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

Citation: *K. L. v. Minister of Employment and Social Development*, 2017 SSTADIS 668

Tribunal File Number: AD-16-1275

BETWEEN:

K. L.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Nancy Brooks

Date of Decision: November 21, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant applies for leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal), dated October 17, 2016, which determined she was not entitled to a disability pension under the *Canada Pension Plan* (CPP).

[2] Pursuant to subsection 56(1) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Tribunal's Appeal Division may only be brought if leave to appeal is granted. Subsection 58(1) states that the only grounds of appeal are that:

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.

Pursuant to subsection 58(2), leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[3] The leave to appeal proceeding is a preliminary step to an appeal on the merits. It presents a different and appreciably lower hurdle to be met than the one presented at the appeal stage: at the leave to appeal stage, the Applicant is required to establish that the appeal has a reasonable chance of success on at least one of the grounds in s. 58(1) of the DESDA; whereas at the appeal stage, the Applicant must prove his or her case on the balance of probabilities: *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC). In the context of an application for leave to appeal, having a reasonable chance of success means having some arguable ground upon which the proposed appeal might succeed: *Osaj v. Canada (Attorney General)*, 2016 FC 115; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41.

PRIOR DECISIONS

[4] The Applicant's application for a CPP disability pension was refused by the Respondent initially and upon reconsideration. The Applicant appealed that decision to the General Division.

[5] In her decision, the General Division member concluded that the Applicant's minimum qualifying period (MQP) date is December 31, 2016, a date falling after the date of the General Division hearing. The member correctly noted that, as the MQP date was in the future, she was to decide whether it was more likely than not that the Applicant had a severe and prolonged disability, as defined under the CPP, on or before the date of the hearing.[1] The member concluded the Applicant's disability was not severe within the meaning of s. 42(2) of the CPP and dismissed the appeal.

SUBMISSIONS

[6] In this application, Applicant's counsel submits that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, an allegation falling within the scope of s. 58(1)(*a*) of the DESDA. She also submits that the General Division based its decision on erroneous findings of fact that it made in a perverse or capricious manner and without regard to the material before it, an allegation falling under s. 58(1)(*c*) of the DESDA.

[7] Specifically, Applicant's counsel alleges that the General Division:

a) misstated the evidence of Dr. Veluri in finding that he advised the Applicant to move forward with plans to seek alternate employment;

b) misstated and misconstrued evidence regarding the Applicant's medical leaves of absence and specifically failed to consider the fact that the Applicant received long-term disability (LTD) benefits from her employer's group insurer until January 2014;

c) made adverse findings regarding the Applicant's responsiveness to treatment in the absence of any supportive medical evidence for such findings and contrary to overwhelming evidence supporting a poor response to treatment; and

[1] Reasons, paras. 8 and 40.

d) failed to consider the Applicant's evidence regarding a lack of medical and financial resources, which prevented her from attending counselling or pain management.

[8] Allegations (a) through (c) fall within the scope of s. 58(1)(*c*) of the DESDA as they amount to allegations that the General Division based its decision on an erroneous finding of fact made in a perverse and capricious manner or without regard to the material before it. The last allegation, if made out, would constitute an error of fact falling within s. 58(1)(*c*) as well as an error of law falling within s. 58(1)(*b*) of the DESDA, arguably based on the failure to properly apply the principles set out by the Federal Court of Appeal in *Villani v. Canada (Attorney General)*, [2002] 1 FCR 130, 2001 FCA 248.

DISCUSSION

Failure to observe principle of natural justice

[9] Dealing first with the allegation that the General Division failed to observe a principle of natural justice or that it committed a jurisdictional error, the Applicant bears the onus to establish that this argument has a reasonable chance of success. However, the Applicant has made no submissions on what the General Division is supposed to have done contrary to s. 58(1)(a) of the DESDA and has not provided any support whatsoever for this allegation. I conclude this argument does not have a reasonable chance of success.

[10] I turn now to deal with each of the specific allegations described in para. 7, above.

The evidence of Dr. Veluri

[11] The Applicant submits that the General Division "misstated the evidence of Dr. Veluri in finding that he advised the patient to move forward with plans to seek alternate employment".

[12] Dr. Veluri, a psychiatrist, saw the Applicant once and carried out an independent medical examination. In his report dated April 14, 2016, under "Treatment Recommendations", he stated:

> Psychotherapy should focus on cognitive behavioural and supportive strategies. <u>The focus should be on her accepting the current situation and moving forward with future plans which also includes looking for alternate employment.</u> Psychotherapy should also help her to deal with her pain symptoms. This is best done by a pain program which also

> takes into consideration other modalities of pain control like medications and injections.[2] [underlining added]

[13] The General Division member dealt with this issue at two points in her reasons. At para. 33, in the section of her reasons dealing with the review of the documentary evidence, the member stated:

> [33] Dr. Veluri opines that the loss of her job caused her depression, anxiety and frustration and changed the course of her life because of the loss of position in the small town, as well as financially. She is on a smaller dose of Effexor, to which she did not respond well. Recommendation was to increase the dose gradually, and adding Clonazepam. She should focus on cognitive behavioural and supportive strategies and should move forward with future plans which also include looking for alternate employment. Psychotherapy should help deal with her pain, and a pain program is recommended. She is currently totally disabled from any gainful employment and will continue to be so for some time. [underlining added]

[14] At para. 48, in the analysis section of her reasons, the member stated:

> [48] Dr. Veluri was consulted once for a medical legal opinion. He is not the treating psychological specialist. He noted she should focus on the CBT [cognitive behavioural therapy] and supportive strategies, which she is doing. He also noted she should move forward with future plans including looking for alternative work. He recommended a pain program, of which the Appellant testified she has no plans. [underlining added]
>
> [49] Dr. Veluri did opine she is totally disabled from any gainful employment and will continue for some time, with improvement depending upon the implementation of the treatment recommendations. The Tribunal does not accept that the Appellant was unresponsive to treatment, one of the key reasons for Dr. Veluri's opinion. As well, the Appellant has not complied with his recommendations, as she has no plans for a pain clinic and is not receiving any further psychological treatment.

[15] I see no reviewable error in the manner in which the member referred to Dr. Veluri's evidence. Furthermore, in order to fall within s. 58(1)(*c*) of the DESDA, the General Division would have had to base its decision on an erroneous finding of fact which, in my view, did not occur. The member made no reference to whether Dr. Veluri had made a recommendation to

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[2] GD9-19.

return to work in her analysis and conclusion regarding whether the Applicant's disability was severe, in paras. 50 to 57 of her reasons, therefore she did not base her conclusion regarding the issue of severity on any finding made in relation to Dr. Veluri's evidence. I find the Applicant has not raised an arguable case in relation to this aspect of the evidence.

Medical leaves of absence and employer's LTD benefits

[16] Applicant's counsel argues that the General Division member misstated and misconstrued evidence regarding the Applicant's medical leaves of absence and specifically failed to consider the fact that the Applicant received LTD benefits from her employer's group insurer until January 2014. Applicant's counsel asserts these benefits were in dispute at the date of the General Division hearing.

[17] The General Division member referred to the issue of the Applicant's attendance at work in her review of the documentary evidence, where she stated:

> [28] An employer's questionnaire received November 6, 2015 from S. R. F. Hospital notes the Appellant worked full time from July 10, 1989 until paid date stopped of [*sic*] August 19, 2013 and was laid off. Her attendance was good and there are no absences noted for medical reasons. Her quality of work was satisfactory. There was no need for special arrangements or help from co-workers. There is no medical condition which affected her ability to handle the demands of the job. The attached minutes of settlement showed she was terminated on January 24, 2012 as a result of restructuring. She received a severance package. It was noted the employer found her to be a knowledgeable, committed and reliable employee. Her job duties as an Accounting Supervisor consisted of material management such as delivery schedules and tenders; Payroll; Human Resources and Accounts Payable. [underlining added]

[18] I have reviewed the employer's questionnaire[3] and the member's description of what the employer said in the questionnaire is accurate.

[19] In para. 52 of the reasons, the member correctly notes that *per Inclima v. Canada (Attorney General),* 2003 FCA 117, where there is evidence of capacity to work, a person must

[3] GD3-12 to GD3-14.

show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition. It appears that the member concluded the Applicant had the capacity to work and then concluded she had not proved that she was unsuccessful in obtaining or maintaining work due to her depression or neck pain (at para. 55). However, although the member relies on the employer's questionnaire to conclude the Applicant had the capacity to work, the questionnaire relates to the period of time when the Applicant was employed. She had two car accidents after her employment was terminated, and the member does not appear to examine the impact of these accidents on the capacity to work. The member also does not discuss the weight she gave to the questionnaire in relation to the evidence concerning the physical and psychological issues the Applicant faced after her employment was terminated. Therefore, bearing in mind the lower threshold that needs to be met by the Applicant to be granted leave to appeal, I am satisfied she has raised an arguable case with respect to a possible error falling within the scope of s. 58(1)(*c*) of the DESDA that the General Division member, when examining the Applicant's capacity to work, may have misconstrued the evidence concerning the Applicant's medical leaves of absence while employed.

[20] Counsel also argues that the member failed to consider "the fact that the Applicant received LTD benefits from her employer's group insurer until January 2014, which benefits were in dispute on the date of the appeal hearing".

[21] Eligibility for LTD benefits under an employer's, or other third party's, LTD benefit plan will be governed by the contractual terms of the specific LTD benefit plan. Whether someone is eligible to receive LTD benefits under contract is not relevant to the issue of whether an applicant for a CPP disability pension is considered "disabled" within the meaning of the CPP, as the definition of disability for the purposes of a CPP disability pension is governed solely by the terms of the statute. This issue was commented on by the Pension Appeals Board, predecessor to the Appeal Division, in *Heller-Pereira v. Minister of Social Development* (May 26, 2004), CP18522 (PAB):

> The provisions of other public and private plans for disability pensions or other similar periodic payments vary from those involved here. The legislation rules that determine eligibility for a disability pension under the Plan are strict and inflexible. This Board, as differently constituted, has emphasized in several cases, for example *Dorion v Minister*

> *of Human Resources Development* CP10672, 2000, that the threshold for a disability pension under the Plan is a high and stringent one, perhaps one of the highest, if not the highest, in any such legislation in North America.

[22] Thus, evidence regarding whether the Applicant was entitled to receive or was challenging her eligibility for benefits under her former employer's LTD benefits plan was irrelevant to the issue before the General Division. I conclude this argument does not have a reasonable chance of success.

Response to treatment

[23] Counsel for the Applicant submits that the General Division member made adverse findings regarding the Applicant's responsiveness to treatment in the absence of any supportive medical evidence for such a finding and contrary to overwhelming evidence supporting a poor response to treatment. Though the Applicant bears the onus to demonstrate this argument has a reasonable chance of success, her counsel has not identified the evidence she relies on to support a finding that the Applicant had a poor response to treatment.

[24] In her reasons, the General Division member identified the evidence on which she based her conclusion that the Applicant responded to treatment. At para. 42 of the reasons, the member referred to the report of Dr. Kos who found the Applicant's anxiety had improved considerably in 2013 due to massage and chiropractic treatments. At para. 43, the member noted the Applicant's evidence that the treatment she received from Dr. Blain (psychologist) and Marion Crow (counsellor) helped her learn coping skills, relation techniques and other tools to help herself. At para. 44, the member noted Ms. Crow's statement that the Applicant had mentioned in 2014 that she had not felt any anxiety in a long time. The member also referred to the Applicant's testimony and documents from Ms. Crow showing that treatment was successful. The member explained why she preferred the evidence of Ms. Crow (who treated the Applicant for three years) over the evidence of Dr. Veluri (who saw the Applicant only once). At para. 46 of the reasons, the member reviewed the history of medications prescribed to the Applicant and concluded, at para. 47, that the medications were considered effective and reasonable by the Applicant's doctors as they had not changed the dosage or type for many years.

[25] As the trier of fact, the General Division member was acting within the scope of her authority in assessing the evidence and making findings of fact. While the Applicant may not agree with the conclusion reached on this issue, it is not the Appeal Division's role to reassess the evidence. In *Simpson v. Canada (Attorney General)*, 2012 FCA 82, at para. 10, the Federal Court of Appeal commented on the respective roles of the trier of fact and appeal tribunal:

> [A]ssigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact.

[26] There was evidence to support the General Division member's conclusion that the Applicant was responsive to treatment. The Applicant bears the onus to establish the appeal has a reasonable chance of success. In my view, she has not discharged her onus in relation to this ground. I see no reasonable chance of success of the proposed appeal on this basis.

Financial resources

[27] Applicant's counsel submits that the General Division failed to consider the Applicant's evidence regarding a lack of medical and financial resources, which prevented her from attending counselling or pain management.

[28] For the reasons that follow, I conclude this argument has no reasonable chance of success.

[29] It is open to the General Division in appropriate cases to consider an applicant's refusal or failure to undergo recommended treatment as part of the *Villani* analysis to determine whether an applicant's disability is severe: *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 2011. However, in the present case, although the member did state at para. 49 that the Applicant had not complied with Dr. Veluri's recommendation, this had no bearing on her analysis and conclusion in paras. 50 through 57 regarding whether the Applicant's disability was severe.

[30] Paragraph 58(1)(*c*) of the DESDA stipulates a ground of appeal where the General Division *based its decision* on an erroneous finding of fact that it made in a perverse or

capricious manner or without regard to the material before it. In the present case, the General Division member concluded that the Applicant had not followed Dr. Veluri's recommendations to obtain further psychological counselling and pain control. She based this conclusion on the Applicant's testimony, which the Applicant does not dispute in her application. Rather, the Applicant says the member should have considered the Applicant's lack of medical and financial resources. However, as the member did not base her decision that the Applicant's disability was not severe on her finding that the Applicant did not follow Dr. Veluri's recommendations, the issue of whether the Applicant could afford the treatment was not engaged in or relevant to the analysis.

[31] On this basis, I am satisfied that the Applicant has not raised an arguable case with respect to a possible error of law falling within the scope of s. 58(1)(*b*) or (*c*) of the DESDA in relation to the submission that the Applicant lacked medical or financial resources, which prevented her from attending counselling or pain management.

[32] Before leaving this issue, I observe that, as far as I am aware, the Courts have not ruled on whether an Applicant's ability to pay for recommended treatment is relevant to the *Villani* analysis. For its part, the Appeal Division has held in one case that, even where an Applicant has submitted clear evidence that a particular therapy was beyond her financial means, the General Division would be entitled to disregard it because financial hardship is not a relevant consideration in the determination of eligibility for a disability pension: *V.T. v. Minister of Employment and Social Development*, 2017 SSTADIS 29. Finally, I note that in the present case, the member made no finding regarding whether the Applicant could afford the recommended treatment or whether the recommended treatment would be available through the public health system.

DISPOSITION

[33] I conclude that the Applicant's appeal has a reasonable chance of success on the ground that the General Division member, when carrying out her analysis of whether the Applicant had the capacity to work, may have misconstrued the evidence regarding the Applicant's medical leaves of absence while employed. I grant leave to appeal on this ground.

[34] Leave to appeal is refused on the other grounds set out in the application for leave to appeal, reproduced above at paras. 7(a), (c) and (d) and in para. 7(b) with respect to the argument that the General Division failed to consider the fact that the Applicant received LTD benefits from her employer's group insurer until January 2014. As explained in these reasons, these grounds do not have a reasonable chance of success on appeal.

[35] In accordance with s. 42 of the *Social Security Tribunal Regulations*, within 45 days after the date of this decision, the parties may file submissions with the Appeal Division or file a notice with the Appeal Division stating that they have no submissions to file.

Nancy Brooks
Member, Appeal Division