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

Citation: *B. W. v. Minister of Employment and Social Development*, 2017 SSTADIS 748

Tribunal File Number: AD-16-1273

BETWEEN:

B. W.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Meredith Porter

Date of Decision: December 19, 2017

REASONS AND DECISION

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] The Applicant seeks to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) which determined that the Applicant had failed to demonstrate that he suffered a severe disability during his minimum qualifying period (MQP), which in this case ended on December 31, 2005.

[3] The General Division found that the evidence in the record did not support the Applicant's claim that he is incapable regularly of pursing substantially gainful employment. He stopped working in 2003 because he was laid off by his employer. At that time, he had been working light duties due to health conditions related to his knees and back. Despite his physical limitations, medical evidence and workplace assessments reflected that the Applicant retained capacity to work at the time he stopped working. The General Division found that the Applicant had failed to demonstrated reasonable efforts to obtain employment after being laid off.

[4] The Applicant argues that the General Division based its decision on several erroneous findings of fact. He filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on November 6, 2016.

ISSUES

[5] Does the Applicant's appeal have a reasonable chance of success on the grounds that the General Division based its decision on an erroneous finding of fact?

[6] Did the General Division err in law by failing to apply the correct test for determining entitlement to a disability pension under the *Canada Pension Plan* (CPP)?

GROUNDS OF APPEAL

[7] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), an appeal to the Appeal Division may be brought only if leave to appeal is granted and the Appeal Division must either grant or refuse leave to appeal. Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.[1]

[8] According to subsection 58(1) of the DESD Act, the only grounds of appeal are that the General Division failed to observe a principle of natural justice; erred in law in making its decision; or 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.

PRELIMINARY ISSUE

[9] The Applicant has cited a number of factors that he submits the General Division erroneously considered in its decision; however, assessing these factors goes beyond the scope of this leave application as they do not fall within any of the enumerated grounds of appeal found in subsection 58(1) of the DESD Act. The specific submissions, which I find are beyond my authority to address in deciding leave, include the following:

- The Applicant has argued that employees at Service Canada and the Tribunal ought to know that individuals who were educated in Canada have a better chance than those who were educated in another country. He has also argued that Service Canada employees ought to know that people over 55 years of age are less likely to be hired by employers.

- The Applicant argues that his ability to speak English appears better than it really is if he is asked descriptive questions and if he is speaking about topics familiar to him. This may be true; however, the Applicant did not require the assistance of an interpreter for his hearing so I do not see how this fact indicates an error on the part of the General Division under subsection 58(1).

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[1] Subsection 58(2) of the DESD Act.

- The Applicant has continued to argue issues pertaining to how he was “exploited” by his employer and the reasons which lead to his lay off, including his re-classification and written warnings regarding his work performance. These issues are irrelevant to the assessment of the severity of the Applicant’s disability as they do not relate to the Applicant’s health condition or his capacity to work.

- The Applicant has argued that the support he received through the Workplace Safety and Insurance Board (WSIB) was substandard. This Tribunal does not have the authority to address matters or services provided through the WSIB.

- The Applicant argues that he was discriminated against on the grounds of his health condition in contravention of the *Ontario Human Rights Act*, and he has pursued the assistance of the Ontario Human Rights Commission (OHRC). Again, this Tribunal is not vested with authority to address matters before the OHRC.

- Finally, the Applicant argues that MRI tests done in a horizontal position are inaccurate with respect to assessing back injuries as the compressive forces that cause back pain are alleviated when a person is lying horizontally. How medical testing is done, whether accurate or inaccurate, is not a ground of appeal found in subsection 58(1) of the DESD Act.

ANALYSIS

Errors of Fact

[10] The Applicant has made several submissions that relate to how the General Division assessed the documentary evidence in the record. The Applicant makes the following arguments:

- He and his wife purchased a new home, which only has grass and no garden and required few renovations. His son assists in maintaining the home.

- The Applicant actually began having back problems as early as 1999, and it was around that time that he began lying down for 45 minutes after work in order to feel better.

- The Applicant claims he never reported an 80 percent improvement in his pain level to Dr. Iwan in 2002, although Dr. Iwan reported this in the Regional Evaluation Centre Report found at GD2-64.

- The Applicant argues that at paragraphs 21 and 26 of the General Division decision, the member intentionally omitted words and statements contained in the respective reports referred to in that paragraph.

- The Applicant argues, in reference to paragraph 35 of the General Division decision, that he currently takes pain medicine twice per day.

- The Applicant seeks to bring attention to his permanent physical restrictions, with respect to the General Division's findings at paragraph 44 of the decision, which include both limitations to his mobility and his ability to bear weight.

- The Applicant argues that his ability to obtain employment after he was laid off in 2003 was affected by his English language skills and functional limitations.

[11] Essentially, the Applicant is arguing that had the General Division properly assessed the evidence as a whole, it would have found that the medical evidence supported a finding that he had a severe and prolonged disability on or before the MQP. I note, however, that the Applicant's submissions contain repeated statements found in the reports that the General Division relied on or in the recording of the General Division hearing. The Applicant's submissions also allege several instances where the General Division failed to refer to specific statements and details found in medical reports. However, as set out by the Federal Court of Appeal in *Simpson*,[2] at paragraph 10, "[…] a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence."

[12] It may be that the Applicant believes the General Division erred in how *Villani*[3] was applied, and I note this possibility as he states that his education and English proficiency were not properly assessed by the member. However, on reviewing the evidence in the record and having listened to the recording of the General Division hearing, the General Division's

[2] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.
[3] *Villani v. Canada (Attorney General)*, 2001 FCA 248.

assessment of both the Applicant's education level and his ability to speak English during the hearing without the assistance of an interpreter reflect that the member's findings with respect to these facts is accurate.

[13] The Applicant does not provide details regarding how he believes the General Division's erroneous finding of fact was made in a "perverse and capricious" manner. In fact, reading the General Division decision, it is noted that paragraphs 14 to 36 of the decision provide a thorough summary of the relevant medical and oral evidence and that paragraphs 40 to 53 provide the General Division's assessment of the evidence in light of both the statutory provisions of the CPP and pertinent case law.

[14] I can only assume that the Applicant is asking the Appeal Division to reconsider the evidence in the record and substitute its decision for the General Division decision. As set out above in paragraph 8, the grounds for which the Appeal Division may grant leave to appeal do not include a reconsidering of evidence already considered by the General Division. The Appeal Division does not have broad discretion in deciding leave pursuant to the DESD Act. It would be an improper exercise of the delegated authority granted to the Appeal Division to grant leave on grounds not included in section 58 of the DESD Act.[4]

[15] That said, the very same issue was before the Federal Court in *Joseph*[5] for consideration. The Court in *Joseph*, citing *Karadeolian*,[6] stated:

> Nevertheless, the requirements of subsection 58(1) should not be applied mechanically or in a perfunctory manner. On the contrary, the Appeal Division should review the underlying record and determine whether the decision failed to properly account for any of the evidence.

[16] I have reviewed the record in its entirety, and I have listened to the recording of the General Division hearing. I note, as did the General Division in its decision, that there is limited medical evidence at the time of the Applicant's MQP date of December 31, 2005. The primary health condition affecting the Applicant is knee problems in both his left and right knee, and he also suffers chronic back pain. It appears that secondary to his knees and back, he experiences

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[4] *Canada (Attorney General) v. O'keefe*, 2016 FC 503.
[5] *Joseph v. Canada (Attorney General)*, 2017 FC 391.
[6] *Karadeolian v. Canada (Attorney General)*, 2016 FC 615.

pain in his groin. Evidence of all of these health conditions was before the General Division for consideration. The impact of the Applicant's health problems on his ability to work was clearly considered and articulated by the General Division at paragraphs 47 to 49. The General Division also assessed the Applicant's efforts to obtain employment within his physical limitations, and determined that he had not made reasonable efforts. He has argued that his ability to obtain employment was limited by his ability to speak English paired with his functional limitations. However, this reasoning differs from the oral evidence he had given during the General Division hearing and I do not find it persuasive.

[17] As I do not find that the above submissions substantiate any possible errors of fact that the General Division may have made, leave is not granted pursuant to paragraph 58(1)(*c*) of the DESD Act.

Error of Law

[18] The Applicant has argued that the General Division erred in law, although he has not framed his argument as an error pursuant to paragraph 58(1)(*b*) of the DESD Act. He asserts that the General Division applied the incorrect meaning of "severe" as found in CPP legislation. He argues that severe means

> Any type of work (not just a person's usual work) that a person might reasonably be expected to do if they:
> - have the necessary skills, education, or training; and
> - have the capacity to acquire these necessary skills, education, or training.

[19] The Applicant's suggested meaning of "severe," as found in the CPP, is incorrect. The language found in subparagraph 42(2)(*a*)(i) of the CPP states that, in order to be entitled to a disability pension under the CPP, an individual must be found to suffer a "severe and prolonged" disability on or before their MQP date. A disability is determined to be "severe" if an individual is "incapable regularly of pursuing any substantially gainful occupation."

[20] Determining the severity of a disability under the CPP, the Federal Court of Appeal in *Villani* clarified the following, at paragraph 44:

> […] The proper test for severity is one that treats each word in the definition as contributing something to the statutory requirement. Those words, read together, suggest that the severity test involves an aspect of employability.

[21] The Court further articulated in *Giannaros*,[7] at paragraph 14, in reference to *Villani*, that "[o]ur Court stated unequivocally that a claimant must always be in a position to demonstrate that he or she suffers from a severe and prolonged disability which **prevents him or her from working**." [my emphasis]

[22] While the Applicant is correct in stating that severity under the CPP involves assessing whether an individual is capable of doing any gainful occupation and not simply their chosen occupation,[8] the central consideration is whether, in light of their health condition, they can work consistently and predictably in a substantially gainful occupation. Assessing an individual's skills, education and training is relevant if they have established that they suffer a serious health condition that impacts both the consistency and predictability of their ability to work. In this case, the Applicant did not demonstrate that he was absent from work because of his health condition. He was available to work consistently and with considerable predictability. Further, he was capable of doing the light duty responsibilities that he had been assigned by his employer. The General Division did not find that the evidence demonstrated a severe disability on or before his MQP date.

[23] As a result, leave is not granted on the ground that the General Division erred in law pursuant to paragraph 58(1)(*b*) of the DESD Act in failing to apply the correct definition of "severe" as found in the CPP. I do not find that this ground of appeal has a reasonable chance of success.

CONCLUSION

[24] The Application is refused.

Meredith Porter
Member, Appeal Division

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[7] *Giannaros v. Canada (Minister of Social Development)*, 2005 FCA 187.
[8] *Klabouch v. Canada (Social Development)*, 2008 FCA 33.