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

Citation: *M. V. v. Minister of Employment and Social Development*, 2017 SSTADIS 693

Tribunal File Number: AD-17-308

BETWEEN:

M. V.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Kate Sellar

Date of Decision: November 29, 2017

REASONS AND DECISION

INTRODUCTION

[1] On January 10, 2017, 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 on April 11, 2017. The Tribunal wrote to the Applicant indicating that the Application was incomplete, and it received a response in writing from the Applicant on May 10, 2017. The Tribunal acknowledged the Application as complete on May 11, 2017.

ISSUE

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

THE LAW

Leave to Appeal

[3] According to ss. 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal may be brought only if the Appeal Division grants leave to appeal, and the Appeal Division must either grant or refuse leave to appeal.

[4] Subsection 58(2) of the DESDA provides that the Appeal Division refuses leave to appeal if it is satisfied that the appeal has no reasonable chance of success. An arguable case at law is a case with a reasonable chance of success [see *Fancy v. Canada (Attorney General)*, 2010 FCA 63].

Grounds of Appeal

[5] According to s. 58(1) of the DESDA, the only grounds of appeal are:

> (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.

SUBMISSIONS

[6] The Applicant submits that she is still "trying to establish the fact" that her condition constitutes a severe and prolonged disability. The Application does not expressly rely on any ground of appeal under the DESDA.

[7] However, the Applicant's submissions do implicitly raise a question about whether the General Division erred in law contrary to s. 58(1)(*b*) in its application of the factors set out in *Villani v. Canada (Attorney General)*, [2002] 1 FCR 130, 2001 FCA 248. The General Division concluded that sedentary work remained an option for the Applicant, although her evidence was that she could read only "a little" English (para. 10). The Applicant also raises a question about how sedentary employment would address the Applicant's limitations relating to the issues she has with her bowels.

ANALYSIS

[8] In reaching its determination about the Applicant's capacity to work, the General Division may have made an error under s. 58(1)(*b*) and/or (*c*) under the DESDA in this matter.

[9] The General Division weighed two pieces of medical evidence from 2015 (i.e. before the expiry of the MQP) about the Applicant's capacity to work. In February 2015, Dr. Singh indicated that, due to constant pain and inconsistent response to medication, it was doubtful the Applicant could perform gainful employment (GD2-47). In September 2016, Dr. Singh indicated that, due to chronic constipation and abdominal pain, the Applicant was unable to work (GD1-B2). The General Division weighed this evidence against that of Dr. Kutcher's report of February 2016 (GD4-4), which stated "She didn't tolerate the Resotran because of side effects. She is feeling better now, although, with several good days a week […] I think she will continue to have gradual improvement in her symptoms over the next 6-12 months."

[10] In determining that the Applicant had capacity to work, the General Division relied on Dr. Kutcher's post-MQP report, specifically on the reference to the Applicant's improvement (paras. 34–36). The General Division decision is silent in terms of analysis about whether the improvement to "several good days a week" was "regular" in the sense of whether the Applicant was capable of working predictably or with consistent frequency, as is required [see *Villani supra*; and also *Atkinson v. Canada (Attorney General)*, [2015] 3 FCR 461, 2014 FCA 187]. Dr. Singh's report of November 2016 (GD4-2) did not mention any improvement in the Applicant's symptoms consistent with what Dr. Kutcher had noted months before in February 2016. Dr. Singh indicated that it would be difficult for the Applicant to work, "given her *constant and unpredictable* bowel issue." [emphasis added] In considering that November 2016 report from Dr. Singh, the General Division states at para. 41:

> He however has not provided correlating medical evidence to suggest that her condition worsened after her visit with her specialist Dr. Kutcher who earlier in the year had said he expected her to continue to improve. The suffering of a claimant is not an element upon which the test of "disability" rests. It should be demonstrated that a claimant suffers from a disability which, in a 'real world' sense, renders him or her incapable regularly of pursuing any substantially gainful occupation. Further, while Dr. Singh felt that it would be difficult for the Appellant to work, he did not say she was incapable of all work.

[11] In weighing the evidence about capacity to work, the General Division may have ignored the reason Dr. Singh gave about why it would be difficult for the Applicant to work–he indicated her symptoms were both constant and unpredictable. A failure to consider predictability in this circumstance may amount to an error under s. 58(1)(*b*) of the DESDA, as it is an analysis required by *Villani*. However, it may also amount to ignoring or misconstruing evidence under s. 58(1)(*c*) of the DESDA, in that, although evidence about predictability was before the General Division from Dr. Singh, the General Division did not expressly weigh it.

[12] Given the Appeal Division has identified a possible error under s. 58(1) of the DESDA, the Appeal Division does not need to consider any other grounds that the Applicant has raised at this time. The DESDA s. 58(2) does not require that individual grounds of appeal be considered and accepted or rejected [see *Mette v. Canada (Attorney General)*, 2016 FCA 276]. The Applicant is not restricted in her ability to pursue the grounds raised in her Application.

CONCLUSION

[13] The Application is granted. This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Kate Sellar
Member, Appeal Division