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

Citation: *L. J. v. Minister of Employment and Social Development*, 2017 SSTADIS 626

Tribunal File Number: AD-17-544

BETWEEN:

L. J.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: November 9, 2017

REASONS AND DECISION

DECISION

Leave to appeal is granted.

OVERVIEW

[1] The Applicant, L. J., is 59 years old and has a history of surgical complications from a hernial repair and hysterectomy. She was last employed as a long-haul truck driver, a job she gave up in November 2011 because of increasing pelvic pain and a torn right shoulder tendon. The Respondent refused her application for a disability pension under the *Canada Pension Plan* (CPP), because it found no indication that her medical problems prevented her from performing less strenuous forms of work.

[2] The Applicant appealed the Respondent's refusal to the General Division of the Social Security Tribunal (Tribunal). It found that, while the Applicant suffered from a number of ailments, they did not amount to a "severe and prolonged" disability during her minimum qualifying period (MQP), which ended on December 31, 2014.

[3] I have reviewed the record and concluded that this appeal has a reasonable chance of success because the General Division may have: (i) failed to assess the severity of the Applicant's claimed disability in a "real world context"; and (ii) disregarded evidence that went to the Applicant's unemployability.

ISSUES

[4] I must answer the following questions. Does the Applicant have an arguable case that the General Division:

(a) erred in law by failing to assess the severity of the Applicant's impairments in a "real world context" as required by *Villani v. Canada*?[1]

[1] *Villani v. Canada (Attorney General)*, [2002] 1 FCR 130, 2001 FCA 248.

(b) based its decision on an erroneous finding of fact by disregarding evidence of the Applicant's lack of employability?

ANALYSIS

[5] According to section 58 of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: The General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material. An appeal may be brought only if the Appeal Division first grants leave to appeal,[2] but the Appeal Division must first be satisfied that it has a reasonable chance of success.[3] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[4]

(a) Did the General Division fail to apply the "real world" test?

[6] I see an arguable case that the General Division failed to fully take into account the Applicant's background when it decided that she remained capable of substantially gainful work.

[7] The Applicant submits that the General Division did not properly apply the *Villani* "real world" test, which requires a decision-maker to specifically consider personal factors such as an applicant's age, education and work experience in assessing disability. Merely citing case law is insufficient. The General Division was obligated not just to mention *Villani* but also to apply it in analyzing the severity of an applicant's disability.

[8] While the General Division correctly summarized the *Villani* principles in its decision, it is not clear that it rigorously applied them to this Applicant's particular circumstances. The General Division noted that the Applicant was 58 years old at the time of the hearing,[5] obtained

---

[2] DESDA at subsections 56(1) and 58(3).
[3] Ibid. at subsection 58(1).
[4] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.
[5] The information of file indicates that she was actually 59 on the date of the hearing and 57 on December 31, 2014, when her MQP ended.

a GED in adulthood and had a work history entirely comprised of "blue collar" jobs such as waitress, truck driver and personal care worker. The General Division then concluded:

> This work history indicates to the Tribunal that the Appellant is nearing the end of her work career. It also indicates that the Appellant has a limited amount of history working in a sedentary position. However even given these observations the Tribunal finds that the Appellant does have transferable skills that would assist her in finding alternate employment in a sedentary work environment if she so desired.

[9] A sedentary, as opposed to light, occupation is commonly held to mean predominantly "sit-down" or desk work, typically involving the use of a telephone or computer in an office setting. Having recognized that the Applicant had spent her working life in a series of active occupations, the General Division did not explains how she had acquired "transferable skills" that would enable a woman in her late fifties to successfully make the transition to "white collar" work.

[10] While the General Division attempted to address the requirements set out in *Villani*, it may have made a leap in logic that was unsupported by the facts and unwarranted by the law. In my view, this ground has reasonable chance of success on appeal.

(b) Did the General Division disregard evidence of the Applicant's unemployability?

[11] Since a claimant's capacity to work is intimately connected to his or her personal characteristics (see above), I will also grant leave to appeal on this admittedly broad issue, albeit with reservations.

[12] The General Division, as trier of fact, is entitled to weigh evidence as it see fits, so long as it does so within the confines of subsection 58(1) of the DESDA. Although the Applicant disputes the General Division's finding that there was "no medical evidence" to suggest the Applicant was barred from substantially gainful employment, she does not cite a specific medical report that contradicts this statement. Still, I think this point deserves further investigation, and I will be interested to hear further submissions from the parties on whether the General Division's categorical statements are fully supported by the underlying documentary medical evidence.

[13] Although the Applicant did not make this argument, I also wonder whether a case can be made that the General Division erred in paragraph 54, when it wrote that Dr. Glasgow's May 6, 2015, report "indicated that the [Applicant's] shoulder surgery was successful and that the [Applicant]was able to return to her previous employment if she so desired." However, the report itself[6] suggests that Dr. Glasgow actually found the Applicant able to return to her job as a truck driver *with restrictions*, subject to 20 weeks of physiotherapy. The question is whether the General Division accurately and fairly summed up the Glasgow report.

[14] The Applicant also suggests that, in finding the Applicant's surgeries had been "successful," the General Division failed to take into account her testimony to the contrary. I see a reasonable chance of success for this ground appeal, if for no other reason than the General Division's exclusive reliance, in its analysis, on documentary medical evidence. Although the Applicant testified at length about her impairments and loss of functionality, her oral evidence appeared to play no part in the General Division's reasoning.

CONCLUSION

[15] I am granting leave to appeal on all grounds that the Applicant has claimed. 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.

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

Member, Appeal Division

[6] See GD6-14.