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

Citation: *J. G. v. Minister of Employment and Social Development*, 2017 SSTADIS 478

Tribunal File Number: AD-16-1040

BETWEEN:

J. G.

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

REASONS AND DECISION

INTRODUCTION

[1] The Respondent date-stamped the Applicant's application for a *Canada Pension Plan* (CPP) disability pension on October 15, 2012. The Respondent refused the application initially and upon reconsideration. The Applicant appealed the reconsideration decision to the Social Security Tribunal of Canada (Tribunal). On May 17, 2016, the Tribunal's General Division determined that a disability pension under the CPP was not payable. The Applicant filed an application for leave to appeal (Application), which the Tribunal's Appeal Division received on August 17, 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 (Minister 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

The General Division erred in law.

[7] The Applicant submits that the General Division erred in law by failing to properly assess the severe criteria in the "real world context," as instructed by *Villani v. Canada (Attorney General)*, 2001 FCA 248, and by failing to consider the totality of evidence. The Applicant's representative submits that, in paragraph 48 of the General Division decision, the *Villani* analysis is conducted incorrectly, as the member failed to consider "significant functional limitations that were present." (AD1-4) Additionally, the submissions argue that the decision failed to consider the totality of evidence, including her personal characteristics, such as education, employment experience and daily activities.

The General Division based its decision on an erroneous finding of fact.

[8] The Applicant submits that the General Division based its decision on an erroneous finding of fact when it determined that the Applicant had "residual work capacity." The submissions argue that the Applicant did not have any residual work capacity. The Applicant's representative submits that proof of this was that she made "a reasonable effort

to continue to work by returning to work at 'highly accommodated light work' with her employer." The submissions further argue that,

> The evidence is that Applicant demonstrated with her current employer that she does not have capacity of light or even highly sedentary work. Theoretically there may exist the possibility that she may be able to perform some unspecified form of employment despite the disability she suffers. [*sic*] (AD1-5)

[9] In addition, the submissions argue that no employer would even remotely consider hiring the Applicant.

ANALYSIS

Did the General Division err in law by failing to properly assess the severe criteria in the "real world context," as instructed by *Villani*?

[10] The General Division decision began with an analysis of the severe criterion by referencing *Villani* and by examining the Applicant's age, education and work experience. (Paragraph 35 of the General Division decision)

[11] Additionally, after an extensive review of the case law, the Applicant's medical evidence, the Applicant's oral testimony and her work history, paragraph 48 of the decision reads:

> The *Villani* case requires the Tribunal when deciding whether a person's disability is severe to keep in mind factors such as age, level of education, language proficiency, past work and life experience. The Appellant was only 51 years old at her MQP date of December 31, 2010. She has a university education from India. Her schooling in India according to her testimony was in English. She is able to read, write and speak English. She was reported by Great West Life after a Portfolio Assessment in July 2009 to have skills that would allow her to work at her own job or in a company or a manufacturing setting or warehouse where she was not required to perform repetitive work.

[12] The General Division member did turn her mind to the *Villani* factors. The determination of employability within the context of the "real world" approach includes a consideration of an applicant's particular circumstances and their medical condition(s), which, for the Applicant in this case, was conducted by the General Division member. The member

correctly summarized the *Villani* principles and made clear findings with respect to the Applicant's age, her employment history, her most recent efforts to work, her education and her language capability.

[13] 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.

[14] When reading the General Division decision, I see that the decision was very focused on the Applicant's medical condition prior to the minimum qualifying period (MQP). The determination of employability prior to the MQP is important, and the General Division member noted that the deterioration of an applicant's condition after the expiry of the MQP is unfortunate. However, it does not qualify someone for CPP disability benefits. In paragraph 46 of the decision, the member writes:

> The Appellant testified that she is currently incapable of all forms of employment due to a worsening of her condition and her limited English skills. According to case law, the Appellant has to demonstrate that she suffered from a severe and prolonged disability by the expiry of her MQP (that is by December 2010). The evidence on file does not support that she was incapable of all work at her MQP date of December 31, 2010. Although she is documented to have permanent restrictions with prolonged sitting, standing and walking and with respect to performing work of a repetitive nature, the evidence specifically reveals that she was capable of sedentary work at her MQP date and as of October 2012. As stated earlier, the purpose of the CPP is to provide individuals who have been disabled with a disability pension because they are "incapable of regularly pursuing any substantially gainful employment" by their MQP date. If an appellant has not done so, it is irrelevant that his or her condition deteriorated after the MQP. (My emphasis)

[15] The Applicant's representative contends that the General Division failed to consider the totality of the evidence. The General Division indicated that the Applicant was required to establish that she had had a severe and prolonged disability on or before the end of the MQP. It is immaterial whether the Applicant's condition has continued to deteriorate since that date and it is immaterial that she is still undergoing medical treatment and rehabilitation. It has not been shown that the General Division failed to consider the totality of the evidence.

[16] 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 and medical condition prior to the MQP. The submissions argue that paragraph 48 of the decision fails to account for "significant functional limitations that were present." However, the submissions do not detail where in the decision there was a specific error, nor do the submissions expand upon what were the "significant functional limitations." Instead, paragraph 46 of the General Division decision clearly outlines that the General Division member found evidence that the Applicant had been capable of sedentary work up to the time of the MQP and after the expiry of the MQP, given her characteristics and medical conditions. I see no reasonable chance of success on the basis that the General Division failed to properly apply *Villani* and that it failed to consider the totality of the evidence. Leave to appeal on this ground is refused.

Did the General Division base its decision on an erroneous finding of fact when it determined that the Applicant had "residual work capacity"?

[17] Although there is considerable evidence that her physical limitations affected her ability to continue with her previous employer, she did not attempt to find any other work. There is no evidence that indicates that she was precluded from performing all types of work prior to the expiry of the MQP. In fact, the General Division decision notes that much of the medical information on file speaks to her capacity for modified work just prior to the expiry of her MQP. Paragraph 47 of the General Division decision notes:

> It is undenied [*sic*] that the Appellant has physical limitations that affect her ability to continue with her previous employment as a scanner or warehouse employee due to her documented partial permanent restrictions. However, not everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. A claimant must still demonstrate that he or she suffers from a serious and prolonged disability that renders her incapable regularly of pursuing any substantially gainful occupation. Section 68 (1) of the CPP Regulations requires an appellant to supply medical reports and medical findings with respect to his or her disability. Evidence has not been provided that the Appellant was unable to be gainfully employed prior to and after her MQP date of December 2010. In July 2009 her long term insurance provider documented that she had capacity for modified work including working at her own job. Her chiropractic Dr. Blainey-Broker in August 2009 reported that she was capable of sedentary work with sedentary hours. In September 2010 Dr. Alborz Oshidari a physiatrist said she had capacity for sedentary activities which would allow for her to stand and move after 20-30 minutes. He felt that she had become deconditioned and had a pain perception which affected her ability to take part in activities. He specifically recommended participation in sedentary activities and in aquatic therapy to prevent further general deconditioning. These observations show that her doctors believed she had the capacity to engage in some form of work and in fact encouraged participation in some form of activity to prevent further "deconditioning".

[18] The General Division member relied on much of this information in determining that there was a residual capacity to work. The submissions ask the question, is it "realistic to postulate that, given the applicants [*sic*] well documented difficulties any employer would even remotely consider engaging the Applicant?" The submissions, although unclear on this

point, seem to argue that this Applicant would not be attractive to any employer, and *Leduc v. MHNW* (June 29, 1998), CP-1376, is cited in support. *Leduc* is an important case that states that it is not enough to consider a disability claim in the abstract; rather, a decision-maker must also ask how the Applicant would be able to find and maintain employment in a "real world" context, which includes understanding how real employers who deal with the realities of commercial enterprise would employ the Applicant, given the restrictions. Again, what seems to be missing from the submissions is the understanding that the evidence on file shows that the residual capacity to work is time-specific—occurring prior to the MQP. Unfortunately, the deterioration of one's health after the expiry of the MQP is irrelevant.

[19] *Inclima v. Canada (Attorney General)*, 2003 FCA 117, places an onus on the Applicant, who has a residual work capacity, to show that their efforts to obtain and maintain employment were unsuccessful by reason of their health condition. The General Division determined, based on the evidence, that there was a residual capacity to work but that the Applicant had not attempted to find work. It is noted that her previous employer could not accommodate her "restrictions" (GD4-176). However, without the Applicant attempting to find other work, the General Division was not able to determine whether the obtaining and maintenance of that work would have been unsuccessful due to her health conditions. The Applicant failed to meet that onus.

[20] In the Federal Court's decision in *Griffin v. Canada (Attorney General)*, 2016 FC 874 (CanLII), Justice Boswell provided guidance as to how the Appeal Division should address applications for leave to appeal under subsection 58(1) of the DESDA:

> It is well established that the party seeking leave to appeal bears the onus of adducing all of the evidence and arguments required to meet the requirements of subsection 58(1): see, e.g., *Tracey*, above, at para 31; also see *Auch v. Canada (Attorney General)*, 2016 FC 199 (CanLII) at para 52, [2016] FCJ no 155. Nevertheless, the requirements of subsection 58(1) should not be applied mechanically or in a perfunctory manner. On the contrary, the Appeal Division should review the underlying record and determine whether the decision failed to properly account for any of the evidence: *Karadeolian v. Canada (Attorney General)*, 2016 FC 615 (CanLII) at para 10, [2016] FCJ no 615.

[21] I reviewed the record and the evidence that was provided, and I have not identified any basis for determining that the General Division made an erroneous finding of fact. An appeal to the Appeal Division is not an opportunity to re-argue the case hoping for a different result. (*Marcia v. Canada (Attorney General)*, 2016 FC 1367, at paragraph 34, *Parchment v. Canada (Attorney General)*, 2017 FC 354, at paragraph 23).

[22] The Appeal Division's job, as per subsection 58(1) of the DESDA, is to determine, without delving directly into an adjudication of the merits of the file, whether the reasons for appeal fall within any of the specified grounds and whether they have a reasonable chance of success. The Appeal Division does not have jurisdiction to conduct a *de novo* hearing. An applicant's disagreement with the General Division decision does not constitute an error in law or fact. This allegation that the General Division member breached subsection 58(1)(*c*) of the DESDA has no reasonable chance of success on appeal.

[23] I have concluded that the Applicant has not raised any arguable ground upon which the proposed appeal may succeed. I am therefore satisfied that the proposed appeal has no reasonable chance of success.

CONCLUSION

[24] The Application is refused.

Jennifer Cleversey-Moffitt
Member, Appeal Division