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

Citation: *B. I. v. Minister of Employment and Social Development*, 2017 SSTADIS 495

Tribunal File Number: AD-16-1390

BETWEEN:

B. I.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: September 27, 2017

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the General Division's decision dated September 19, 2016, which determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it had found that her disability had not been "severe" by the end of her minimum qualifying period on December 31, 2012. The Applicant submits that the General Division erred in law and that it based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it.

ISSUE

[2] Does the appeal have a reasonable chance of success?

ANALYSIS

[3] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to 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 that it made in a perverse or capricious manner or without regard for the material before it.

[4] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

(a) Villani

[5] In *Villani v. Canada (Attorney General)*, 2001 FCA 248, the Federal Court of Appeal stated that the severity test requires that a decision-maker adopt a "real world" approach, i.e. that he or she considers an appellant's particular circumstances, such as his or her age, education level, language proficiency, past work experience and life experience, when assessing whether that appellant is incapable regularly of pursuing any substantially gainful occupation.

[6] The Applicant claims that the General Division failed to consider several factors in her case. She notes, for instance, that the General Division failed to recognize that, by the time she undergoes and is recovering from knee replacement, she will be 62 years old. She questions who in the real world would consider employing someone with her characteristics: she is in her 60s, has several "serious physical limitations," and requires follow-up surgery for her other knee. She also claims that she has limited "transferable skills" as a nurse and that she has no office skills. She claims that, in any event, she is unable to contemplate any sedentary occupations because she is unable to sit for any extended periods due to her back issues. She argues that it is unrealistic to contemplate that she will be able to return to a "normal state" following surgery, given these considerations. She asks for a reconsideration.

[7] In terms of the Applicant's suitability for sedentary occupations, the General Division noted the December 20, 2013 medical report from the Applicant's family physician, Dr. D. Glaeske, in which he stated that once coronary artery disease was ruled out and the Applicant's symptoms were controlled medically, she "may return to a sedentary position pending rehabilitation from knee surgery, at which time a return to her former occupation may be contemplated" (GD2-94). In my review of the documentary record, there was no supporting evidence of any limitations involving sitting for prolonged periods, at any time prior to the end of the Applicant's minimum qualifying period. For instance, in the Applicant's questionnaire that accompanied her application for a disability pension, the Applicant indicated that sitting was "ok if [left] leg can be extended and elevated regularly." There was no mention that she had any problems or limitations involving sitting for

prolonged periods. Indeed, in a subsequent medical report dated June 3, 2014, months after the end of the minimum qualifying period, the family physician indicated that she was capable of sedentary work only at that time (GD8-3).

[8] The first mention in the medical records that the Applicant was encountering any issues with sitting arose in the family physician's medical report dated August 4, 2016 (GD10-3 to GD10-4). The family physician noted that in fall 2014, the Applicant's knee had given out, causing her to fall backwards. The Applicant injured her back from this incident. Diagnostic examinations revealed that the Applicant had sustained a vertebral compression at T12. The family physician was of the opinion that, although the Applicant's knee pain masked her back pain, she would nevertheless encounter difficulty sitting for long periods. Although the Applicant was subsequently diagnosed as also having severe degenerative lumbar arthritis, there are no documented instances prior to the end of the minimum qualifying period whereby she had complained that it caused any limitations with sitting. Given that any limitations with sitting seemingly arose after the end of the minimum qualifying period, it was reasonable that the General Division did not consider the Applicant's complaints in this regard, when it assessed the severity of her disability.

[9] In regard to the *Villani* considerations, the General Division wrote:

> [29] The severe criterion must be assessed in a real world context (*Villani v. Canada (A.G.)*, 2001 FCA 248). This means that when assessing a person's ability to work, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.
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> [30] The [Applicant] is nearing the end of her work career however she has an extensive and varied work history that has given her numerous] transferable skills. The Tribunal notes that the [Applicant] has a good education as well as has a LPN designation. The Tribunal also notes that the [Applicant] has issues standing due to her knee however her background would enable her to develop skills that would not require physical labour or excess standing. I have taken into account the *Villani* factors and have determined that the [Applicant'] age, level of education, language proficiency, and work and life experiences are of such a level that there would be alternative options available to the [Applicant] to find alternate work.

[10] Although the Application argues that the General Division did not fully take into account her age, limited skills and work experience, the General Division in this case not only referred to *Villani*, but it also considered the Applicant's particular circumstances in the paragraphs that I have cited above.

[11] I note that the Federal Court of Appeal in *Villani* stated that:

> [...] as long as the decision-maker applies the correct legal test for severity – that is, applies the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) he or she will be in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantial gainful occupation. The Assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere. (My emphasis)

[12] Given that the General Division took the Applicant's personal circumstances into account, I am not satisfied that the appeal has a reasonable chance of success on the issue that the General Division erred in failing to apply the "real world" context.

[13] Essentially, the Applicant is seeking a reassessment on the basis of her particular circumstances. However, subsection 58(1) provides for only limited grounds of appeal. It does not allow for a reassessment or rehearing of the evidence: *Tracey*, *supra*.

(b) Alleged erroneous findings of fact

[14] The Applicant submits that the General Division made several erroneous findings of fact:

- At paragraph 8, where it stated that she had stopped working in 2011 so she could await knee replacement surgery. The Applicant states that she had stopped working because she had sustained a severe knee injury that rendered her unable to work or walk.

- At paragraphs 9 to 12, regarding her knee issues. The Applicant submits that the General Division neglected to mention much of her testimony regarding the many occasions when she has fallen because her knee has given out.

- At paragraph 18, where it stated that she had not sustained a compression fracture to her mid-back from a fall in 2014. The Applicant notes that she fell "very severly [*sic*]"and that it resulted in a spinal compression fracture that has left her unable to stand for more than 10 minutes.

- At paragraph 19, where it referred to her family physician's medical report. The Applicant submits that the General Division neglected to mention that she is unable to "ambulate sufficiently, that [she] must use a cane at all times and that not only [is she] unable to walk well or safely … cannot sit for any lengths of time either." She argues that the General Division unfairly minimized her disabilities, to her detriment.

- At paragraph 20, which she claims is wholly untrue and unrepresentative. For instance, she denies any findings that her earnings were ever "spotty," that she worked in a palliative care home, or that she worked as a Licensed Practical Nurse (LPN) from 1991 to 1993. She claims that she had testified that she had trained as a nursing assistant for and with a palliative care organization. She also claims that she did not do her grade 12 upgrading and subsequent LPN nurses' training until 2000.

- At paragraph 26, which she claims inaccurately sets out the evidence regarding the frequency of physiotherapy appointments and her efforts at seeking or attempting any type of alternate or sedentary work.

[15] In regard to paragraph 8, while the General Division may have mischaracterized the Applicant's evidence explaining why she had stopped working, it did not base its decision on this fact.

[16] At paragraphs 9 to 12, the General Division summarized some of the documentary evidence regarding the Applicant's knee issues. The Applicant argues that the General Division's portrayal of her knee issues was inaccurate, as it failed to mention that, from time to time, her knee gave out, which led to falls. Although the General Division may not have set this out under the subheading "Knee issues," the General Division was aware of and briefly described the Applicant's problems in this regard. At paragraphs 20 and 22, under the subheading "Oral Evidence," the General Division noted that the Applicant had fallen. It wrote, "In August 2011 her knee collapsed and she was placed on short term disability due to the fact that she could not walk. In 2012 she fell again" and "In August 2014 she slipped off a step and landed on her back and fractured her back."

[17] The Applicant asserts that, at paragraph 18, the General Division misinterpreted the X-ray report dated October 17, 2014. The General Division indicated that the X-ray report showed that no compression fracture had developed in the lumbar spine, when she claims that she in fact had sustained a compression fracture. The X-ray of the lumbar spine indeed reads, "No compression fracture has developed in the lumbar spine," so the General Division's interpretation was accurate. However, there is a handwritten notation on the X-ray report that indicates that a fracture was later confirmed by magnetic resonance imaging (MRI). An MRI of the thoracic and lumbar spine done on June 19, 2015 confirmed the fracture (GD8-6). However, although the General Division may have misconstrued some of the evidence by failing to correctly note that the Applicant had in fact suffered a compression fracture, the fracture was of little relevance, given that the fracture appeared old. The Applicant had undergone the diagnostic examinations following a slip and fall that had occurred after the end of the minimum qualifying period, so any increased symptomology that resulted was of no significance in assessing whether her disability could be considered severe by the end of her minimum qualifying period.

[18] The Applicant argues that, at paragraph 19, the General Division did not accurately describe her limitations, which were set out in the family physician's report. The General Division referred to the family physician's report and summarized what it considered to be its most important aspects. While the General Division may not have provided a

comprehensive review and analysis of the evidence, and did not fully set out the contents of the medical report that described the Applicant's limitations, that does not mean that the General Division failed to consider that evidence. I note that the Federal Court of Appeal has held that there is no obligation for a decision-maker to exhaustively list all the evidence before it, as there is a general presumption that it considered it all. In *Simpson v. Canada (Attorney General)*, 2012 FCA 82 (CanLII), the Federal Court of Appeal held that, "[…] 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." I note too the words of Stratas J.A. in *Canada v. South Yukon Forest Corporation and Liard Plywood and Lumber Manufacturing Inc*., 2012 FCA 165 in this regard. Stratas J.A. wrote:

> […] trial judges are not trying to draft an encyclopedia memorializing every last morsel of factual minutiae, nor can they. They distill and synthesize masses of information, separating the wheat from the chaff and, in the end, expressing only the most important factual findings and justifications for them.

[19] The Applicant contends that the General Division misstated her oral testimony. I have not reviewed the audio recording of the hearing before the General Division, but irrespective of whether the General Division misstated or mischaracterized her evidence, I find that nothing turns on how it may have described her earnings history, when she trained and worked as an LPN, or whether she trained or worked at either a palliative care home or organization. The General Division simply did not base its decision on any of these factors.

[20] Paragraph 26 represents the Respondent's submissions and not necessarily the General Division's findings. The Respondent reportedly argued that there were no physiotherapy reports to indicate that she had continued her treatments. However, the General Division did not base its decision on whether there was any evidence to indicate that the Applicant had continued her (physiotherapy) treatments. At paragraph 19, the General Division noted that an orthopaedic surgeon had recommended that the Applicant try NeoVisc and that she continue with physical therapy. The General Division found that it was reasonable to expect the Applicant to not have the NeoVisc treatment. The General

Division did not make any findings regarding the issue of whether the Applicant had continued physical therapy. It did not base its decision on the Respondent's submissions.

[21] The General Division wrote that the Respondent submitted that there was a "lack of evidence to support that she sought or attempted any type of alternate work or sedentary work more suitable to her limitations." The Applicant states that sometime before December 2013, she had approached her employer for accommodation in the form of light duties. She states that her employer declined her request, because nothing was available to accommodate her limitations. It is unclear whether this evidence had been before the General Division, but clearly the General Division accepted that the Applicant was unable to return to her usual duties at her former employment and, that being so, that unless the employer could accommodate her with modified duties, the Applicant was still required to seek or attempt alternative employment. The General Division noted that the Applicant had not attempted any alternative employment.

CONCLUSION

[22] Given the considerations above, I am not satisfied that the appeal has a reasonable chance of success and the application for leave to appeal is therefore refused.

Janet Lew
Member, Appeal Division