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

Citation: *V. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 644

Tribunal File Number: AD-17-40

BETWEEN:

V. C.

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: November 15, 2017

DECISION AND REASONS

DECISION

[1] The application requesting leave to appeal is granted.

OVERVIEW

[2] The Applicant, V. C., a custodian, stopped working in September 2012, after sustaining a work-related injury to his right knee. He has not returned to work since then. The Applicant applied for a Canada Pension Plan, but the Respondent denied his application. He appealed the decision to the General Division, but it too determined that he was ineligible for a Canada Pension Plan disability pension, as it found that his disability had not been "severe" by the end of his minimum qualifying period on December 31, 2015. The Applicant now seeks leave to appeal the General Division's decision.

[3] I must consider whether there are any grounds of appeal that would satisfy me that the appeal has a reasonable chance of success. The Applicant submits that the General Division erred in law and that it based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it.

ISSUE

[4] The Applicant alleges that the General Division erred in law and also based its decision on several erroneous findings of fact that it had made in a perverse or capricious manner or without regard for the evidence before it. Does the appeal have a reasonable chance of success on any of these grounds?

ANALYSIS

[5] 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.

[6] 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.[1]

[7] The Applicant advances several arguments under paragraphs (*b*) and (*c*). I will address them in the order in which the Applicant has raised them.

(a) Alleged failure to follow *Villani* and *Ronald*

[8] The Applicant argues that, by failing to assess his circumstances in a "real world context" as required by *Villani*[2] and by failing to consider the principles referenced in *Ronald*,[3] the General Division erred in law in assessing whether his medical conditions rendered him disabled.

[9] The Applicant argues that *Villani* requires that a decision-maker consider an applicant's disability and the "realities of workplaces in contemporary Canada."

[10] The Applicant submits that the Pension Appeals Board in *Ronald* held that it is legally incorrect for the Review Tribunal in that case to assume "that every applicant who is theoretically capable of doing sedentary work is capable of substantially gainful employment" and that, when applying the real-world test, a tribunal is to "look at the whole person in his or her situation." The Applicant notes that the Pension Appeals Board also

---

[1] *Tracey v. Canada (Attorney General)*, 2015 FC 1300.
[2] *Villani v. Canada (Attorney General)*, [2002] 1 FCR 130, 2001 FCA 248.
[3] *Ronald v. Minister of Social Development* (June 8, 2005), CP21909 (PAB).

held that, where an applicant has shown a good work ethic over a long period of time, it is reasonable to infer that the applicant "would not sit idly at home" if he or she were capable of working.

[11] The Applicant submits that he had provided uncontradicted evidence regarding his age, educational level, work history and physical abilities, and that he had also testified that he suffered from chronic knee pain, dizziness, obesity and sleep problems.

[12] The Applicant notes that, at paragraph 30, the General Division wrote:

> Given his education and work history the Tribunal finds that the Appellant does not have any transferable skills that would allow him to find alternative employment.

[13] The Applicant notes that, notwithstanding its finding at paragraph 30 that he does not have any transferable skills, the General Division found that there was "no indication" that he could not pursue a possible career as a "telephone solicitor" or "telemarketer" as suggested in a transferable skills analysis. At paragraph 35, the General Division wrote:

> While the Tribunal finds that the Appellant does not have many transferable skills that would assist him in finding alternate employment there is no evidence that the Appellant made any attempt at finding employment. The transferable skills analysis that the appellant participated in indicated that the Appellant would have the suitable skills to be a telephone solicitor and telemarketer. There is no indication that the Appellant would have been able to pursue such an occupation because the Appellant has not tried any other alternative employment.

[14] The Applicant argues that the evidence clearly established that he was not suitable for and was unable to pursue such a career path. The Applicant submits that the General Division's finding, as well as the process by which it arrived at this finding, indicate that it did not apply a real-world analysis as required by *Villani* and *Ronald*.

[15] The Applicant submits it is completely unrealistic to assume, as the General Division has done, that a real-world Canadian employer would hire the Applicant as a telemarketer when he has had no prior work experience in an office setting, no familiarity with computers or any relevant computer skills, is impaired by lack of sleep, and is constantly suffering from dizziness. The Applicant asserts that, in arriving at this conclusion, the General Division appears to have assessed the Applicant's employability and personal circumstances in a manner inconsistent with the *Villani* approach.

[16] The General Division relied on the transferable skills analysis. As the vocational rehabilitation consultant explained in her report, she described the analysis as a "methodical approach" for estimating an individual's vocational potential. She noted that information pertaining to the "education, employment, physical capacity, social and/or psychological status of the individual is significant to the process of determining vocational potential."

[17] The transferable skills analysis in this case identified suitable employment alternatives for the Applicant, taking into account his education, training and work experience. The vocational rehabilitation consultant was aware that the Applicant was restricted from prolonged standing and walking, and that he had restrictions for kneeling, squatting, crouching and that he should avoid any repetitive heavy lifting exceeding 10 kg. The vocational rehabilitation consultant set out these restrictions in her report at pages GD5-2 and GD5-4. The consultant also set out the Applicant's education and training, noting in particular that the Applicant did not use a computer and did not have email, Internet, a cell phone or smart phone. The consultant was also mindful that the Applicant had a history of chronic right knee pain with severe underlying osteoarthritis and complete anterior cruciate ligament tear, morbid obesity and hypertension.

[18] The only restrictions or medical considerations that the vocational rehabilitation consultant did not mention were the Applicant's purported lack of sleep and constant dizziness. However, the General Division found that the Applicant experienced dizziness only when he stood up. The General Division did not mention any issues involving sleep impairment. Indeed, there was little in the documentary record or even in the Applicant's

submissions to the General Division that he suffered from sleep impairment or constant dizziness.

[19] There was one occasion when he reported feeling dizzy, after taking an iron pill, but otherwise I am unaware of any other documented instances when he complained of dizziness to any of his physicians.

[20] The Applicant was identified as having positive symptoms for obstructive sleep apnea, as early as December 2012 (GD5-17/49), but even by October 26, 2015, although he apparently was quite symptomatic, had not been diagnosed and had not gone for any testing or treatment (GD5-12), despite having a note indicating that he should be tested (GD2-46). Hence, in the absence of much documentary support, it cannot be said that either the vocational rehabilitation consultant or the General Division neglected to consider the Applicant's complaints of sleep impairment or constant dizziness. There simply was insufficient independent corroborating evidence of this.

[21] I note that the Federal Court of Appeal in *Villani* stated that an assessment of an applicant's circumstances "is a question of judgment with which this Court will be reluctant to interfere."

[22] Given that the General Division took the Applicant's personal circumstances into account, in part having relied upon the vocational rehabilitation consultant's transferable skills analysis, 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 a "real world" context. The General Division was mindful of the Applicant's restrictions and his particular circumstances.

[23] Essentially, the Applicant is seeking a reassessment on the basis of his particular circumstances. However, subsection 58(1) provides for only limited grounds of appeal. It does not allow for a reassessment or rehearing of the evidence: *Tracey*, *supra*.

(b) Alleged failure to follow medical advice

[24] The Applicant argues that the General Division erred in law in finding at paragraphs 34 and 36 of its decision that the Applicant failed to follow medical advice regarding weight loss. The Applicant submits that the General Division misapprehended the legal test for failure to follow medical advice and did not properly apply it to the facts of the case.

[25] In July 2013, an orthopaedic surgeon considered the Applicant "far to [*sic*] overweight and too young to consider a total knee arthroplasty" (GD2-78) and, in May 2014, the same orthopaedic surgeon remained of the opinion that the Applicant needed to make a "major effort to try to lose some weight," as he would then likely be a candidate for a total knee arthroplasty (GD2-67). The clinical records indicate that the Applicant was in need of dietary counselling for weight loss (GD2-43). The Applicant saw a dietician (GD2-39).

[26] The Applicant claims that he attempted to lose weight through dietary changes and by following a weight-loss program called "Herbal Magic." He lost 10 pounds through this weight-loss program but discontinued the program because of financial constraints. He also notes that none of his health caregivers provided any specific recommendations for weight loss, so he argues that it would be inappropriate to find that he failed to pursue other possible weight-loss measures.

[27] The Applicant argues that the General Division failed to consider the reasonableness of his non-compliance with treatment recommendations. In this regard, the Applicant relies on *Bulger*,[4] where the Pension Appeals Board held that an applicant for a disability pension is obligated to abide by and submit to treatment recommendations, and if not done, satisfy the Board as to the reasonableness of his or her non-compliance. The Applicant also relies on *Lombardo*,[5] in which the Pension Appeals Board determined that applicants were required to demonstrate a "good-faith preparedness to follow obviously appropriate medical advice."

---

[4] *Bulger v. Minister of Human Resources Development* (May 18, 2000), CP09164 (PAB).
[5] *Lombardo v. Minister of Human Resources Development* (June 25, 2001), CP12731 (PAB).

[28] The Applicant asserts that he demonstrated good faith in that he attempted to comply with doctors' weight loss recommendations and stopped only when he could no longer afford treatment. The Applicant maintains that this constitutes a reasonable excuse to not follow recommended medical treatment.

[29] The General Division noted at paragraph 20 and 32 of its decision that the Applicant had attempted weight loss in approximately 2014 through Herbal Magic and that he stopped because it was too expensive at $427 per month.[6] Furthermore, the Applicant was expected to purchase his own groceries. He also was unable to meet with the consultant, as it required travelling. The General Division noted the Applicant's testimony that the Applicant had stopped the program not only due to financial considerations, but because he found that "[i]t was not really working anyway."[7]

[30] The General Division considered whether the Applicant's attempts had been reasonable, but apart from this, it is not readily apparent whether the General Division also considered the reasonableness of the Applicant's perceived non-compliance with recommendations to lose weight, despite being aware of his explanations. On this basis, I am satisfied that the appeal has a reasonable chance of success.

(c) Alleged erroneous findings of fact

[31] As I have granted leave to appeal, it is unnecessary for me to decide on the remaining issues.

CONCLUSION

[32] The application for leave to appeal is granted.

[33] In accordance with subsection 58(5) of the DESDA, the application for leave to appeal 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

[6] 26:50 to 29:00 of audio recording of the hearing of the appeal before the General Division.
[7] 28:00 of the audio recording of the hearing of the appeal before the General Division.

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