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

Citation: *A. M. v Minister of Employment and Social Development*, 2018 SST 1005

Tribunal File Number: AD-18-859

BETWEEN:

A. M.

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: December 31, 2018

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] The Applicant, A. M., was born in India, where she obtained a Bachelor of Arts degree. She is now 44 years old. She came to Canada in 1997 and worked in a series of factory jobs until November 2011, when she injured her neck and back in a motor vehicle accident (MVA). She has not worked, or looked for work, since.

[3] In July 2016, the Applicant applied for a disability pension under the *Canada Pension Plan* (CPP), claiming that she could no longer work because of chronic pain syndrome (CPS), fibromyalgia, depression, and carpal tunnel syndrome. The Respondent, the Minister of Employment and Social Development (Minister), refused the application because it found that her disability was not "severe and prolonged," as defined by the CPP, during the minimum qualifying period (MQP), which it determined ended on December 31, 2013. The Minister acknowledged that the Applicant experienced arm and back pain but found that it did not prevent her from performing work within her limitations.

[4] The Applicant appealed the Minister's refusal to the General Division of the Social Security Tribunal. The General Division held a hearing by teleconference and, in a decision dated September 17, 2018, dismissed the appeal, finding, on balance, that the Applicant was capable of substantially gainful work as of the MQP.

[5] On December 17, 2018, the Applicant's representative requested leave to appeal from the Tribunal's Appeal Division, alleging that the General Division erred when it failed (i) to consider the totality of the Applicant's evidence that she is disabled and (ii) to assess the severity of the Applicant's impairments in light of "real world" factors set out in *Villani v Canada.*[1]

[1] *Villani v Canada (Attorney General)*, [2002] 1 FCR 130, 2001 FCA 248.

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

ISSUES

[7] According to section 58 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 grants leave to appeal,[2] but the Appeal Division must first be satisfied that it has a reasonable chance of success.[3] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[4]

[8] I must determine whether the Applicant has an arguable case on the following issues:

Issue 1: Did the General Division consider the evidence in its totality?

Issue 2: Did the General Division apply the "real world" test?

ANALYSIS

Issue 1: Did the General Division consider the evidence in its totality?

[9] The Applicant alleges that the General Division erred by failing to consider the totality of the evidence, including numerous medical reports indicating that she was unable to work due to her impairments.

[10] I have reviewed the General Division's decision and found no indication that it ignored—or inadequately considered—any significant evidence. The General Division summarized key items from the Applicant's medical file and meaningfully analyzed the oral and documentary

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[2] DESDA, ss 56(1) and 58(3).
[3] *Ibid*., s 58(1).
[4] *Fancy v Canada (Attorney General)*, 2010 FCA 63.

evidence. The General Division explicitly considered all of the Applicant's conditions, which include CPS, fibromyalgia, whole body pain, depression, and anxiety.

[11] According to the Applicant, the General Division failed to consider Dr. Hussain's reports and clinical notes; I do not see an arguable case for this allegation. In fact, the General Division devoted a significant portion of its analysis (paragraphs 16, 17, and 23) to Dr. Hussain. If the General Division had "difficulty"[5] with Dr. Hussain's clinical notes, it was because Dr. Hussain simply accepted the Applicant's word that she could no longer use her hands for repetitive tasks, even though she never attempted a return to work after her MVA or her CTS surgeries. In my view, a finding that Dr. Hussain was merely relaying subjective complaints was a defensible reason for the General Division to discount his evidence. In any case, while Dr. Hussain strongly supported the Applicant's disability claim, his evidence was only one factor, among many, that the General Division had to consider.Assessing disability under the CPP is a legal question as much as it is a medical one, and a physician's opinion is not necessarily the final word on the matter.

[12] The Applicant also argues that the General Division disregarded evidence indicating that she required physiotherapy but could not afford it. While it is true that the General Division did not make explicit reference to the document in question (a chiropractic assessment report from 2015),[6] it is settled law that an administrative tribunal charged with finding fact is presumed to have considered all the evidence before it and need not discuss each and every element of a party's submissions.[7] Furthermore, the General Division did not ignore this aspect of the Applicant's treatment; it noted that the Applicant had received extensive physiotherapy before 2013, but to little effect.[8]

[13] Ultimately, the 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. Section 58(1) of the DESDA sets out very limited grounds of appeal and does not allow the Appeal Division to reconsider disability claims on their merits.

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[5] General Division decision at para 17.
[6] Assessment report by Sheldon Winter dated July 6, 2015, GD3-90.
[7] *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[8] General Division decision at para 14.

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

Issue 2: Did the General Division apply the "real world" test?

[15] The Applicant also submits that the General Division failed to properly apply *Villani*, which requires a decision-maker in assessing disability, to consider the claimant as a whole person, including such background factors as age, education, language proficiency, and work and life experience.

[16] Again, I see no arguable case on this ground. The Applicant's submissions are essentially a request to reassess the evidence as it pertains to her personal circumstances. I note the words of the Federal Court of Appeal in *Villani*:

> [A]s long as the decision-maker applies the correct legal test for severity—that is, applies the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) [of the CPP] he or she will be in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantially gainful occupation. The assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere.

This passage suggests that the General Division, as trier of fact, should be afforded a degree of deference in how it assesses a claimant's background. It also implies that **whether** the test for disability was applied matters more than **how** it was applied. This approach happens to align with recent case law[9] that has clearly outlined the three grounds of appeal available under section 58(1) of the DESDA. In short, the Federal Court of Appeal has ruled that the Appeal Division does not have jurisdiction to intervene on questions of mixed fact and law; it is therefore necessary to ask whether a reason for appealing can be clearly characterized as an error of law or as an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[17] Here, the General Division correctly cited *Villani* and referred to relevant aspects of the Applicant's history in paragraph 33 of its decision. Moreover, it undertook a meaningful

[9] *Quadir v Canada (Attorney General)*, 2018 FCA 21; *Cameron v Canada (Attorney General)*, 2018 FCA 100; *Garvey v Canada (Attorney General)*, 2018 FCA 118.

assessment of the impact of the Applicant's impairments in the context of her age, education, language proficiency, and work experience:

> The [Applicant] was only 39 years old at the time of her MQP. Her work experience was limited to working as a general labourer in manufacturing settings. An argument could be advanced that a return to such work was not realistic prior to her MQP because of impairments to her hands, as well as impairments with lifting, memory, concentration, sitting, and standing. However, the [Applicant] gave her evidence in English and I find that she had a good understanding of the English language. I accept the Minister's submission that while the [Applicant] might have had some limitations in her work capacity, these limitations would not have precluded her from performing all types of work as of December 31, 2013. I find that the [Applicant] had the capacity to work at a sedentary occupation that would have allowed her to rotate between sitting and standing at the time of her MQP. She could have, for example, worked at a help desk.

[18] I see no reason to overturn the General Division's assessment, where it has noted the correct legal test, considered the Applicant's background and personal circumstances, and arrived at a defensible conclusion. In finding the Applicant employable as of the MQP, it was open to the General Division, as trier of fact, to find that her English language skills were adequate for some types of sedentary, or semi-sedentary, jobs. While the Applicant may not agree with the General Division's findings, they emerge from what strikes me as a good-faith attempt to assess her capacity using the *Villani* principles.

CONCLUSION

[19] Since the Applicant has not identified any grounds of appeal under section 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:	Jaswinder Johal, for the Applicant