consider new evidence because the Appeal Division refrains from conducting *de novo* hearings. The General Division's role is to review the evidence and make findings of fact. The General Division Member was tasked with weighing the evidence, determining the facts and concluding the matter based on an unbiased analysis of the file, as well as the oral evidence provided at the hearing. In *Parchment v. Canada (Attorney General)*, 2017 FC 354, the Federal Court again explained the Appeal Division's role in paragraph 23 of the decision:

> In considering the appeal, the Appeal Division has a limited mandate. They have no authority to conduct a rehearing of Mr. Parchment's case. They also do not consider new evidence. The Appeal Division's jurisdiction is restricted to determining if the General Division committed an error (ss. 58(1) (a) through (c) of the DESDA) and the Appeal Division is satisfied that an appeal has a reasonable chance of success (58(2) of the DESDA). Only if the criteria of ss. 58(1) and (2) are met does the Appeal Division then grant leave to appeal.

[13] Additionally, Roussel J. wrote in *Tracey v. Canada (Attorney General)*, 2015 FC 1300, that "[u]nder the current legislative framework however, the introduction of new evidence is no longer an independent ground of appeal (*Belo-Alves*, at para 108)."

[14] This was further enunciated in *Marcia v. Canada (Attorney General)*, 2016 FC 1367, where it was determined that new evidence does not constitute a ground of appeal. As the Federal Court stated,

> [34] New evidence is not permissible at the Appeal Division as it is limited to the grounds in subsection 58(1) and the appeal does not constitute a hearing de novo. As Ms. Marcia's new evidence pertaining to the General Division's decision could not be admitted, the Appeal Division did not err in not accepting it (*Alves v Canada (Attorney General)*, 2014 FC 1100 (CanLII) at para 73).

[15] In a more recent case, *Glover v. Canada (Attorney General*), 2017 FC 363, the Federal Court adopted the reasoning in *Canada (Attorney General) v. O'Keefe*, 2016 FC 503, and concluded that the Appeal Division had not erred in refusing to consider new evidence in that case, in the context of the application for leave to appeal.

[16] There is no breach of natural justice in this instance, as the record indicates that the General Division was uninformed of the December 9, 2015 surgery and that there was no request for an adjournment. The General Division's role is to act as the primary trier of fact. The Appeal Division's role is not to consider new evidence or re-adjudicate the file.

[17] There is no reasonable chance of success on appeal with respect to this allegation of a breach of natural justice. Leave to appeal on this ground is refused.

Did the General Division err in law by assuming that pursuing further medical treatment would have resulted in improvement of her condition(s)?

[18] In paragraph 55 of the submissions provided to the Tribunal on May 24, 2016, the Applicant alleges:

> The SST further erred by speculating that the surgery may have improved the Appellant's conditions. There was no evidentiary basis for this. The only medical evidence before the SST was that of Dr. Cowie, which was that surgery only be looked at as a last option. There was no evidence that the surgery would improve the Appellant's condition. Indeed, it did not, according to the opinions above. The SST's assumption in this regard, made without any evidence to support it, is a strong ground of appeal. The decision to undergo surgery lies with the applicant, so long as this decision is reasonable, this cannot be a negative factor in determining entitlement: *Wescome v. MHRD*, CP 3752 (November 28, 1996).

[19] The General Division Member did analyze the issue of surgery—the fact that the Applicant had not yet undergone surgery. In paragraph 31 of the General Division decision, it is noted that Dr. S. Crowie's report of August 15, 2013, states that surgical treatment is a last option. Then, following her discharge from X Hospital in November 2013, it is noted that a surgical opinion should be considered (paragraph 37 of the General Division decision).

Acknowledging the November 2013 discharge report from X Hospital, paragraphs 62 and 63 of the General Division decision read:

> [62] The Tribunal finds that the Appellant was discharged from X Hospital in November 2013 and it was noted that a surgical opinion should be considered however the Tribunal finds there are no reports that address whether surgery is an option or not for the Appellant.
>
> [63] Without these reports the Tribunal is unable to properly assess critical matters such as treatments actually undertaken by the Appellant, medication trials, recommendations that may have been made, the Appellant's compliance with recommendations, and the benefits, if any, from the treatments. The Tribunal does not have the diagnoses and prognoses made by these specialists. The Tribunal does not have the opinions, if any, that these specialists might have expressed concerning the Appellant's work capacity in 2014 at the time of her MQP. It is the duty and responsibility of the Tribunal to act only on credible and supporting evidence and not on speculation: MHRD v S.S. (December 3, 2007) CP 25013 (PAB).

[20] The General Division clearly noted a lack of medical evidence with respect to the issue of surgery, and the commentary provided in paragraphs 62 and 63 note that decisions must be made based on supporting evidence and not on speculation. In *Klabouch v. Canada (Social Development)*, 2008 FCA 33, the Federal Court of Appeal stated that there must be evidence of efforts to manage the medical condition. Paragraph 16 of *Klabouch* explains:

> … this Court has consistently held that an applicant must adduce before the Board not only medical evidence in support of his claim that his disability is "severe" and "prolonged", but also evidence of his efforts to obtain work and to manage his medical condition.

[21] The General Division can rely only on the evidence provided. *Klabouch* instructs that an assessment of efforts made to manage a medical condition is needed in assessing the severity of the condition. Furthermore, when there is evidence of treatment that was unpursued and no explanation is given, the decision maker cannot make inferences. This was the case in *Warren v. Canada (Attorney General)*, 2008 FCA 377, where the Federal Court of Appeal dismissed the application noting, "There was also before the Board evidence that the applicant had failed, without giving any explanation, to abide by and submit to treatment recommendations." (paragraph 6)

[22] The General Division did not assume that surgery would improve the Applicant's condition but instead simply noted a lack of evidence that would allow her to assess whether the Applicant had made reasonable efforts to manage her medical condition as required by *Klabouch* and *Warren*. It is the Applicant's duty to adduce evidence that efforts were made in managing the medical condition. The conclusion that there was a lack of evidence is not an error in law.

[23] There is no reasonable chance of success on appeal with respect to this alleged error in law. Leave to appeal on this ground is refused.

Did the General Division err in law by failing to consider the "real world approach" in evaluating whether the Applicant's disability was severe, in particular by finding that the Applicant was "young" at age 51?

[24] The General Division decision looks to the "real world approach" in evaluating whether the Applicant's disability was severe in paragraphs 54–56, which read:

> [54] 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.
>
> [55] While assessing the *Villani* characteristics, the Tribunal finds that the Appellant was young at 51 at her MQP. The Appellant had a Grade 12 education. She has a one year College Diploma. The Appellant was a Community Support Worker with the mentally challenged. She is proficient in the English language.
>
> [56] The Tribunal finds that not everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. 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 as will evidence of employment efforts and possibilities (*Villani v. Canada (Attorney General)*, 2001 FCA 248).

[25] The determination of employability within the context of the "real world" approach includes a consideration of an Applicant's particular circumstances, including factors such

as age. In *Bungay v. Canada (Attorney General)*, 2011 FCA 47, the Federal Court of Appeal discussed how the "real world" approach helps determine whether an applicant is capable regularly of pursuing any substantially gainful occupation. At paragraph 8 of the decision, the Court wrote:

> The leading case on the interpretation of "severe" is *Villani v. Canada (AG)*, 2001 FCA 248 (CanLII), [2002] 1 F.C. 130. *Villani*, at paragraphs 32 and 38, stands for the proposition that in assessing whether a disability is severe, the Board must adopt a "real world" approach. This "real world" approach requires it to determine whether an applicant, in the circumstances of his or her background and medical condition, is employable, i.e., capable regularly of pursuing any substantially gainful occupation. Employability is not to be assessed in the abstract, but rather in light of "all of the circumstances." The circumstances fall into two categories:
>
> (a) The claimant's "background." Matters such as "age, education level, language proficiency and past work and life experience" are relevant here (Villani, supra at paragraph 38).
>
> (b) The claimant's "medical condition." This is a broad inquiry, requiring that the claimant's condition be assessed in its totality. All of the possible impairments of the claimant that affect employability are to be considered, not just the biggest impairments or the main impairment. The approach of assessing the claimant's condition in its totality is consistent with section 68(1) of the Regulations, which requires claimants to submit highly particular information concerning "any physical or mental disability," not just what the claimant might believe is the dominant impairment.

[26] Ultimately, the General Division concluded that the Applicant had a residual capacity to work, and that conclusion was based on an assessment of the Applicant's circumstances. The General Division did not err in law by considering the Applicant's age—in fact, the consideration of the Applicant's age was a relevant factor to be considered when assessing an applicant in the "real world" context. Paragraph 59 of the General Division decision is quite clear in its determination that residual capacity to work was determined based on the Applicant's personal circumstances and her medical condition. The determination was that there was a residual capacity to work. The fact that the General Division determined that the Applicant was "young" does not amount to an error of law.

[27] Because of the abovementioned reasons, there is no reasonable chance of success on appeal with respect to this alleged error in law. Leave to appeal on this ground is refused.

Did the General Division further err in law by concluding that the Applicant would have been capable of "alternate employment in between flare-ups even on a part-time basis in employment that is less stressful?"

[28] The General Division takes the Applicant's personal characteristics into consideration and, in paragraph 68 of the decision, concludes that the Applicant had not attempted alternate less stressful work even on a part-time basis within her limitations and medical conditions.

[29] In contrast, the submissions of May 24, 2016, argue that the Applicant had a low level of education, that she had extremely limited employment available to her when determining the context for the real-world approach and that the General Division failed to take those characteristics into consideration. In support of this argument, the submissions also cite the report from Dr. Bacchus of March 13, 2016, which has already been deemed inadmissible, as it was produced after the General Division decision had been delivered and, as such, was not considered. The submissions also argue that her presence in the hospital for a few days at a time when she experienced flare-ups, coupled with her depression, would have prohibited her from performing any "sort of gainful employment."

[30] The General Division decision was quite clear in its analysis of the Applicant's conditions and how they affected her ability to work. Paragraphs 67 and 68 of the General Division decision note her limitations. In fact, this portion of the decision cites many medical opinions that have a direct bearing on her capacity to work. However, it is in paragraph 68 where the General Division Member notes that the issue is that the Applicant never attempted to find less stressful, alternate employment, and the failure to try left the General Division Member with no choice but to conclude that "[t]he Appellant [now Applicant] does not know if she would be successful or not at maintaining alternate employment within her functional limitations and medical conditions." (Paragraph 68 of the General Division decision)

[31] There was consideration for her personal characteristics in assessing her ability to look for part-time work in-between flare-ups as suggested in paragraph 68 of the General Division decision. Additionally, the submissions raised the issue of her depression (while it may not be severe) and that this would have provided an additional barrier to looking for "what limited work may be available." (AD1-17). The General Division decision did address the issue of her depression and, in paragraph 64 of the General Division decision, the Member wrote:

> The Tribunal agrees with the Respondent that that [*sic*] reports that have been produced do not establish a severe disability. These reports confirm that the Appellant suffers from Crohn's Disease and intermittent flares, hypertension, and depression; however, they do not establish a severe disability. The Tribunal acknowledges that the Appellant started taking 10 mg of Celexa in January 2014 and it was increased to 20 mg in November 2014 by Dr. Bacchus, however the Tribunal finds there are no clinical notes from Dr. Bacchus with regards to her depression and whether the medication is helping or not. The Tribunal finds there is a lack of medical evidence and the Tribunal finds that the Celexa medication was increased from 10 mg to 20 mg however the Tribunal finds that the medication that the Appellant was taking for depression is not supportive of severe depression.

[32] In paragraph 59 of the General Division decision, the Member determined that the medical evidence did not establish that the Applicant lacked the "residual capacity to pursue alternative work within her functional limitations and medical conditions." Following this finding of fact, the General Division Member correctly identified that, without an attempt to find alternate work, there is no way to know whether part-time or different employment could have been successful. The test in *Inclima v. Canada (Attorney General)*, 2003 FCA 117, requires that, if there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition. In the submissions, it is argued that work would not be "readily available to her" because of her personal characteristics. Without attempting to find alternative employment, but determining there was a residual capacity to work, the General Division's decision correctly applied the test in *Inclima* and, as such, the General Division did not err in law on this issue.

[33] For the above-noted reasons, I see no arguable case on this ground that could have a reasonable chance of success on appeal. Leave to appeal on this ground is refused.

Did the General Division err in law by considering Dr. Bacchus' recommendation in January 2013 that the Applicant apply for short-term disability benefits as an opinion that the Applicant needed to be "tied over" only for a temporary period?

[34] Paragraph 67 of the General Division decision states:

> The Tribunal took into consideration that in January 2013 Dr. Pluta suggested that the Appellant should apply for short term disability as she works with the mentally handicapped and will not be able to perform this job. However the Tribunal finds The purpose of the disability benefit is to provide income to those who are disabled from working on a long-term basis, not to tide claimants over a temporary period On May 10, 2013, Dr. R. Bacchus, Family Physician, reported the Appellant will not be able to ever return to her previous employment due to a medical issue. In June 2013 Dr. Bacchus noted that work stresses exhaust the Appellant and he noted that the stress is at least partially causing her disease to remain active. On October 21, 2013, Dr. K. Atkinson, Gastroenterologist, noted that the Appellant is continuing to find physical and emotional stressors to prevent her from normal activities. However the Tribunal finds that as the law states "the purpose of the disability benefit is to provide income to those who are disabled from working on a long-term basis, not to tide claimants over a temporary period."

[35] The submissions asserted that most insurance plans require that the insured first apply for short-term disability benefits before long-term disability benefits can be accessed. In paragraph 67, the reference to short-term disability benefits as being an option for the Applicant at that time is also supported by the May 10, 2013, report of Dr. Bacchus where he notes that she cannot return to her previous employment. He does not say that she can never return to any employment. Paragraph 67 discusses the Applicant's situation from January 2013 until October of 2013 and, during that time, none of the medical information on file is contradictory but instead notes that her present employment and her "normal activities" have been affected. There is no discussion about her being unable to perform other types of work.

[36] Additionally, the submissions noted that the General Division Member failed to reference Dr. Pluta's report of May 23, 2013, where he had suggested that the Applicant might want to apply for long-term disability. Any determination that someone qualifies for long-term disability benefits under a different plan has absolutely no bearing on whether the Applicant

qualifies for a CPP disability pension. However, showing that initially this doctor thought that only short-term disability benefits would be required was an indication that he had reservations about the disability being permanent at that point in time. As was determined by the Federal Court of Appeal in *Canada (Minister of Human Resources Development) v. Henderson*, 2005 FCA 309:

> The restrictive language of section 42 indicates that the purpose of the Plan is to provide a pension to those who are disabled from working on a long-term basis, not to tide claimants over a temporary period where a medical condition prevents them from working.

[37] Additionally, it is understood that the General Division has assessed all of the information on file even if every detail has not be explicitly referenced in the decision. In *Simpson v. Canada (Attorney General)*, 2012 FCA 82, the appellant's counsel identified a number of medical reports that, she said, the Pension Appeals Board—the predecessor to the Appeal Division—had ignored, attached too much weight to, misunderstood or misinterpreted. In refusing the application for judicial review, the Federal Court of Appeal held:

> First, a tribunal need not refer in its reasons to each and every piece of evidence before it, but 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. 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 […]

[38] The General Division's determination was that the medical information on file did not provide evidence that this Applicant was incapable regularly of pursuing any substantially gainful occupation. The General Division's decision is consistent with established jurisprudence, and the Member did not err in law on this issue.

[39] I see no arguable case on this ground that could have a reasonable chance of success on appeal. Leave to appeal on this ground is refused.

CONCLUSION

[40] The Application is refused.

Jennifer Cleversey-Moffitt
Member, Appeal Division