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

Citation: *D. F. v. Minister of Employment and Social Development,* 2017 SSTADIS 735

Tribunal File Number: AD-17-470

BETWEEN:

D. F.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Jude Samson

Date of Decision: December 14, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant was involved in a motor vehicle accident (MVA) in June 2013 and then slipped and fell on ice in November 2013. She has not worked since the MVA, citing a neck injury, headaches, a broken elbow with an entrapped nerve, loss of use of her right hand and arm, and pain in her right shoulder, along with restrictions on bending, twisting, lifting, and reaching (GD2R-69). She applied for a disability pension under the *Canada Pension Plan* in January 2015. Her application was denied by the Respondent, the Minister of Employment and Social Development (Minister), as was her request for reconsideration. She then appealed to the General Division of the Social Security Tribunal of Canada (Tribunal), which held a hearing in March 2017, but later dismissed the appeal.

[2] In June 2017, the Applicant filed this application requesting leave to appeal to the Tribunal's Appeal Division. For the reasons described below, I have decided to grant leave to appeal.

THE LEGAL FRAMEWORK

[3] The Tribunal is created and governed by the *Department of Employment and Social Development Act* (DESD Act). The DESD Act establishes a number of important differences between the Tribunal's General Division and its Appeal Division.

[4] First, the General Division is required to consider and assess all of the evidence that has been submitted, including new evidence that was not considered by the Minister at the time of its earlier decisions. In contrast, the Appeal Division is more focused on particular errors that the General Division might have made. More specifically, the Appeal Division can interfere with a General Division decision only if one of the following errors set out in subsection 58(1) of the DESD Act is established (also known as grounds of appeal):

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.

[5] A second important difference created by the DESD Act is that most appeals before the Appeal Division must follow a two-step process:

a) The first step is known as the application for leave to appeal stage. This is a preliminary step that is intended to filter out those cases that have no reasonable chance of success.[1] The legal test that applicants need to meet at this stage is a low one: Is there any arguable ground upon which the proposed appeal might succeed?[2]

b) If leave to appeal is granted, the file moves on to the second step, which is known as the merits stage. It is at the merits stage that appellants must show that it is more likely than not that the General Division committed at least one of the three possible errors described in subsection 58(1) of the DESD Act. The expression "more likely than not" means that appellants have a higher legal test to meet at the second stage as compared to the first.

[6] This appeal is now at the leave to appeal stage, meaning that the question I have asked myself is whether there is any arguable ground on which the proposed appeal might succeed. It is the Applicant who has the responsibility of showing that this legal test has been met.[3]

ANALYSIS

[7] In her application requesting leave to appeal, the Applicant submits that the General Division made errors of law and based its decision on erroneous findings of fact. With respect to the errors of law, the Applicant alleges that the General Division failed to consider binding authorities such as *Villani v. Canada (Attorney General)*[4], *D'Errico v. Canada (Attorney*

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[1] DESD Act, at subsection 58(2).
[2] *Osaj v. Canada (Attorney General)*, 2016 FC 115, at paragraph 12; *Ingram v. Canada (Attorney General)*, 2017 FC 259, at paragraph 16.
[3] *Tracey v. Canada (Attorney General)*, 2015 FC 1300, at paragraph 31; *Griffin v. Canada (Attorney General)*, 2016 FC 874, at paragraph 20
[4] 2001 FCA 248.

General)[5] and *Inclima v. Canada (Attorney General)*[6], particularly with respect to her ability to regularly pursue a substantially gainful occupation and the efforts she made to obtain alternative employment.

[8] The Applicant also argues that the General Division made important errors of fact when it (AD1-13 to 14):

a) wrote at paragraph 15 that there were no reports in relation to certain treatments;

b) made contradictory findings at paragraphs 29 and 32 with respect to fractures of her right arm (elbow and wrist);

c) concluded at paragraphs 46 and 52 that she has not suffered from a mental or psychological condition;

d) wrote at paragraph 51 that "there was no significant pathology shown on investigative reports"; and

e) noted at paragraph 52 that "there is no evidence of nerve entrapment."

[9] It is worth noting that the quotations in subparagraphs d) and e) above are from the application requesting leave to appeal (at page AD1-14) and do not correspond precisely to the General Division's decision.

Alleged Errors of Law

[10] The Applicant criticizes the General Division for basing its decision, at least in part, on her ability to do a job that no longer existed and for which she was functionally limited. She says that the General Division failed to consider the Federal Court of Appeal's decisions in *Villani* and *D'Errico*, which stressed that the legal test does not require that applicants be incapable of doing all types of work. In *D'Errico*, the Court explained the legal test this way (at paragraph 4):

> Under subparagraph 42(2)(*a*)(i) of the *Plan*, a person has a "severe" disability if she is "incapable regularly of pursuing any substantially gainful occupation." This Court has interpreted this requirement as meaning an

[5] 2014 FCA 95.
[6] 2003 FCA 117.

> inability to pursue "with consistent frequency" or "regularly" any "truly remunerative occupation": *Villani v. Canada (Attorney General)*, 2001 FCA 248, [2002] 1 F.C. 130 at paragraphs 38 and 42. This legal test for severity must be "applied with some degree of reference to the 'real world'," with a view to considering the claimant's employability based on education, employment background and daily activities: *Villani* at paragraphs 38 and 39. Where there is evidence of a capacity to work, the claimant must establish she has tried to obtain and maintain employment but has been thwarted by her health problems: *Canada (Attorney General) v. Ryall*, 2008 FCA 164 at paragraph 5.

[11] The General Division cited the "severe" requirement at paragraph 5 of its decision and cited *Villani* at paragraph 48 of its decision. The General Division then continued as follows at paragraph 49:

> The measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether his or her disability prevents him or her from earning a living. The determination of the severity of the disability is not premised upon a person's inability to perform his or her regular job, but rather on his or her inability to perform any work (*Klabouch v. Canada (Social Development)*, 2008 FCA 33). [Underlining added]

[12] In fact, what the Federal Court of Appeal wrote in *Klabouch*[7] is this:

> Second, as a corollary to the above principle is the principle that the determination of the severity of the disability is not premised upon an applicant's inability to perform his regular job, but rather on his inability to perform any work, i.e. "any substantially gainful occupation" (see: *Canada (Minister of Human Resources Development) v. Scott*, 2003 FCA 34, at paragraphs 7 and 8).

[13] In my view, the General Division's reference to the Applicant's "inability to perform any work" without including the parenthetical comment "i.e. 'any substantially gainful occupation'" raises an arguable ground that the General Division might have committed an error of law under paragraph 58(1)(*b*) of the DESD Act. Leave to appeal is granted accordingly.

[7] *Klabouch v. Canada (Social Development)*, 2008 FCA 33, at paragraph 15.

[14] Since I am granting leave on one ground, it is not necessary for me to consider any of the other issues that were raised by the Applicant, though all may be considered at the second step of the proceeding (i.e. the merits stage).[8]

[15] It is worth stressing at this point that nothing in this decision prejudges the result of the appeal on its merits. It is at the merits stage that the Applicant will have to show that it is more likely than not that the General Division committed at least one of the errors set out in subsection 58(1) of the DESD Act.

[16] Moving forward, it is noted that the Applicant's application requesting leave to appeal makes some reference to her testimony before the General Division. To the extent that it might be necessary, the recording of the hearing can be requested from the Tribunal. Should any party rely on the recording of the hearing, their submissions must include timestamp references, so that all parties can quickly locate the relevant portions of the recording.

CONCLUSION

[17] The application for leave to appeal is granted. I invite the parties, as part of their submissions, to consider whether an oral hearing is required and, if so, the appropriate form of hearing (i.e. teleconference, videoconference, or in-person).

Jude Samson
Member, Appeal Division

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[8] *Mette v. Canada (Attorney General)*, 2016 FCA 276, at paragraph 15.