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

Citation: *J. F. v. Minister of Employment and Social Development,* 2017 SSTADIS 547

Tribunal File Number: AD-16-694

BETWEEN:

J. F.

Applicant

and

Minister of Employment and Social Development (formerly known as the Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Meredith Porter

Date of Decision: October 24, 2017

Canada

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 April 29, 2016, which denied the Applicant a disability pension under the *Canada Pension Plan* (CPP).

[2] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on May 16, 2016.

ISSUE

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

THE LAW

[4] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), "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." Determining leave to appeal is a preliminary step to a hearing on the merits and is an initial hurdle for an applicant to meet. However, the hurdle is lower than the one that must be met at the hearing stage of an appeal on the merits.

[5] Subsection 58(2) of the DESD Act provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." The Applicant must establish that there is some arguable ground upon which the proposed appeal might succeed in order for leave to appeal to be granted (*Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630). An arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success (*Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63).

[6] According to subsection 58(1) of the DESD Act, 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 that it made in a perverse or capricious manner or without regard for the material before it.

SUBMISSIONS

[7] The Applicant's counsel submits that the General Division based its decision on several erroneous findings of fact, pursuant to paragraph 58(1)(*c*) of the DESD Act, including the following:

i. The General Division failed to properly consider Dr. Rodriquez-Elizalde's medical evidence, which was that the Applicant's health condition has "had a dramatic effect on his quality of life."

ii. The General Division failed to consider Dr. Townley's evidence, which was that the Applicant's health condition has a poor prognosis and that his health condition prevents the Applicant from engaging in his chosen recreational activities and from doing household chores.

iii. The General Division failed to properly consider Ms. C. P.'s functional assessment, which found that the Applicant requires extensive assistance around the home.

iv. The General Division failed to properly consider the oral testimony of the Applicant's father, which was that the Applicant can "do virtually nothing with his back pain and was sore all day if he did not take pills at night."

[8] The Applicant's counsel submits that the General Division erred in law, pursuant to paragraph 58(1)(*b*) of the DESD Act, in failing to properly apply the principals set out in *Villani v. Canada (Attorney General)*, 2001 FCA 248, and that, particularly, it failed to consider the

Applicant’s limited functioning in addition to his advanced age, lack of transferable skills and his education.

[9] Finally, the Applicant’s counsel has submitted that the General Division made an erroneous finding of fact, pursuant to paragraph 58(1)(*c*) of the DESD Act, in finding that the Applicant had not properly followed treatment recommendations when, in fact, evidence that the Applicant had provided demonstrated the Applicant’s compliance with all the referrals that his family physician Dr. Maraj had made.

ANALYSIS

<u>Did the General Division make erroneous findings of fact</u>?

[10] In points (i) to (iv) in paragraph 7 above, the Applicant’s counsel has submitted that the reports and opinions of several attending health care professionals were not considered properly, and that the General Division, in its decision, overlooked or did not properly consider the Applicant’s father’s testimony. The Applicant’s counsel references several statements that health care professionals made in the reports filed in support of the application for a disability pension under the CPP. It is the Applicant’s counsel’s position that these statements demonstrate that the Applicant suffers from a severe disability and that he should be found disabled at his respective minimum qualifying period (MQP).

[11] I will begin by noting that it is an established principle of administrative law that a tribunal need not refer to each and every item of evidence before it, but that it is deemed to have considered all of it (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). I also recognize that the General Division, as trier of fact, was tasked with sorting through the relevant facts, assessing the quality of the evidence and determining what evidence, if any, it chose to accept or disregard. The General Division is also permitted to assign weight to certain evidence and, ultimately, come to a decision based on its interpretation and analysis of the evidence before it. However, where certain evidence is preferred, reasons for preferring that evidence must be given (*Canada (Attorney General) v. Fink*, 2006 FCA 354).

[12] On reading the General Division’s decision, at paragraphs 48 and 49, I see that the General Division notes the respective medical reports that the Applicant’s counsel referred to in

his submissions. The General Division's rationale includes reasons why the General Division finds certain medical evidence more persuasive than other reports. The General Division's reasoning reads as follows:

> [48] Turning to the key question of whether the Appellant has been severely disabled (that is, whether if he was incapable regularly of pursuing any substantially gainful occupation) since on or before his MQP date, the Tribunal observes that there is documentary evidence to support at least an inability to perform his old job. This was noted by Dr. Rodriguez-Elizalde in his report of July 30, 2013, as well as by the August 5, 2014 assessment by Dr. Townley and Ms. C. P.'s report of August 21, 2014.
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> [49] The Tribunal finds Ms. C. P.'s report to be more helpful than the reports of Drs. Townley and Rodriguez-Elizalde, as it considers all of the Appellant's complaints and not just the strictly orthopaedic complaints. A focus on the Appellant's orthopaedic complaints (particularly in the form of a one-off assessment for litigation purposes) is of relatively less value in assessing severity. The Tribunal is also concerned about Dr. Townley's objectivity, given the advocacy that appears to be in his report: for example, there was no reason for an orthopaedic specialist to comment on the Appellant's pre- and post-accident earnings and calculate the percentage reduction in take-home pay.

[13] Ultimately, the General Division concludes, at paragraph 51, that "[w]hile Ms. C. P. only expressly addressed the Appellant's ability to do his former job, her report paints a much broader and clearer picture of the Appellant's condition; she also indicated that there were some limitations in the Appellant's activities of daily living."

[14] With respect to the Applicant's father's testimony, I disagree with the counsel's argument that the General Division did not consider his evidence. At paragraph 52 of the decision, it is noted that the Applicant's father's "evidence was generally supportive of a significant disability but also suggested that the Appellant's limitations were significantly affected by whether he was taking his medication."

[15] The Appeal Division is not in a position to reweigh the evidence that the General Division has already considered. As set out above in paragraph 6, the grounds for which the Appeal Division may grant leave to appeal do not include a reconsideration of evidence that the General Division has already considered. I have acknowledged the General Division's

discretion to consider the evidence before it. The General Division's decision, in this case, has articulated reasons for relying on medical evidence in the record and for preferring certain evidence and opinions over others.

[16] The Applicant may disagree with the General Division's findings, but the Applicant's disagreement is not a ground for appeal enumerated in subsection 58(1) of the DESD Act. The Appeal Division does not have broad discretion in deciding leave to appeal pursuant to the DESD Act. It would be an improper exercise of the delegated authority conferred upon the Appeal Division to grant leave to appeal on grounds not included in section 58 of the DESD Act (*Canada (Attorney General) v. O'Keefe*, 2016 FC 503).

[17] Leave to appeal is not granted on the ground that the General Division based its decision on an erroneous finding of fact in failing to properly consider the medical opinions of the Applicant's attending health care professionals, including Dr. Rodriguez-Elizalde, Dr. Townley, Ms. C. P., and the oral testimony of the Applicant's father.

Did the General Division err in law in failing to properly apply *Villani*?

[18] The Federal Court of Appeal in *Villani*, in addressing the issue of assessing disability under the CPP, stated at paragraph 38 that:

> This analysis of subparagraph 42(2)(a)(i) strongly suggests a legislative intention to apply the severity requirement in a "real world" context. […] In my view, it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.

[19] The real-world context set out in *Villani* does not refer to an Applicant's subjective assessment of whether in a "real world" they could work. The real-world context in *Villani* means that certain factors should be kept in mind when determining the severity of a person's disability and their subsequent capacity for employment. These factors include the Applicant's age, level of education, language proficiency, and past work and life experience.

[20] In order for an Applicant to be found disabled under the CPP, they must first demonstrate that they suffer from a serious and possibly debilitating medical condition. Then, a

decision-maker assesses the severity of the claimed disability in the context of the *Villani* factors, which include personal characteristics. In this case, the General Division considered that the Applicant was relatively young; he was 31 years old at the time of the hearing before the General Division. He lived with his parents, and he had completed high school and a college education in the operation of various types of heavy construction equipment. He had an AZ and DZ driving licence certification, along with completing a program on the handling of radioactive materials. He had worked for several years, and there were no issues with his language proficiency. He occasionally mowed the lawn, he could drive for 45 minutes at a time, and he used his computer extensively. The General Division did not find that the Applicant suffered from a serious or debilitating condition, nor did the General Division assess the severity of the Applicant's disability within the context of the *Villani* factors. While this may be an error of law, as the Federal Court of Appeal may require that, in all cases, an analysis of the *Villani* factors be done, I do not find that this argument has a reasonable chance of success on appeal. The General Division dismissed the appeal on the basis that the Applicant had failed to follow treatment options. Even if the *Villani* factors had been assessed, the basis for the General Division's findings and ultimate decision would have been the same.

[21] Leave to appeal is not granted on the ground that the General Division erred in law in failing to properly consider the *Villani* factors.

Did the General Division erroneously find that the Applicant had failed to follow recommended treatment options?

[22] Disability is not assessed in accordance with the Applicant's medical diagnosis or health condition (*Klabouch v. Canada (Social Development)*, 2008 FCA 33). The test for determining disability under the CPP has been articulated by the Federal Court of Appeal in *Villani*:

> This restatement of the approach to the definition of disability does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation". **Medical evidence will still be needed** as will evidence of employment efforts and possibilities." [my emphasis]

[23] Unless there is a reasonable explanation for not doing so, applicants seeking a disability pension under the CPP are expected to follow the advice of their attending medical professionals regarding prescribed medications and other types of treatment intended to mitigate troublesome health conditions (*Kambo v. Canada (Human Resources Development)*, 2005 FCA 353). A decision-maker must also consider what impact any unreasonable refusal to follow recommended treatment would have on their disability (*Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211).

[24] The Applicant's counsel has submitted that the General Division made an erroneous finding of fact when it determined that the Applicant had not properly followed treatment recommendations, as the evidence demonstrates that the Applicant had complied with all referrals that his family physician Dr. Maraj had made. I find that, had the General Division failed to properly consider that the Applicant had pursued all recommended treatment options, including those of Dr. Maraj, this would have been an error of mixed fact and law.

[25] It is not enough to follow one physician's advised treatment. The General Division found that the Applicant had failed to follow the advised treatment of several of his attending health care professionals, and it noted in the decision that:

> [58] A claimant is obligated to follow treatment recommendations but the treatment must be affordable, available and recommended. In this case, multiple recommendations have been made. Pain clinics, psychologists, physiotherapists and massage therapists are all available.
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> […]
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> [60] The Tribunal also finds the failures to attend physiotherapy and massage referrals in 2015 to be unreasonable: his primary complaint is back pain and these referrals are directly connected to those complaints. At another point, he said that he only attended massage therapy when he had a flare-up. Furthermore, while Ms. C. P.'s recommendation of psychological intervention may not have been a referral, it was still a recommendation and both the Tribunal and Appellant agree that depression and mood play a role in his current condition. To the Tribunal, it appears unreasonable to not pursue treatment in these circumstances. The impact on the Appellant was demonstrable at the hearing: he clearly displayed and described both physical pain and psychological issues that might have been addressed by the recommended treatments.

[26] The General Division did not find any evidence that the Applicant's personal circumstances had prevented him from accessing recommended treatment options, including pain clinics, psychological counselling, physiotherapists and massage therapy. The General Division also did not find that the Applicant's explanations for failing to pursue his recommended treatments were reasonable.

[27] The General Division recognized that *Lalonde* requires the consideration of both the reasons for refusing to undergo recommended treatment and the impact that refusal would have, if the refusal is determined to be unreasonable. The General Division considered the impact that the Applicant's unreasonable refusal had had on his treatment and found that, due to the failure to pursue KOPI treatment, there resulted a two-year gap in the opportunity for the Applicant to be seen by another pain clinic. With respect to the impact of his failure to pursue psychological counselling, the General Division notes, at paragraph 60 of its decision, that the Applicant gave oral evidence that he suffered ongoing psychological difficulties. This could have been alleviated had he pursued Ms. C. P.'s recommendation.

[28] Leave to appeal is not granted on the ground that the General Division made an error of mixed fact and law, as I do not find that the General Division's findings on the issue of whether the Applicant had pursued all recommended treatment options are incorrect. Further, even if the General Division had considered that he had complied with all Dr. Maraj's referrals, the General Division did take issue with the Applicant's failure to pursue other recommended treatment.

CONCLUSION

[29] The Application is refused.

Meredith Porter
Member, Appeal Division