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

Citation: *G. H. v. Minister of Employment and Social Development*, 2017 SSTADIS 649

Tribunal File Number: AD-17-165

BETWEEN:

G. H.

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 16, 2017

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, G. H., worked in construction until September 2011, when he was involved in an accident and injured his lower back. He has had lower back pain since, as well as decreased mobility. He also suffers from poor sleep and fatigue.

[3] The Applicant applied for a Canada Pension Plan disability pension but the Respondent turned down his application. He appealed the decision to the General Division but it also 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, 2014. (The minimum qualifying period is the date by which an applicant is required to be disabled, to qualify for a Canada Pension Plan disability pension.) The Applicant now seeks leave to appeal the General Division's decision, on the basis that the General Division erred in law. I must consider whether the appeal has a reasonable chance of success.

ISSUE

[4] The issue before me is whether the appeal has a reasonable chance of success on the basis of any errors of law.

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 leave can be granted, 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 of Canada endorsed this approach in *Tracey*.[1]

[7] The Applicant claims that the General Division made several errors of law.

Did the General Division apply the correct test for a severe disability under the *Canada Pension Plan*?

[8] The Applicant contends that the General Division erred by applying the same test for disability as those used by other disability insurers, such as the Workplace Safety and Insurance Board, and by relying on medical reports that were prepared in relation to his workplace accident claim. He argues that the General Division "opined that the tests and conclusions compiled by contracted WSIB physicians were of evidentiary equivalency to the CPPD threshold."

[9] I do not see that the General Division applied tests used by other disability insurers when it assessed the severity of the Applicant's disability. At paragraph 9, the member set out the test that he applied. He wrote that a "person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation." This accords with the test set out under paragraph 42(2)(*a*) of the *Canada Pension Plan*.

[10] Although the medical reports may have been prepared in relation to the Applicant's workplace claim, I see no reason to exclude them on that basis where they are determined to have some relevance to the proceedings at hand.

[1] *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

Did the General Division assess the Applicant's disability at the end of his minimum qualifying period?

[11] The General Division was required to assess whether the Applicant was severely disabled by the end of his minimum qualifying period.

[12] The Applicant argues that, by relying largely on his family physician's medical report dated February 13, 2012, the General Division did not properly consider whether he could be found severely disabled by the end of his minimum qualifying period. He submits that the General Division should have focused its attention instead on other medical reports that had been prepared between February 2012 and December 2014 because they were particularly relevant to the issue of whether the Applicant could be found severely disabled by December 31, 2014.

[13] Although Dr. Green's Canada Pension Plan medical report, dated June 2015, was prepared approximately six months after the end of the minimum qualifying period had passed, the Applicant argues that the report nevertheless was critical to establishing the severity of his disability. He asserts that the report was based on diagnoses made prior to the end of his minimum qualifying period and that Dr. Green had provided an updated opinion regarding the Applicant's capacity.

[14] The Applicant further asserts that the General Division should have also relied on the medical reports that had been prepared after December 31, 2014, because they too addressed the issue of whether he could be found severely disabled by the end of his minimum qualifying period.

[15] The Applicant notes in particular that, although his family physician had provided an updated medical opinion in June 2015 — after the end of the minimum qualifying period — it was based on diagnoses that had been made within the minimum qualifying period. The Applicant also claims that Dr. Green "altered his position about modified work" in his opinion of June 2015, and that the General Division therefore should have relied on this report rather than the February 2012 report.

[16] The General Division gave extensive weight to Dr. Green's February 2012 medical report, as well as the Workplace Safety and Insurance Board Regional Evaluation Centre report dated December 29, 2011. The General Division found that the February 2012 medical report—which it described as having been written "well within the [Applicant's minimum qualifying period]"—established that the Applicant was able to work and perform light duties.

[17] However, the General Division clearly recognized that it was required to assess any subsequent medical evidence and determine whether it could establish that the Applicant was disabled on or before the end of his minimum qualifying period. The member acknowledged the Applicant's testimony that his condition had worsened after February 2012, but simply found that the medical documentation did not support the Applicant's testimony.

[18] The General Division noted that the medical reports, including Dr. Green's Canada Pension Plan medical report and January 2016 report, and a physiatrist's medical report of June 2016) were post-minimum qualifying period and were therefore of little relevance in establishing the severity of the Applicant's disability.

[19] If any of the medical opinions prepared after December 31, 2014 were to be of any use, they would have had to address the severity of the Applicant's disability on or before the end of his minimum qualifying period.

[20] The Canada Pension Plan medical report was relatively brief and gave no indication that there had been any deterioration in the Applicant's condition at any time after his injury in September 2011, or after Dr. Green's opinion set out in his February 2012 report.

[21] Dr. Green indicated that the Applicant suffered from lower back pain, sciatica and sacroiliac dysfunction, and that he had decreased mobility, such that he required ongoing pain relief medication. Dr. Green also indicated that the Applicant required nerve blocks and that he had undergone physiotherapy. He was of the view that the Applicant was unlikely to improve. This fell short of establishing with any certainty that the Applicant's

disability was severe, or that his condition had deteriorated since either September 2011 or February 2012.

[22] In his January 13, 2016, report, Dr. Green simply wrote that the Applicant was "currently unable to perform the duties necessary for his employment as the result of his medical condition" (GD1-5). This opinion also failed to address the issue of the severity of the Applicant's disability on or before the end of his minimum qualifying period.

[23] If Dr. Green had been of the opinion in February 2012 that the Applicant was capable of some work, the Applicant should have obtained an opinion from Dr. Green that specifically addressed whether there had been any discernible change in the Applicant's condition since February 2012, such that he had been rendered incapable regularly of pursing any substantially gainful occupation.

[24] The physiatrist first saw the Applicant in June 2016, well after the end of the minimum qualifying period had passed. He did not see the Applicant in or around the end of the minimum qualifying period and therefore was unable to comment on the severity of the Applicant's disability. Indeed, the physiatrist did not offer any opinion in this regard and could comment only on the Applicant's current condition.

[25] I recognize that the Applicant has been diagnosed as having degenerative changes in his lower back, and while generally it may represent a progressive condition, there would need to be some clinical corroboration. The Applicant has been unable to point me to any medical records that show a progressive deterioration in his condition.

[26] The Canada Pension Plan medical report and the 2016 medical reports were of limited use, as they did not address the Applicant's condition for the relevant time frame. Accordingly, it was appropriate in these circumstances for the General Division to rely on earlier medical opinions and determine whether the Applicant's disability deteriorated or progressed over time, up to the end of the minimum qualifying period, in examining whether the Applicant could be found severely disabled by December 2014. I am not satisfied that the appeal has a reasonable chance of success on the basis of this issue.

Did the General Division fail to apply *Villani* and *Inclima*?

[27] The Applicant argues that the General Division failed to consider and apply *Villani*[2] and *Inclima*.[3]

[28] The *Villani* analysis, i.e. "real world" approach, requires the General Division to determine whether an appellant, in the circumstances of their background and medical condition, is capable regularly of pursuing any substantially gainful occupation. The Federal Court determined that the hypothetical occupations that a decision-maker must consider cannot be divorced from the particular circumstances of an appellant, such as their age, education level, language proficiency and past work and life experience.

[29] The General Division did not refer to *Villani* and it is not readily apparent whether the General Division considered and undertook any analysis of the Applicant's personal characteristics in a "real world context." As such, I am satisfied that the appeal has a reasonable chance of success on this ground.

[30] In *Inclima*, the Federal Court of Appeal held that an applicant who seeks to bring himself within the definition of a severe disability must not only show that he or she has a serious health problem but, where there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.

[31] The General Division does not appear to have conducted an *Inclima* analysis and determined whether any efforts at obtaining and maintaining employment had been unsuccessful. I am not altogether convinced that such an analysis would have necessarily assisted the Applicant in establishing severity, but as I have already granted leave to appeal, the Applicant may make further submissions on this point.

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[2] *Villani v. Canada (Attorney General)*, 2001 FCA 248.
[3] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

Did the General Division err in relying on the physiatrist's report of June 6, 2016?

[32] The Applicant submits that the General Division erred by allowing the physiatrist's report of June 6, 2016 to be admitted into the evidentiary record following the hearing of the appeal, on the basis that the Respondent had referred to the report in its written submissions. The Applicant asserts that the physiatrist's opinion was not in the hearing record in the first instance and that he did not have a fair opportunity to respond to it.

[33] I see no merit to this particular submission. The General Division indicated that it was the Applicant who relied on the report, rather than the Respondent. Additionally, notwithstanding the fact that the General Division indicated that the physiatrist's report was not included in the appeal record, I see from a review of the hearing file that the Applicant had filed a copy of the physiatrist's report of June 6, 2016 as an attachment to his Notice of Readiness filed on July 5, 2016 (GD3). He indicated on the Notice of Readiness that he wished to add the document to the existing file.

[34] Given that the report originated with the Applicant, I see no basis for his suggestion that somehow he did not have a fair opportunity to respond to the June 2016 report. I am not satisfied that the appeal has a reasonable chance of success on this particular ground.

Did the General Division commit other errors under subsection 58(1) of the DESDA?

[35] The Applicant asserts that the General Division erred by failing to undertake much analysis of the evidence before it. However, as the Federal Court of Appeal has consistently held, it is unnecessary for a decision-maker to address all of the evidence before it, unless it is of such probative value that the decision-maker should have considered it. The General Division discussed each of the medical opinions. Apart from these reports, the Applicant has not referred me to any other evidence that required any analysis or discussion.

[36] The Applicant further contends that the General Division breached principles of natural justice and that it based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it. However, the Applicant did not particularize these allegations. Without any particulars, I am not satisfied that these issues raise an arguable case.

CONCLUSION

[37] I am satisfied that the General Division may have failed to conduct a *Villani* analysis. Accordingly, the application for leave to appeal is granted. The Applicant should be aware, however, that the Federal Court of Appeal has determined that there are occasions whereby a decision-maker may not be required to conduct such an analysis, and he should be prepared to address this line of authorities in the factual circumstances of this case.

[38] 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 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