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

Citation: *G. K. v. Minister of Employment and Social Development*, 2017 SSTADIS 544

Tribunal File Number: AD-16-1130

BETWEEN:

G. K.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Nancy Brooks

Date of Decision: October 24, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated June 14, 2016, which determined that she was not eligible for a disability pension under the *Canada Pension Plan* (CPP).

[2] Pursuant to s. 58(1) of the *Department of Employment and Social Development Act* (DESDA), the only grounds of appeal to the Appeal Division are that:

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.

[3] The use of the word "only" in s. 58(1) means that no other grounds of appeal may be considered: *Belo-Alves v. Canada (Attorney General)*, [2015] 4 FCR 108, 2014 FC 1100, at para. 72.

[4] An appeal to the Appeal Division may only be brought if leave to appeal is granted: DESDA, s. 56(1). The requirement to obtain leave to appeal to the Appeal Division serves the objective of eliminating appeals that have no reasonable chance of success: *Bossé v. Canada (Attorney General)*, 2015 FC 1142, at para. 34. In this context, having a reasonable chance of success means "having some arguable ground upon which the proposed appeal might succeed": *Osaj v. Canada (Attorney General)*, 2016 FC 115, at para. 12.

SUBMISSIONS

[5] The Applicant's representative submits that the General Division "erred in not taking into consideration the totality of the evidence and material before it in deciding that the

appellant [the Applicant here] was not entitled to a disability pension".[1] The representative submits that "numerous reports indicated that the appellant was unable to work due to his [*sic*] condition".[2] If this allegation were proven, this would constitute an error within s. 58(1)(*c*) of the DESDA.

[6] The representative also argues that the member failed to properly apply the "real world" context described by the Federal Court of Appeal in *Villani v. Canada (Attorney General)*, 2001 FCA 248 [*Villani*].[3] If established, this would constitute an error of law within s. 58(1)(*b*) of the DESDA or an error of mixed fact and law within s. 58(1)(*c*) of the DESDA.

[7] Finally, the representative states, "In as far fairness [*sic*] and natural justice permit, the appellant should receive an impartial hearing so she may put forth his evidence of his [*sic*] disability".[4] This allegation, if proven, would constitute a failure to observe a principle of natural justice within s. 58(1)(*a*) of the DESDA.

[8] The Respondent was provided with a copy of the application for leave. It made no submissions on the application.

DISCUSSION

[9] With respect to the first ground of appeal, the Applicant's representative submits that the General Division member did not consider the totality of the evidence. He points to evidence of two of the Applicant's physicians who, in his view, supported a finding that the Applicant's disability was severe on or before the minimum qualifying period (MQP) date.[5] The representative refers to unspecified evidence of the Applicant's family physician, Dr. Kular, and the January 6, 2011,[6] April 30, 2012,[7] October 29, 2012[8] and April 30, 2014[9] reports of Dr. Armitage, a physical medicine and rehabilitation specialist.

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[1] AD1-6.
[2] *Ibid.*
[3] AD1-8.
[4] AD1-7.
[5] AD1-7 to AD1-8.
[6] GD4-74.
[7] GD4-78: The representative refers to Dr. Armitage's report of April 30, 2011, but this should read April 30, 2012.
[8] GD4-38 to GD4-40.
[9] GD6-137.

[10] The General Division member reviewed the medical evidence in considerable detail and carried out a broad inquiry, considering all the possible impairments of the Applicant that affected employability. She noted that Dr. Kular listed four conditions on the form dated January 23, 2013,[10] which was submitted in support of the Applicant's application for disability benefits: gastroesophageal reflux (GERD), post-traumatic stress disorder (PTSD), neck pain and shoulder pain.

[11] The member found that although Dr. Kular had listed GERD on the form, there were no other medical reports on this condition in the hearing file, which was extensive.[11] With respect to PTSD, the member noted that the Applicant's psychiatrist did not diagnose her with PTSD, but rather with chronic adjustment disorder with depressed mood. With respect to this medical condition, the member noted that the Applicant was on a low dosage of Ciraplex, and she concluded that the Applicant's depression was manageable.[12] With respect to the Applicant's neck pain, the General Division member assessed and weighed the medical evidence relating to this condition. She noted that diagnostic imaging of the Applicant's cervical spine was normal in October 2009, September 2014, and December 2014. She concluded the Applicant's neck pain was not severe. With respect to shoulder pain, the member accepted that the Applicant had bilateral shoulder pain.[13] I find the member's findings are supported by the record and by her analysis of the evidence.

[12] In her review of the evidence, the member referred to all four reports of Dr. Armitage referred to by the Applicant's representative in his submissions,[14] as well as several other reports of Dr. Armitage. In her analysis, the member considered and weighed Dr. Armitage's reports.[15]

[13] In accordance with the principles laid down by the Federal Court of Appeal in *Bungay v. Canada (Attorney General)*, 2011 FCA 47, the General Division member considered the totality of the evidence and the cumulative effect of the Appellant's medical conditions. I

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[10] GD4-48 to GD4-52.
[11] Reasons, para. 86.
[12] Reasons, para. 88.
[13] Reasons, para. 89.
[14] Reasons, paras. 44, 50, 59 and 69.
[15] Reasons, paras. 88, 89, 92 and 95.

conclude the Applicant's argument that the General Division failed to consider the totality of the evidence does not raise an arguable ground upon which the proposed appeal might succeed.

[14] The Applicant's representative cites *Romanin v. Minister of Social Development* (November 18, 2004), CP21597 (PAB), a decision of the Pension Appeals Board, for the proposition that attendance at retraining is not tantamount to evidence of work capacity. The decisions of the Pension Appeals Board are not binding on the Appeal Division, but, in any event, the General Division member did not rely on the fact that the Applicant had participated in retraining with the Workplace Safety and Insurance Board to find that the Applicant had residual work capacity. Instead, the member relied on the medical evidence outlined in para. 95 of the reasons. She referred to Dr. Armitage's report of February 3, 2014, written shortly after the MQP date of December 31, 2013, which stated:

> Now aged 42, [the Applicant] should be a working individual [who] should use her personality in customer services or as a receptionist as she would be effective in helping others with their concerns. […] Re-engaging her in the workforce I think is important for her. This could be in the general work force or the community work force but her English skills I think are quite acceptable. She should avoid excessive, repetitive use of her arms throughout the day. Some arm activity is acceptable but not constant.[16]

I am satisfied the proposed appeal does not have a reasonable chance of success in relation to the argument that the member erred in concluding that the Applicant had a residual capacity to work.

[15] With respect to the Applicant's submission that the General Division failed to apply the "real world" context as required by *Villani*, the Applicant's representative argues that the Applicant's "chances of returning to any suitable occupation, not necessarily his [*sic*] last employment, on a balance of probabilities are much diminished".[17] The representative pointed, in particular, to the Applicant's "difficulty speaking proficiently in the English language".

[16] In *Villani*, the Federal Court of Appeal held that, in assessing whether a disability is severe, the Tribunal must adopt a "real world" approach. Such a real-world approach requires it

[16] GD6-138.
[17] AD1-8.

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. The Court held that matters such as "age, education level, language proficiency and past work and life experience" are relevant to the inquiry (*Villani*, at para. 38).

[17] In its analysis, the General Division member recognized, citing *Villani*, that the severe criterion "must be assessed in a real world context" and she considered the *Villani* factors. With respect to the Applicant's language skills, she discussed them in some detail and concluded the Applicant's English was at a "functional level" based on the fact that she was able to participate in retraining in English without any language difficulties and based also on Dr. Armitage's statement in her February 2014 report that the Applicant's English skills are quite acceptable.[18] The member gave weight to Dr. Armitage's opinion in this regard "as Dr. Armitage is a medical specialist whom the Appellant has known from September 2006 to April 2014. It also appears that during the last three or four years, the Appellant saw her on an almost bi-monthly basis".[19]

[18] I am satisfied the proposed appeal has no reasonable chance of success on the basis that the General Division did not properly apply *Villani*.

[19] The representative also argues in general terms that the evidence supports a finding of severe disability. However, the role of the Appeal Division is not to reweigh the evidence (see *Marcia v. Canada (Attorney General)*, 2016 FC 1367), and an appeal to the Appeal Division is not an opportunity to re-argue the case and ask for a different outcome.

[20] Finally, the representative submits, "In as far fairness [*sic*] and natural justice permit, the appellant should receive an impartial hearing so she may put forth his evidence of his disability [*sic*]". The Applicant's representative did not provide any further submissions on this point and offered no basis for the suggestion that the Applicant did not have an impartial hearing before the General Division. This submission is nothing more than an oblique, non-particularized allegation that the Applicant did not receive an impartial hearing. I am not satisfied that this allegation raises an arguable ground upon which the proposed appeal could succeed.

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[18] GD6-138.
[19] Reasons, para. 96.

DISPOSITION

[21] I am satisfied that the proposed appeal does not have a reasonable chance of success. In accordance with s. 58(2) of the DESDA, leave to appeal is refused.

Nancy Brooks
Member, Appeal Division