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

Citation: *K. H. v. Canada Employment Insurance Commission*, 2018 SST 158

Tribunal File Number: AD-17-636

BETWEEN:

K. H.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Kate Sellar

Date of Decision: February 15, 2018

Canada

REASONS AND DECISION

INTRODUCTION

[1] On June 27, 2017, the General Division of the Social Security Tribunal of Canada determined that a disability pension under the *Canada Pension Plan* was not payable. The Applicant filed an application for leave to appeal with the Tribunal's Appeal Division on September 18, 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 applicant may bring an appeal to the Appeal Division only if leave to appeal is granted. 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 following are the only 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.

SUBMISSIONS

[6] The Applicant submits that the General Division erred in law under s. 58(1)(*b*) of the DESDA by: a) failing to apply the principle in *Bungay v. Canada (Attorney General)*, 2011 FCA 47, requiring that all of the possible impairments that affect the claimant's employability are to be considered, not just the biggest impairments or the main impairment (thereby requiring an assessment of the claimant's condition in its totality); and b) failing to follow the requirement set out in *Villani v. Canada (Attorney General)*, 2001 FCA 248, to assess the applicant's circumstances in a "real world" context.

ANALYSIS

[7] The Applicant has not raised a ground of appeal under s. 58(1) of the DESDA that has a reasonable chance of success on appeal.

Assessing the Applicant's Medical Conditions in Their Totality

[8] The evidence section of the General Division's decision includes references to the Applicant's post-traumatic destruction of his right hip (paras. 14, 15) and his chronic left Achilles tendinitis (para. 14). The analysis section of the decision (para. 27) also mentions the Applicant's shoulder pain, which arose after his minimum qualifying period (MQP). The

General Division noted that the Applicant takes extra strength Tylenol for the pain (para. 12). The General Division took note of Dr. Martin's reports, in which he indicated that the Applicant's limitations were stiffness, weak right hip with short right leg, and a tender left Achilles tendon. Dr. Martin stated that the Applicant will always be restricted to light activities, and that the Applicant is probably disabled from any work other than very light and preferably sedentary activities (paras. 14, 15). The Applicant gave evidence that he could sit for 45 minutes to an hour at a time (para. 11).

[9] In its analysis, the General Division did not ignore or skip over any of the evidence regarding the Applicant's conditions. The General Division again acknowledged the medical evidence from Dr. Martin (paras. 23, 24) and found, as a result, that the Applicant has limitations but is not precluded from all work (para. 25) as of the end of his MQP on December 31, 2014. The General Division also referenced the Achilles tendinitis, noted that the Applicant was treated with physiotherapy (para. 26), and noted that medical evidence about his shoulder indicated he was to "carry on with his regular activities as best he can" (para. 27). *Bungay* requires the General Division to consider all of the claimant's possible impairments that affect employability, not just the biggest impairments or the main impairment (thereby requiring an assessment of the claimant's condition in its totality). The General Division's discussion of the conditions was not compartmentalized such that there was an arguable error of law here under *Bungay*.

[10] The Applicant appears to allege that there was a third medical condition: chronic pain. While there was certainly evidence before the General Division that the Applicant has long experienced pain, chronic pain condition was not a separate condition outlined in the medical file before the General Division. Nevertheless, pain was certainly a key factor in understanding the Applicant's experience relating to his hip.

Taking the Applicant's Personal Circumstances into Account

[11] The General Division outlined the Applicant's personal circumstances in its summary of the evidence, and then considered those circumstances in its analysis as to whether the Applicant's condition was severe. Read as a whole, the General Division's decision does not give rise to an arguable case for an error in failing to apply the Applicant's real-world personal circumstances, as required by *Villani*.

[12] When the General Division is determining whether an applicant is incapable of pursuing with consistent frequency any truly remunerative occupation, *Villani* makes it clear (at para. 38) that the hypothetical occupations the General Division must consider "cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience."

[13] In reference to the evidence, the General Division's decision notes the Applicant's age; work history as a heavy equipment operator, printing machine operator, and printer-technician; and Grade 12 education (paras. 7, 8). The General Division also referenced the Applicant's evidence about the fact that he did not retrain due to financial constraints (para. 11).

[14] In the analysis, the General Division writes (para. 28):

> The severe criterion must be assessed in a real world context (*Villani v. Canada (A.G.),* 2001 FCA 248). This means that when deciding whether a person's disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. The appellant was 43 years of age at the time of his application. He has a grade 12 education and has many years' experience working in the printing industry. Keeping in mind the appellant's personal circumstance, along with his medical condition, the Tribunal has concluded that his personal circumstances would not negatively impact on his ability to seek, and, if necessary, retrain for full or part-time employment.

[15] While paragraph 28 specifically mentions the Applicant's age, work history, and education, it is true that the General Division did not expressly discuss the Applicant's financial circumstances again in relation to retraining. The General Division is presumed to have considered all the evidence before it, but that presumption will be set aside when the probative value of the evidence that is not expressly discussed is such that it should have been [see *Lee Villeneuve v. Canada (Attorney General)*, 2013 FC 498; *Kellar v. Canada (Minister of Human Resources Development)*, 2002 FCA 204; and *Litke v. Canada (Human Resources and Social Development)*, 2008 FCA 366]. The probative value of the evidence should be considered in light of the Applicant's obligation, where there is evidence of work capacity, to show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that

health condition [*Inclima v. Canada (Attorney General)*, 2003 FCA 117]. The probative value of the evidence about the Applicant's financial circumstances in relation to retraining is low here, given that the Applicant's evidence was that he never applied for any job (para. 11).

[16] The Applicant appears to argue that the General Division misapplied *Villani* in concluding that his personal circumstances would not negatively impact on his ability to seek other work, as opposed to looking at whether he was capable of re-entering the workforce and obtaining suitable employment.

[17] In *Bungay*, the Federal Court of Appeal interpreted *Villani* as standing for the proposition that the "real world" approach requires the General Division to determine whether an applicant, in the circumstances of his or her background and medical condition, is employable (that is, capable of regularly pursuing any substantially gainful occupation). The General Division applied this principle. The General Division took into account real-world circumstances like the Applicant's age and education, and objective medical evidence from Dr. Moore about restrictions and treatment for pain, in determining that there was evidence of capacity for work. The same personal circumstances that the General Division relied on to determine that the Applicant's restrictions were such that he had a capacity to work applied in considering whether the Applicant was unable to seek or maintain employment by reason of his disability. That is reflected in the General Division's decision at paragraph 28.

[18] The Applicant bears the onus of providing all the evidence and arguments required under s. 58(1) of the DESDA [see *Tracey v. Canada (Attorney General)*, 2015 FC 1300]. However, the Appeal Division should go beyond a mechanistic review of the grounds of appeal [see *Karadeolian v. Canada (Attorney General)*, 2016 FC 615]. The Appeal Division has examined the record and is satisfied that the General Division did not overlook or misconstrue the evidence. The Applicant was unrepresented at the hearing, and the General Division carefully elicited information that clarified and enhanced evidence already in the record about both the Applicant's medical conditions and his personal circumstances. The General Division spent some time ensuring that the Applicant was able to provide detailed oral evidence about his work history and the precise nature of his physical restrictions.

CONCLUSION

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

Kate Sellar
Member, Appeal Division