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

Citation: *A. E. v. Minister of Employment and Social Development*, 2018 SST 450

Tribunal File Number: AD-18-116

BETWEEN:

A. E.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: April 27, 2018

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] The Applicant, A. E., who is now 47 years old, was born in Jamaica, where she graduated from high school. She immigrated to Canada in 1988 and earned a diploma in early childhood education in 1995. For many years, she worked in a City of Toronto daycare centre. In June 2014, she was involved in a motor vehicle accident (MVA), which she claims has left her with persistent neck and back pain, as well as headaches, anxiety and depression. In February 2017, following a lengthy period of recovery and treatment, she returned to her job but stopped after three months because of mounting pain and anxiety compounded by the hardship of a lengthy commute to and from work. She tried again in August 2017, initially part-time and then full-time, but only lasted two months.

[3] In February 2016, the Applicant applied for a disability pension under the *Canada Pension Plan*. The Respondent, the Minister of Employment and Social Development (Minister), refused the application, finding insufficient evidence that the Applicant was disabled from performing suitable work during her minimum qualifying period (MQP), which ended on December 31, 2016.

[4] The Applicant appealed the Minister's refusal to the General Division of the Social Security Tribunal. On December 18, 2017, the General Division held a hearing by videoconference but ultimately found that the Applicant had not demonstrated a severe disability, nor had she sought alternative employment that would have been better suited to her physical limitations.

[5] On February 20, 2018, the Applicant's representative requested leave to appeal from the Tribunal's Appeal Division, alleging that the General Division had failed to consider her client's vocational characteristics, as well as the totality of the evidence before it. The Tribunal asked the

Applicant to provide additional reasons for her appeal, and her representative responded in a letter dated March 21, 2018. In it, she made the following points:

- The General Division did not give any consideration to the fact that the Applicant is in her mid-40s and experienced only in childcare, having worked in the same capacity for the same employer for 15 years. Given her ongoing pain and psychological issues, it was unreasonable to expect the Applicant to have embarked upon a new career in the two-month period between the failure of her second attempt to return to work in October 2017 and the hearing date in December 2017.
- The General Division noted that the Applicant's family doctor limited her working capacity to three and a half hours per day, three days per week, and it accepted that her limitations rendered her completely incapable of returning to her usual employment as an early childhood educator (ECE), yet it went on to conclude that her failed return to work suggested "some capacity for lighter work." In fact, the Applicant's demonstrated failure to manage her old job—as a result of panic attacks, mental stress and physical impairment—spoke more to her incapacity than her capacity.

[6] I have reviewed the General Division's decision against the record and have concluded that the Applicant has not advanced any grounds that would have a reasonable chance of success on appeal.

ISSUES

[7] According to s. 58(1) of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: The General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material. An appeal may be brought only if the Appeal Division first grants leave to appeal,[1] but

[1] DESDA at ss. 56(1) and 58(3).

the Appeal Division must first be satisfied that the appeal has a reasonable chance of success.[2] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[3]

[8] I must decide whether the Applicant has presented an arguable case for the following questions:

Issue 1: Did the General Division consider the totality of the evidence before it?

Issue 2: Did the General Division consider the Applicant's personal and vocational history?

Issue 3: Did the General Division draw an unsupportable inference from the Applicant's attempt to return to work?

ANALYSIS

Issue 1: Did the General Division consider the totality of the evidence before it?

[9] The Applicant alleges that the General Division erred in failing to consider the evidence in its totality. The leading case on this subject is *Bungay v. Canada*,[4] which requires a decision-maker to assess employability in light of all the circumstances, including the claimant's background and their overall medical condition, not just the "biggest" or "dominant" impairments. In this case, the General Division's decision contains what appears to be a thorough summary of the Applicant's medical file, followed by an analysis that meaningfully discusses the oral and documentary evidence in the context of her personal characteristics. It seems to me that the General Division explicitly considered each and every one of the Applicant's major complaints—neck and back pain, but also depression, anxiety, panic attacks and post-traumatic stress disorder—as of the MQP.

[10] In any event, it is settled law that an administrative tribunal charged with fact finding is presumed to have considered all the evidence before it and need not discuss each and every

[2] *Ibid*. at s. 58(1).
[3] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.
[4] *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

element of a party's submissions.[5] That said, I have reviewed the General Division's decision and have found no indication that it ignored, or gave inadequate consideration to, any significant aspect of the evidence.

[11] Ultimately, the Applicant's submissions under this ground amount to a demand that I reassess and reweigh the evidence and come to a conclusion that differs from the General Division's. However, s. 58 of the DESDA sets out very limited grounds of appeal and does not allow the Appeal Division to reconsider disability claims on their merits.

[12] I am not satisfied that the appeal has a reasonable chance of success on this ground.

Issue 2: Did the General Division consider the Applicant's personal and vocational history?

[13] The Applicant also alleges that the General Division erred in failing to take into account her age and unidimensional work experience. Here, the Applicant seems to be invoking *Villani v. Canada*,[6] which requires a decision-maker, in assessing disability, to consider the claimant as a whole person, including real world factors such as age, education, language proficiency, and work and life experience. Having reviewed its decision, I see no arguable case that the General Division disregarded the Applicant's profile or background. The General Division referred to *Villani* in paragraph 28 and engaged in what strikes me as a genuine attempt to assess the Applicant's employment prospects in a real world context:

> In this case the Appellant was 46 years of age at her MQP date in December 2016 with almost 20 years before the usual retirement age. She had a grade 12 and some college education, although specialized, and she had work specific on-line training over her career. Her work history was primarily in child care but her duties also encompassed planning, administrative, laundry, communication and cleaning duties. Language skills did not seem to be a difficulty for her. It does not appear to the Tribunal that the *Villani* factors would have any significant effect on her ability to obtain or maintain any substantially gainful occupation.

[14] In my view, the General Division fulfilled its obligation to keep the Applicant's personal factors in mind in assessing the severity of her claimed disability, finding that her age, education and work experience, in combination with her impairments, did not preclude her from securing

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

and maintaining a less physically strenuous form of employment than childcare. The General Division also based its analysis, in part, on an October 2017 vocational skills report, which assessed her as a whole person but did not rule out all forms of work.

[15] The Applicant submits that the General Division unreasonably expected her to embark on a new career in the two months after her second unsuccessful October 2017 attempt to return to work. In my view, this argument distorts the Applicant's obligation under *Inclima v. Canada*[7] to mitigate her impairments by seeking *suitable* work. The General Division's essential point was that, once the Applicant became aware that she was going to be left with lasting limitations as a result of her injuries, it became her responsibility to at least investigate alternative occupations that promised lesser physical and psychological burdens. The General Division found that, in the more than three years following her June 2014 MVA, she failed to fulfil that obligation. I see no reason to interfere with this finding.

Issue 3: Did the General Division draw an unsupportable inference from the Applicant's attempt to return to work?

[16] As noted, the General Division based much of its decision on what it found was the Applicant's failure to retrain or attempt alternate work despite evidence that she retained some capacity. At paragraph 31, the General Division wrote:

> In fact, the Appellant has worked since her MQP, although she was not able to maintain that employment for very long. The question becomes whether she was capable of performing some lighter duty occupation within her limitations. … The Tribunal notes that the Assessment was completed 10 months after her MQP, while she was working full time, at what the Tribunal has found to be an unsuitable occupation and she not having injections, which she noted to be very helpful. In fact, she stopped working very shortly after the assessment due to her inability to continue with the job and the long commute. The Tribunal queries whether or not the Vocational Assessment, if done at the MQP date, would yield different results. While the Tribunal does not rely on any such speculation in its final decision, the evidence of her actual work, even for temporary periods and in a position which was clearly unsuitable for her, suggests some capacity for lighter work.

[7] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

The Applicant takes issue with the General Division's inference that her attempt to return to work at her old job, however unsuccessful, indicated some capacity to potentially succeed in a lower impact job.

[17] Here, the Applicant is alleging factual error, but the wording of s. 58(1)(*c*) suggests that the threshold for finding such an error is high: The decision must be *based* on the allegedly erroneous finding, and the finding must have been made in a "perverse or capricious manner or without regard for the material." In other words, a factual error by itself cannot be the basis for overturning a decision; it must also be material *and* egregious.

[18] With that in mind, I see no reasonable chance of success for this argument. I do not think it stretches logic to infer at least some residual capacity from a two-month work trial in a physically demanding full-time job. This is particularly so where, as here, the General Division noted the context in which the work trial took place. Indeed, there was evidence that the Applicant returned to her ECE job (i) several months after the MQP; (ii) despite an inordinately lengthy daily commute; and (iii) without the benefit of nerve block injections, which she had previously found effective.

[19] The General Division was also careful to limit the weight it placed on the Applicant's post-MQP work trial, offering the assurance that it did not rely on "speculation." I also note that the work trial was only one of many factors that the General Division considered in arriving at its conclusion.

CONCLUSION

[20] Since the Applicant has not identified any grounds of appeal under s. 58(1) of the DESDA that would have a reasonable chance of success on appeal, the application for leave to appeal is refused.

Member, Appeal Division

REPRESENTATIVE:	Salina F. Chagpar, for the Applicant