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

Citation: *D. A. v. Minister of Employment and Social Development*, 2017 SSTADIS 578

Tribunal File Number: AD-16-1104

BETWEEN:

D. A.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Jennifer Cleversey-Moffitt

Date of Decision: October 31, 2017

REASONS AND DECISION

INTRODUCTION

[1] On June 28, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division, which was received on September 7, 2016. The Applicant's minimum qualifying period (MQP) ended on December 31, 2014.

ISSUE

[2] The Member must decide whether the appeal has a reasonable chance of success.

THE LAW

[3] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), "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."

[4] Subsection 58(2) of the DESDA provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[5] 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.

[6] The process of assessing whether to grant leave to appeal is a preliminary one. The review requires an analysis of the information to determine whether there is an argument that would have a reasonable chance of success on appeal. This is a lower threshold to meet than the one that must be met on the hearing of the appeal on the merits. The Applicant does not have to prove the case at the leave to appeal stage: *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC). The Federal Court of Appeal, in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success.

SUBMISSIONS

[7] The Applicant submits that the General Division erred in the following ways:

a) The General Division based its decision on an erroneous finding of fact when it determined that the Applicant's disability was not severe. The Applicant submits that WorkSafeNB's conclusion that there was no suitable occupation available to the Applicant after completing a Transferable Skills Analysis is evidence that the disability was severe. Additionally, the Applicant argues that because WorkSafeNB gave him a long-term disability award, this is also evidence that his disability was severe within the definition of subsection 42(2) of the CPP.

b) The General Division based its decision on an erroneous finding of fact when it determined that there was evidence of work capacity and that the Applicant could work part-time in a sedentary position. In his submissions, the Applicant states:

> i) I completed every task they [WorkSafeNB] assigned me in Vocational Rehabilitation. WorksafeNB and my family physician have determined I am unable to maintain employment due to my workplace injury…After my first Functional Capacity Evaluation, I was re-trained and returned to work with my pre-accident employer. My condition deteriorated and I turned to WorksafeNB for help. After additional medical intervention, it was found I could no longer work as a crane operator. I had the 5 day Functional Capacity Evaluation and returned to Vocational Rehabilitation. It was at that time, WorksafeNB determined I could not work.

ii) The Functional Capacity Evaluation shows that I do not have the capacity to work.

c) The General Division erred in law in making its decision by not applying *Villani v. Canada (Attorney General)*, 2001 FCA 248 correctly. The Applicant submits that the Vocational Profile, created through a Transferable Skills Analysis, was used to determine that there were no suitable occupations for him. He further submits that this analysis uses a person's age, level of education, language proficiency, past work and life experiences as well as their physical limitations/restrictions as determined by the Functional Capacity Evaluation, which mirrors the test in *Villani*. Furthermore, he argues that the Functional Capacity Evaluation shows that he is "incapable of regularly pursuing any substantial gainful employment." (My emphasis added)

ANALYSIS

Does the Applicant have an arguable case/ reasonable chance of success on appeal on the basis that the General Division based its decision on an erroneous finding of fact when it determined that the Applicant's disability was not severe?

[8] The Applicant's submissions rely heavily on the conclusions reached by WorkSafeNB. The Applicant argues that because WorkSafeNB determined there was no suitable employment in his area and gave him a long-term disability award, this is also evidence that his disability is severe within the definition of subsection 42(2) of the CPP for the purposes of determining eligibility for a CPP disability pension.

[9] WorkSafeNB's determination of whether an applicant would qualify for a long-term disability benefit rests on finding that there is no "suitable employment" at this time. The definition of "suitable employment" can be found in subsection 42.1(1) of the *Workers' Compensation Act* (R.S.N.B. 1973, c. W-13:

> "[S]uitable employment" means appropriate employment that a worker who suffered a personal injury by accident is capable of doing, considering the worker's physical abilities and employment qualifications and which does not endanger the health, safety or physical well-being of the worker.

[10] In addition to this, the Workplace Health, Safety and Compensation Commission of New Brunswick, *Policy 21-417 – Identifying Suitable Employment*, identifies further requirements at paragraph "1.0 General":

> WorkSafeNB also further defines suitable employment to mean:
>
> - Employment for which the injured worker may reasonably become qualified to perform;
> - Employment that does not endanger the health, safety or well-being of other workers in the workplace;
> - Employment that allows an injured worker to achieve optimal earning potential; and
> - Employment that reasonably exists in the current labour market

[11] In contrast, the test to determine whether one is eligible for a CPP disability pension is found in subparagraph 42(2)(*a*)(i) of the CPP:

> (2) For the purposes of this Act,
>
> (a) a person shall be considered disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,
>
> (i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation […]

[12] The General Division decision correctly cited this test to determine whether a disability is severe under the CPP, in paragraph 5 of the decision. Further in the decision, at paragraphs 55 and 56, the General Division member comments on the case law treatment of the severity test for CPP disability pensions and notes the following:

> *[55]* The severe criterion must be assessed in a real world context (*Villani v. Canada (A.G.)*, 2001 FCA 248). This means that when deciding whether a person's disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.
>
> [56] Socio-economic factors such as labour market conditions are not relevant in a determination of whether a person is disabled within the meaning of the CPP (*Canada (MHRD) v. Rice*, 2002 FCA 47).

[13] There is a very important distinction between the adjudication done for the purposes of being eligible for a long-term disability benefit under New Brunswick's provincial workers' compensation scheme, and the determination that a disability is severe for the purposes of a CPP disability pension. The test is different. The provincial workers' compensation scheme considers available work with remuneration equal to or in close proximity to their client's previous salary; the CPP does not consider these socio-economic factors when determining eligibility for disability benefits. Qualifying for a long-term disability benefit through workers' compensation does not automatically qualify one for a CPP disability pension. One must still meet the test as outlined in subparagraph 42(2)(*a*)(i) of the CPP.

[14] The General Division decision went on to note that little weight was placed on the WorkSafeNB case manager's evidence because she based her analysis on the test for long-term disability benefits as defined in New Brunswick's *Workers' Compensation Act*. In paragraph 62, the General Division member noted:

> The Tribunal places a small amount of weight on T. R.'s, Case Manager of Work Safe NB, evidence because she based her analysis on the Appellant's capabilities of returning to any form of suitable employment on a transferable skills analysis. However, the Tribunal notes that CPP bases its analysis on a severity test of the Appellant and whether, by this standard, he is incapable regularly of pursing any substantially gainful employment.

[15] The General Division member clearly understood that much of the evidence on file was produced for the purpose of determining certain benefits under the provincial workers' compensation scheme, as the disability arose out of a workplace accident and he correctly distinguished how that evidence is assessed for the purposes of determining eligibility for a CPP disability pension. The evidence might be the same but the test for eligibility is very different. The General Division member correctly identified the severity test under the CPP. I am not convinced that this ground would have a reasonable chance of success on appeal. The Application on this ground is refused.

Does the Applicant have an arguable case/ reasonable chance of success on appeal on the basis that the General Division based its decision on an erroneous finding of fact when it determined that there was evidence of work capacity and that the Applicant could work in a sedentary position?

[16] The Applicant argues that the Functional Capacity Evaluation showed that there was no capacity to work. In his submissions, it appears that the evaluation conducted on November 26–November 30, 2012, is the intended document, although it should be noted that it is actually called a Work Capacity Evaluation, which includes a functional capacity portion.

[17] The Applicant argues that this document shows that he had no capacity to work prior to the expiry of the MQP and that WorkSafeNB determined he could not work. In reading the Work Capacity Evaluation (GD3-133 to GD3-153), it was noted:

a) Based on Mr. D. A.'s overall performance during the Evaluation, he demonstrated the ability to perform half days of general work activities meeting the full demands of the sedentary physical demand level. Mr. D. A. demonstrated decreased endurance over the five-day evaluation with objective signs of biomechanical change noted. There was a decrease in his ability to safely handle weight within the light and medium physical demand levels; weights were lowered over the course of the five-day evaluation due to decreased safety with weight handling. Mr. D. A.'s ability to stand and walk decreased throughout the five days, as well as his ability for squatting and bending forward at the waist. Mr. D. A.’s concentration was noted to decrease on days four and five with increased biomechanical change and increased intensity of his symptom reports. (GD3-137)

b) Finally, at the end of the report, it was concluded that Mr. D. A. demonstrated the ability to safely perform sedentary work. (GD3-153)

[18] In the General Division decision, the Work Capacity Evaluation located at GD3-133-GD3-153 is referenced in paragraphs 42, 43, 44 and 45 of the decision where the member correctly identified the limits noted and the conclusion that there was a demonstration of the ability to perform sedentary work.

[19] The General Division decision clearly references the Work Capacity Evaluation, notes the information as presented in the document and references the conclusion exactly as it was written. As noted above, WorkSafeNB's ultimate decision to award long-term disability benefits was based on a finding that no suitable occupation existed to match the Applicant's present physical condition (GD3-58). The Work Capacity Evaluation clearly noted there was capacity to work. In the context of determining whether one is eligible for a CPP disability pension, capacity to work is very important—whether there is a suitable occupation is not part of the test. For these reasons, I find there is no reasonable chance of success on appeal for this ground. Leave to appeal on this ground is refused.

Does the Applicant have an arguable case/ reasonable chance of success on appeal on the basis that the General Division erred in law in making its decision by not applying* Villani v. Canada (Attorney General)*, 2001 FCA 248 correctly?

[20] The Applicant argues that many of the evaluations used by WorkSafeNB analyze an applicant's ability to work using criteria such as a person's age, level of education, language proficiency, past work and life experiences as well as their physical limitations/restrictions, which he believes mirrors the test in *Villani*.

[21] The relevant portion of *Villani* that must be addressed is located at paragraph 38 of the decision. It reads:

> This analysis of subparagraph 42(2)(a)(i) strongly suggests a legislative intention to apply the severity requirement in a "real world" context. Requiring that an applicant be incapable regularly of pursuing any substantially gainful occupation is quite different from requiring that an applicant be incapable at all times of pursuing any conceivable occupation. Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. 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.

[22] The Applicant is correct, that a "real world" approach is required in understanding how the test for severity is to be applied. Paragraph 55 of the General Division decision does outline

the test as per *Villani* and paragraphs 64 and 65 delve into the Applicant's personal characteristics. The General Division's decision took into account the Applicant's limitations but noted that the Work Capacity Evaluation, which also looked at many of these factors, stated that the Applicant had capacity for part-time sedentary work. Based on this evaluation, the General Division concluded there was a residual capacity to work.

[23] The Applicant argues that he was incapable of regularly pursuing any substantially gainful employment, but that is not the test. The test is that a disability is severe if the applicant/appellant is incapable regularly of pursuing any substantially gainful occupation. In *Bungay v. Canada (Attorney General)*, 2011 FCA 47, the Federal Court of Appeal discussed how the "real world" approach helps determine whether an applicant is capable regularly of pursuing any substantially gainful occupation. At paragraph 8 of the decision, the Court wrote:

> The leading case on the interpretation of "severe" is *Villani v. Canada (AG)*, 2001 FCA 248 (CanLII), [2002] 1 F.C. 130. Villani, at paragraphs 32 and 38, stands for the proposition that in assessing whether a disability is severe, the Board must adopt a "real world" approach. This "real world" approach requires it 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. Employability is not to be assessed in the abstract, but rather in light of "all of the circumstances." The circumstances fall into two categories:
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> (a) The claimant's "background." Matters such as "age, education level, language proficiency and past work and life experience" are relevant here (Villani, supra at paragraph 38).
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> (b) The claimant's "medical condition." This is a broad inquiry, requiring that the claimant's condition be assessed in its totality. All of the possible impairments of the claimant that affect employability are to be considered, not just the biggest impairments or the main impairment. The approach of assessing the claimant's condition in its totality is consistent with section 68(1) of the Regulations, which requires claimants to submit highly particular information concerning "any physical or mental disability," not just what the claimant might believe is the dominant impairment.

[24] When reading the General Division decision, I see that the decision was very focused on the Applicant's medical condition prior to the MQP and the Work Capacity Evaluation, which

was completed prior to the expiry of the MQP and which stated that there was a capacity to work. (GD3-153)

[25] Although there is evidence that his physical limitations affected his ability to continue with his previous employer, he did not attempt to find any other work. In his submissions, the Applicant states, "At no point in time did I refuse to seek alternate employment." Unfortunately, for the purposes of eligibility for CPP disability pensions, this is not the test. *Inclima v. Canada (Attorney General)*, 2003 FCA 117, places an onus on the applicant, who has a residual work capacity, to show that their efforts to obtain and maintain employment were unsuccessful by reason of their health condition. The General Division determined, based on the evidence, that there was a residual capacity to work but that the Applicant had not attempted to find work. It is noted that his previous employer could not accommodate his restrictions, however, without the Applicant attempting to find other work, the General Division was not able to determine whether obtaining and maintaining that work would have been unsuccessful due to his health conditions. The Applicant failed to meet that onus.

[26] There is no evidence that indicates that he was precluded from performing all types of work prior to the expiry of the MQP, and as was noted in the file and correctly captured by the General Division decision—the Applicant chose not to attempt to find work. In paragraph 65 of the General Division decision, the member wrote:

> The Appellant testified that he had not looked for alternative employment when he stopped working in 2012 because Work Safe NB told him that he could not. The Tribunal notes that it is the capacity to work, not the diagnosis of the disease, which determines the severity of the disability (see *Klabouch*, supra). Therefore the Tribunal cannot determine, from the evidence before it that the Appellant was unsuccessful in obtaining or maintaining employment by reasons of his health conditions if he never attempted to look for alternative employment.

[27] Despite the Applicant's submissions that WorkSafeNB determined he could not work, it was in fact concluded in the Work Capacity Evaluation that there was a capacity to work. Again, as noted above, the provincial workers' compensation test to find "suitable employment" is a very different test than the one to determine whether a disability is severe for the purposes of the CPP. The General Division member very clearly understood the distinction and applied

the *Villani* test appropriately. I find there is no reasonable chance of success on appeal for this proposed ground. Leave to appeal on this ground is dismissed.

CONCLUSION

[28] In the Federal Court's decision in *Griffin v. Canada (Attorney General)*, 2016 FC 874, Justice Boswell provided guidance as to how the Appeal Division should address applications for leave to appeal under subsection 58(1) of the DESDA:

> It is well established that the party seeking leave to appeal bears the onus of adducing all of the evidence and arguments required to meet the requirements of subsection 58(1): see, e.g., *Tracey*, above, at para 31; also see *Auch v. Canada (Attorney General)*, 2016 FC 199 (CanLII) at para 52, [2016] FCJ no 155. Nevertheless, the requirements of subsection 58(1) should not be applied mechanically or in a perfunctory manner. On the contrary, the Appeal Division should review the underlying record and determine whether the decision failed to properly account for any of the evidence: *Karadeolian v. Canada (Attorney General)*, 2016 FC 615 (CanLII) at para 10, [2016] FCJ no 615.

[29] I have reviewed the key pieces of evidence, including medical reports relevant to the MQP, work capacity evaluations, the transferable skills analysis, medical imaging reports and personal characteristics. My review did not find that any of the evidence was misconstrued or overlooked by the General Division.

[30] The Appeal Division's job, as per subsection 58(1) of the DESDA, is to determine, without delving directly into an adjudication of the merits of the file, whether the reasons for appeal fall within any of the specified grounds and whether they have a reasonable chance of success. The Appeal Division does not have jurisdiction to conduct a *de novo* hearing. An applicant's disagreement with the General Division decision does not constitute an error in law or fact. An appeal to the Appeal Division is not an opportunity to reargue the case hoping for a different result: (*Marcia v. Canada (Attorney General)*, 2016 FC 1367, at paragraph 34; *Parchment v. Canada (Attorney General)*, 2017 FC 354, at paragraph 23).

[31] I have concluded that the Applicant has not raised any arguable ground upon which the proposed appeal may succeed. In addition, my review of the key pieces of evidence also found

that no evidence was misconstrued or overlooked. I am therefore satisfied that the proposed appeal has no reasonable chance of success.

[32] The Application is refused.

Jennifer Cleversey-Moffitt
Member, Appeal Division