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

Citation: *R. P. v. Minister of Employment and Social Development*, 2017 SSTADIS 490

Tribunal File Number: AD-16-1373

BETWEEN:

R. P.

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

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated September 13, 2016, which determined that the Applicant was not eligible for a Canada Pension Plan disability pension, as it found that he did not have a severe disability as defined by the *Canada Pension Plan* by the end of his minimum qualifying period, on December 31, 2013. The Applicant submits that the General Division erred in law 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.

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] The Applicant argues that the General Division erred in law in assessing whether his medical conditions rendered him disabled, by failing to assess his circumstances in a "real world context" as required by *Villani v. Canada (Attorney General)*, 2001 FCA 248. He cites *K.S. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 36, a case in which the Appeal Division granted leave to appeal. Although the General Division had cited *Villani* in that case, seemingly it did not consider *K.S.*'s particular circumstances, despite referring to them in its evidence section.

[6] When assessing whether an appellant is incapable regularly of pursuing any substantially gainful occupation, *Villani* requires that a decision-maker adopt a "real world" approach, i.e. that he considers that appellant's particular circumstances, such as his age, education level, language proficiency, past work and life experience.

[7] The Applicant claims that realistically he is not employable, given his disability, and that he is unlikely to successfully retrain for light sedentary work: He has no post-secondary education or any training that is relevant to an office-type position. He notes that his only work background is in manual labour and that the evidence before the General Division was that he cannot afford to enrol in retraining programs or to attend a postsecondary institution. He argues that it is unrealistic to believe that any employer would hire someone of his profile, as he has no office-type experience, lacks basic word-processing and computer skills, and has no relevant training or educational experience. He asserts that, based on these considerations, it is clear that the General Division did not consider his disability in a "real world context."

[8] At paragraphs 29 and 30, the General Division wrote:

> 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.
>
> The [Applicant] was 47 years old with a grade 12 education when he stopped working in November 2012 at his long-time job as a roofer, due

> to recurring bilateral foot ulcers with pain and numbness with prolonged standing or walking. The [Applicant's] Diabetes and Osteomyelitis conditions limit his capacity for work such as full-time roofing; however, the Tribunal finds the [Applicant's] relatively young age, education, English proficiency and considerable residual abilities establish he is capable of regularly pursuing a substantially gainful occupation.

[9] At paragraph 41, the General Division also wrote that "th[e] requirement [of evidence of a serious effort by the Applicant to help himself] extends to the obligation of all Appellants to establish that reasonable and realistic efforts were made to find and maintain employment while taking into account the *Villani* personal characteristics and his employability: *A.P. v MHRSD* (December 15, 2009) CP 26308 (P AB)."

[10] In its evidence section and again at paragraph 30, the General Division noted that the Applicant had a grade 12 education. The General Division also noted that the Applicant had worked as a roofer. It did not mention whether the Applicant had ever been involved in any other type of employment.

[11] Although the Applicant argues that the General Division did not fully take into account his limited education and work experience, and although he relies on *K.S.*, 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.

[12] 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. <u>The Assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere</u>. (My emphasis)

[13] 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.

[14] Essentially, the Applicant is seeking a reassessment on the basis of his particular circumstances. However, subsection 58(1) of the DESDA 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

Efforts to become reemployed

[15] The Applicant submits that the General Division made an error in fact in finding at paragraph 41 that he had failed to establish "efforts to become re-employed, despite evidence of residual work capacity." The Applicant submits that the General Division made this erroneous finding of fact, despite evidence that indicated that he had taken all reasonable steps in seeking alternative employment and retraining.

[16] Throughout its analysis, the General Division found that the Applicant had not attempted to find alternate work or to retrain: at paragraph 32, the General Division wrote that there was "no evidence of the [Applicant's] failed attempt to return to any work or retrain for more suited to his limitations"; at paragraph 35, it cited the Applicant's reason for not retraining or attempting alternate work as increased pain from prolonged standing and walking; and at paragraph 41, it found that the Applicant had not established efforts to become re-employed.

[17] I note that, at paragraph 14, the General Division indicated that the Applicant testified that he had not attempted a return to work or to retrain for alternate work because of his medical condition, and that, at paragraph 24, the General Division indicated that the Applicant had testified that he had "looked into unspecified alternate jobs and retraining options since stopping work as a roofer in 2012, but […] could not find any suitable work."

[18] I have not listened to the audio-recording of the hearing before the General Division to verify what evidence the Applicant might have given. If indeed the Applicant testified that he had both attempted and not attempted a return to work or any retraining, the General Division should have sought clarification of the conflicting evidence before it. It is not immediately clear whether the General Division rejected the Applicant's evidence that he had "looked into unspecified alternate jobs and retraining options," on the basis that there was no supporting documentary evidence of any efforts by the Applicant but, if so, the General Division should have set this out or at least explained why it was prepared to find that the Applicant had failed to establish "efforts to become re-employed" or, at paragraph 32, that there was no evidence of any failed attempts to return to any work or to retrain for work more suited to his limitations. On this basis, I am prepared to find that there is an arguable case and that the appeal has a reasonable chance of success.

Residual capacities

[19] The Applicant argues that the General Division failed to provide any evidentiary basis for it to determine at paragraph 30 that he had "considerable residual capacities." The Applicant maintains that, indeed, the evidence showed that he could not afford to pursue retraining or postsecondary education. The Applicant also notes that he had explained why he had been unable to pursue other vocational alternatives. For instance, because he was unable to drive, he could not pursue a career as a taxi driver or courier, and because of his limited education, training and work experience, he could not pursue any sedentary work.

[20] At paragraphs 30 and 32, the General Division seemingly determined that the Applicant had "considerable residual capacities" without having undertaken any analysis, but it is clear that the General Division set out its findings first and then proceeded to explain how it came to its findings. At paragraphs 34 to 37, the General Division reviewed some of the medical evidence and also set out the Applicant's testimony and arguments. Although it found that the Applicant has limitations and difficulties, it did not rule out the possibility that he could perform work that did not involve prolonged standing or walking. The General Division noted, for instance, that the orthopaedic surgeon had not ruled out alternate work.

[21] Given that the General Division had conducted some analysis and explained how it determined that the Applicant has some residual capacities, I am therefore not satisfied that the appeal has a reasonable chance of success on this issue.

Condition of feet

[22] Further, the Applicant submits that he had testified that he had to regularly change bandages on his feet throughout the day, and that his feet emitted a foul odor. He argues that it is unlikely that any employer would hire someone in an office environment whose feet required constant attention and caused an offensive smell. The Applicant argues that this evidence was material to his appeal and that the General Division ignored it.

[23] It is unclear what evidence the Applicant adduced at the hearing regarding the frequency that he was required to or should change his dressings, but the Applicant's problems with foot ulcers and chronic foot infections are well documented in the family physician's clinical records. In 2013, it was noted that he was seeing a podiatrist, rather than a nurse, for changing his dressings. The November 28, 2013 entry indicates that there was a "foul smell [emanating from his left foot] on occasion."

[24] Notwithstanding the Applicant's oral evidence, the General Division determined from its review of the treatment records that, by November 2014, the Applicant's ulcers were 75% healed and that, by December 2015, there had been significant progress. Given these findings, it is clear that the General Division found that any evidence regarding the Applicant's dressings and foot odors became less relevant over time. As such, I am not satisfied that this issue raises an arguable case.

CONCLUSION

[25] Leave to appeal is granted, although this decision of course is not determinative of whether the appeal itself will succeed.

[26] In accordance with subsection 58(5) of the DESDA, the application for leave to appeal hereby becomes the notice of appeal. Within 45 days after the date of this decision, the parties may: (a) file submissions with the Appeal Division; or (b) file a notice with the Appeal Division stating that they have no submissions to file. The parties may make submissions regarding the form the hearing of the appeal should take (e.g. by teleconference, videoconference, in person or on the basis of the parties' written submissions), together with submissions on the merits of the appeal.

Janet Lew
Member, Appeal Division