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

Citation: *N. A. v. Minister of Employment and Social Development*, 2017 SSTADIS 505

Tribunal File Number: AD-17-74

BETWEEN:

**N. A.**

Applicant

and

**Minister of Employment and Social Development**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

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Leave to Appeal Decision by: Neil Nawaz

Date of Decision: September 29, 2017

Canada

## REASONS AND DECISION

## DECISION

Leave to appeal is granted.

## INTRODUCTION

[1] In a decision dated October 29, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a pension under the *Canada Pension Plan* (CPP) was not payable to the Applicant, because she did not have a severe and prolonged disability during the minimum qualifying period (MQP), which ended on December 31, 2016.

[2] On January 25, 2017, the Applicant faxed the Tribunal a request for an extension of time because of a "critical situation" with her health. In a letter dated February 8, 2017, the Tribunal advised the Applicant that a member of the Appeal Division had allowed an extension of time until March 27, 2017, to file her complete application for leave to appeal.

[3] On March 24, 2017, the Applicant's newly retained authorized representative filed an application for leave to appeal, and Tribunal staff subsequently declared the application complete.

[4] Having reviewed the record, I find that the application was filed within the time limit set out in paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA).

## THE LAW

### *Department of Employment and Social Development Act*

[5] Pursuant to paragraph 57(1)(*b*) of the DESDA, an application for leave to appeal must be made to the Appeal Division within 90 days after the day on which the decision was communicated to the applicant. Under subsection 57(2), the Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an

application be made more than one year after the day on which the decision is communicated to the applicant.

[6] According to subsections 56(1) and 58(3) of the DESDA, an appeal to the Appeal Division may be brought only if leave to appeal is granted. The Appeal Division must either grant or refuse leave to appeal. 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.

[7] 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.

[8] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for an applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, an applicant does not have to prove the case.

[9] The Federal Court of Appeal has 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 v. Hogervorst*[1]; *Fancy v. Canada.*[2]

***Canada Pension Plan***

[10] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

> (a) be under 65 years of age;

[1] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41.
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

(b) not be in receipt of the CPP retirement pension;

(c) be disabled; and

(d) have made valid contributions to the CPP for not less than the MQP.

[11] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[12] Paragraph 42(2)(*a*) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if they are incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.

**SUBMISSIONS**

[13] In the application requesting leave to appeal, the Applicant's counsel summarized his client's vocational and medical history, highlighting extracts from several medical reports, all of which I note were before the General Division at the time of the teleconference hearing on October 6, 2016.

[14] However, counsel alleged that the General Division ignored (i) the opinion of the Applicant's family doctor regarding her inability to perform even a part-time job and (ii) the full impact and compound effect of all her medical problems on her ability to pursue any form of substantially gainful occupation for which she may be qualified by training, past experience or education.

[15] Specifically, counsel submitted that the General Division erred in law as follows:

- It failed to properly apply the "real world" test as set out in *Villani v. Canada*,[3] which requires a decision-maker to specifically consider an applicant's background, including factors such as age, education, language proficiency and work and life experience, in assessing disability. In this case, the General Division overlooked the fact that the Applicant has only a grade five education

[3] *Villani v. Canada (Attorney General)*, 2001 FCA 248.

from Turkey and that her work experience was mainly in manual labour jobs that involved the use of her arms and hands.

- It applied a test for severity not in keeping with the statutory definition of disability. In paragraph 27 of its decision, the General Division found that the Applicant was not "incapable of all types of work." This is inconsistent with paragraph 42(2)(*a*) of the CPP, which requires claimants to show that they are "incapable regularly of pursuing any substantially gainful occupation."

[16] Counsel also alleged that the General Division based its decision on erroneous findings of fact, among them:

- At paragraph 25 of its decision, the General Division drew an adverse inference from the fact that the Applicant's family physician found her unsuitable for even part-time work without specifying what her limitations might be. However, Dr. Sochocka was under no obligation to address alternative occupations, and her statement should have been interpreted to refer to the Applicant's overall capacity to work.

- At paragraph 27, the General Division noted that the Applicant's limited education and language difficulties did not prevent her from carrying on her own business or working with the public. In doing so, it ignored the reality that these achievements were only possible as long as she was healthy. As soon as her capacity to do physical work was impaired, she effectively became unemployable.

**ISSUE**

[17] I must decide whether this appeal has a reasonable chance of success.

**ANALYSIS**

[18] As some of the Applicant's submissions overlap, I have grouped them under the headings below.

### *Villani* Real-World Test

[19] The Applicant submits that the General Division misapplied *Villani* when it concluded that the Applicant's disability fell short of severe, even in the face of evidence that her age, education, English-language skills and work experience would impede her ability to find alternative employment. The Applicant also disputes the General Division's suggestion that her experience as a business owner rendered her employable given her physical limitations.

[20] Having reviewed the General Division's decision, I see an arguable case on this ground. The General Division correctly summarized *Villani* in paragraph 21 of its decision, and noted that the Applicant was

> […] just 52 years of age and although she has limited education and some language difficulties it has not prevented her from being able to carry on her own business for a number of years or working with the public. It appears that there may be some capacity for work however she has not made any attempts to look for alternate employment.

[21] It is clear that the General Division found that the Applicant had some residual capacity and drew an adverse inference from evidence that she had not sought lighter work. The General Division considered the Applicant's *Villani* factors, but found that they were, in effect, trumped by the fact that she had, at one time, owned her own business. I would go further and observe that the General Division's decision hinges on this finding but, oddly enough, its reasons contain few details about the Applicant's business experience. The only other mention of it comes in paragraph 11, which notes that she "had previously owned and operated a pizza and sub shop which she sold in 2008."

[22] I have not listened to the audio recording of the hearing, but I will be interested to hear how closely the General Division questioned the Applicant about her restaurant, the precise role she played in running it and whether she had help. Until then, the Applicant has an argument that, having decided to base its decision on her supposed experience running a business and dealing with the public, the General Division was obligated, as a matter of fairness, to investigate these questions when it had the opportunity.

**Test for Severity**

[23] On its face, paragraph 27 suggests that the General Division misstated the test for severity. As the Applicant notes, paragraph 42(2)(*a*) of the CPP does not require claimants to show that they are precluded from "all types" of work, but from "any substantially gainful" occupation.

[24] I acknowledge that misstating a test does not necessarily mean one has in fact misapplied the test; it is useful to also examine other factors, including how a decision-maker actually treats the evidence and whether the misstatement is consistently repeated.

[25] In this case, the General Division correctly stated the test in paragraph 5 of its decision, but it misstated it a second time, in paragraph 24, referring to the leading case of *Klabouch v. Canada*[4] in a way that subtly altered its meaning. The General Division wrote:

> The determination of the severity of the disability is not premised upon a person's inability to perform his or her regular job, but rather on his or her inability to perform any work.

[26] This sentence closely paraphrases a passage in *Klabouch* but omits what, in my view, is an important qualifier in the original:

> Second, as a corollary to the above principle is the principle that the determination of the severity of the disability is not premised upon an applicant's inability to perform his regular job, but rather on his inability to perform any work, *i.e. "any substantially gainful occupation"* [my italics].

[27] In my view, the Applicant has made out an arguable case that the General Division erred in law by misstating and misapplying the test for severity to the Applicant's situation.

**Inferences from Dr. Sochocka's Report**

[28] The three reports on file from Dr. Sochocka are all terse and short on detail. As such, the General Division's analysis does no more than accurately characterize her February 22, 2016, report, which, it seems to me, is indeed ambiguous about whether the Applicant was unable to work at all jobs or only her previous job as a baker. The Applicant is correct to say

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[4] *Klabouch v. Canada (Social Development)*, 2008 FCA 33.

that Dr. Sochocka was under no obligation to suggest alternative occupations, but I do not see how the General Division's analysis suggested that she was. In my view, the General Division set out a rational basis for assigning the Sochocka report lesser weight and, in doing so, cannot be said to have based its decision on an erroneous finding of fact, much less one made in a "perverse or capricious manner or without regard for the material before it."

## CONCLUSION

[29] I am granting leave to appeal on two grounds:

- The General Division may have based its decision on a finding that the Applicant operated a business without fairly inquiring what that entailed;
- The General Division may have misstated and misapplied the test for severity.

[30] Should the parties choose to make further submissions, they are free to offer their views on whether a further hearing is required and, if so, what format is appropriate.

[31] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Member, Appeal Division