Federal Court  Cour fédérale

Date: 20161102

Docket: T-192-16

Citation: 2016 FC 1208

Ottawa, Ontario, November 2, 2016

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

DAPHNE MURPHY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review brought by Daphne Murphy [the Applicant] under s. 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of a decision made on October 8, 2015, by a member of the Social Security Tribunal – Appeal Division (SST-AD) [SST-AD Decision] denying the Applicant's application for leave to appeal. The Applicant sought leave in order to appeal a decision of the Social Security Tribunal – General Division (SST-GD) made on August

28, 2015 [SST-GD Decision], which had dismissed the Applicant's appeal from a decision denying her application for Canada Pension Plan (CPP) disability benefits.

[1] The Applicant is a self-represented litigant. She designated her husband as a representative to assist her after suffering a stroke in November 2011.

[2] Judicial review is granted for the following reasons.

II. Facts

[3] The Applicant is a 58-year-old woman from Gander, Newfoundland. The record shows that she has a significant speech impairment, which was apparent at the hearing. She advises she was unable to speak until she was 7 years old. She obtained a grade 8 education. She married in 1979 and it appears she divorced in 1993. Her husband was in the armed forces. She has two children.

[4] She has a very extensive history of attendances on physicians. A very large number of visits to various doctors and associated reports are documented in the Certified Tribunal Record (CTR) from 2011 going back to the 1990s.

[5] She is able to access the CPP through credits accumulated by way of credit-splitting with her former husband from 1979 to 1993. The record indicates she was not otherwise working; she was raising her two children and advises she was doing some babysitting to make her own money. She also has contributions from her own work in 2007 and 2008, but they were not

sufficient to entitle her to disability under the *Canada Pension Plan*, RSC 1985, c C-8 [*CPP Act*]. This will be discussed in more detail later.

[6] Her application for a CPP disability pension was made under the 'late application provisions', the effect of which is that she may obtain a CPP disability pension if she establishes she was severely disabled (as defined) as of December 31, 1997, and remained severely disabled continuously since then.

[7] The SST-AD conceded the Applicant is currently disabled as a consequence of injuries to her right knee sustained in a fall on September 1, 2009, and damages resulting from a stroke on November 29, 2011. Following the stroke, the Applicant has not been able to work. She has trouble speaking, spelling and walking without a cane or walker. She is only able to walk a little distance before her knee gives out on her and as a result, she is continuously falling. She drags her foot when walking and requires assistance in order to shower, bathe, eat, go for walks and/or do housework. As noted, she has a significant speech impairment – she stutters and therefore has trouble expressing her thoughts.

[8] Therefore, the issue is not whether she is severely disabled now; the issues are whether she was severely disabled as of December 1997, and whether she has remained so continuously.

[9] On April 19, 2011, the Applicant's claim for disability benefits was denied [Denial Letter]. On January 18, 2012, her claim was again denied after reconsideration by CPP staff [Reconsideration Denial Letter]. The Denial Letter included a list of documents that had been

reviewed and considered and specific factors that were considered in coming to a decision. It provided the following as the basis for denial:

> We recognize you have identified limitations resulting from your knee injury and we realize that you may not have been able to do labour intensive work since 2009. However, we concluded that your condition did not start until 2009 and this would not have any effect or [*sic*] an ability to work in December 1997.

[10] She appealed to the SST-GD.

[11] One relevant factor in the Applicant's appeal was her work experience. Her contact with the workplace between 1979 and 2011 was minimal. She only made work-related contributions to CPP in 2 of those 32 years, namely 2007 and 2008. She did not work enough in either 2006 or 2010 to warrant CPP premiums, and the small premium she paid in 2006 ($60.53) was refunded. She made no payment in 2010. According to the Respondent's Record, she worked six months at Tim Hortons's in Windsor, Nova Scotia, three weeks at Baskin Robbins and two months at Swiss Chalet in Sackville, Nova Scotia. As I mentioned earlier, she also did some babysitting a long time ago.

[12] The Applicant's appeal to the SST-GD was a paper appeal. In other words, although the Applicant might have had a *de novo* hearing, the matter proceeded without a hearing on the basis of a file review. The Applicant was given notice that the SST-GD intended to conduct a paper appeal; she was invited to comment and submit additional material, but took no position in that regard. In its decision, the SST-GD explained its reasons for conducting a paper appeal:

> [2] The hearing of this appeal was by decision on the record for the following reasons:
>
> a) The issues under appeal are not complex;
>
> b) There are no gaps in the information in the file or need for clarification;
>
> c) Credibility is not a prevailing issue;
>
> d) The form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[13] I pause to note that the paper record before the SST-GD contained a notation by CPP staff, dated September 28, 2011, that the Applicant had a "significant speech impairment." The same note states that: "[H]er speech impediment prevents her from doing phone work as well as her education." The decision by the SST-GD to proceed without an oral hearing does not refer to this notation, nor to the Applicant's speech impairment.

[14] Based on its paper review, the SST-GD denied the Applicant's appeal. The SST-GD found that the Applicant failed to prove, on a balance of probabilities, that she had a severe and prolonged disability on or before her minimum qualifying period (MQP) of December 31, 1997.

[15] On the issue of the severity of the Applicant's disability, the SST-GD stated:

> [16] There is very little medical evidence prior to the Appellant's MQP [the date her minimum qualifying period ended, i.e., December 31, 1997]. The evidence on file indicates the Appellant suffered from general medical ailments. The evidence also indicates that the Appellant was able to work for numerous years and attend school after her MQP. Her education and limited work

> experience may present barriers to employment, but the Tribunal must consider her medical condition as the primary factor.
>
> [emphasis added]

[16] Although the SST-GD acknowledged that the Applicant was unable to work at the time of its review, it concluded that there was "no evidence to support that [the Applicant] had a severe disability on or before December 31, 1997 that continues to this day." Because the test for disability under the *CPP Act* is conjunctive, the Member did not make a finding on the prolonged criterion.

[17] The Applicant sought leave to appeal to the SST-AD, which denied her application on October 8, 2015.

III. Decision under Review

[18] The SST-AD indicated that, in order to succeed on an application for leave to appeal to the SST-AD under the *Department of Employment and Social Development Act*, SC 2005, c 34 (*DESDA*), the Applicant must present some arguable ground upon which the proposed appeal might succeed, citing *Kerth v Canada (Minister of Development)*, [1999] FCJ No 1252 (FC) [*Kerth*]. The SST-AD also cited case law for the proposition that an arguable case is "akin to whether legally an applicant has a reasonable chance of success": *Canada (Minister of Human Resources Development v Hogervorst*, 2007 FCA 41; *Fancy v Canada (Attorney General)*, 2010 FCA 63.

[19] The SST-AD noted that, pursuant to s. 58(1) of *DESDA*, there are only three grounds under which an appeal to the SST-AD can be considered:

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.

[20] The SST-AD member made the following findings:

> [6] The Applicant requested leave to appeal on the basis that she disagreed with the General Division decision. She set out her physical limitations to support this argument. I accept that the Applicant currently has these limitations. The General Division decision correctly stated, however, that in order for the Applicant to receive a *Canada Pension Plan* disability pension, she had to have been disabled on or before December 31, 1997. It clearly set out the basis for its conclusion that the Applicant was not disabled at that time.
>
> [7] The Applicant's arguments in support of her request for leave to appeal do not point to any error made by the General Division, or to any breach of the principles of natural justice. Therefore, they are not grounds of appeal under the Act.
>
> [8] The Applicant also argued that she needed money to pay for medication. This argument also does not point to any error or to a breach of natural justice by the General Division. Leave to appeal cannot be granted on this basis.

[21] The SST-AD found that the Applicant had not presented a ground under s. 58 of *DESDA* upon which she had a reasonable chance of success and consequently denied her application for leave to appeal.

[22] It is from this decision that the Applicant seeks judicial review.

IV. Issues

[23] This matter raises the following issues:

1. Whether the SST-AD member's finding that the Applicant did not present a ground of appeal with a reasonable chance of success under s. 58 of *DESDA* was reasonable?

2. Whether there is an arguable issue under any of the grounds provided in s. 58(1) of *DESDA*?

3. Whether the Member acted unreasonably in finding that there was no reasonable chance for success pursuant to s. 58(2) of *DESDA*, considering the evidence provided by the Applicant and the law surrounding the definition of "severe"?

V. Standard of Review

[24] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence

has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." The Respondent correctly submits that the decision by the SST-AD granting or refusing leave to appeal should be reviewed in this Court on the reasonableness standard: *Tracey v Canada (Attorney General)*, 2015 FC 1300 at para 17; *Canada (Attorney General) v Hoffman*, 2015 FC 1348 at para 27. In addition, *Canada (Attorney General) v O'Keefe*, 2016 FC 503 at para 17 indicates that "substantial deference" should be given to the SST-AD.

[25] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

VI. Relevant Provisions

[26] *DESDA* governs the operation of the Social Security Tribunal. The grounds for appeal are specifically set out in s. 58(1) of *DESDA*. The grounds for granting leave to appeal are set out in s. 58(2):

Grounds of appeal	**Moyens d'appel**
58 (1) The only grounds of appeal are that	58 (1) Les seuls moyens d'appel sont les suivants :
(a) the General Division failed to observe a principle	a) la division générale n'a pas observé un principe de justice

of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or	b) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;
(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.	c) elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.
Criteria	**Critère**
(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.	(2) La division d'appel rejette la demande de permission d'en appeler si elle est convaincue que l'appel n'a aucune chance raisonnable de succès.
Decision	**Décision**
(3) The Appeal Division must either grant or refuse leave to appeal.	(3) Elle accorde ou refuse cette permission.

[27] The requirements for disability benefits are set out in sections 42 and 44 of the *CPP Act*. Subsection 44(1)(b)(ii) is referred to as the 'late applicant provision' and applies to the Applicant in this case. Under section 44(1)(b)(ii), a disability pension may be paid to a contributor:

- Who has not reached 65 years of age;
- To whom no retirement pension is payable;
- Who is disabled; and,

- Who is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received.

[28] Subsection 42(2) sets out when a person is deemed disabled. A person is considered disabled when they have a "severe and prolonged" mental or physical disability. A disability is considered "severe" when it renders the person incapable regularly of pursuing any substantially gainful occupation: *CPP Act s*. 42(2)(a)(i). A disability is considered "prolonged" where it is likely to be long continued and of indefinite duration or is likely to result in death: *CPP Act* s. 42(2)(a)(ii). This section is conjunctive; a person must satisfy both the "severe" and "prolonged" criteria in order to be found disabled within the meaning of the *CPP Act*. If they fail to satisfy one of the two criteria, the other need not be assessed. Paragraph 42(2)(b) puts a temporal limit on when a person may be deemed disabled.

VII. Analysis

[29] In my respectful view, judicial review should be granted in this case.

[30] I say this because, on the critical issue of the severity of the Applicant's disability, the SST-GD misapprehended critical and central evidence concerning the Applicant's attachment to the workplace, thereby erring in law and basing its decision on an erroneous finding of fact without regard for the material before it, which in my respectful opinion are both bases upon which the SST-AD acting reasonably ought to have granted leave to appeal.

[31] This critical misapprehension occurs in the following passage of the reasons of the SST-GD:

> The evidence also indicates that the Appellant was able to work for numerous years and attend school after her MQP.
>
> [emphasis added]

[32] The case turned on the Applicant's employability, that is, her ability to work. This finding is of central importance because it misstates the nature of the Applicant's ability to work, and does so in a manner that is not defensible on the record because it is contrary to the record.

[33] There was in fact no evidence that the Applicant was able to work for a single continuous year, let alone the "numerous years" found by the SST-GD. The facts of this case do not support the finding that she "was able to work for numerous years".

[34] Indeed, the record shows that over the relevant 32 year period (1979 to 2011), the Applicant's attachment to the workforce was extremely limited: her short term work in 2007 (in Newfoundland) and 2008 (in Nova Scotia) and very little else except babysitting many years ago in Newfoundland. In my respectful view, the SST-GD's conclusion regarding the Applicant's workforce attachment was not supported by the evidence before it. The decision is based on a misapprehension of the evidence; in addition, in this central respect, there is no evidence to support it which is an error of law.

[35] In my respectful view, this misapprehension of the evidence, and the absence of evidentiary support, reasonably meets the test set out in paragraph 58(1)(c) of *DESDA* which

provides that a ground of appeal exists where the SST-GD "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". This finding also constituted an error of law per paragraph 58(1)(b) of *DESDA*. In my view, the Applicant therefore had two arguable grounds upon which her proposed appeal might succeed per *Kerth*; the Applicant has a reasonable chance of success on these grounds.

[36] In my view, a proper consideration of the evidence may have led to a different outcome, namely the grant of leave to appeal with the possible result that the SST-AD would refer the matter to the General Division for redetermination pursuant to s. 59(1) of *DESDA*, or grant other relief.

[37] As a consequence, the SST-AD's decision was not reasonable because it was not justified on the facts and law, as *Dunsmuir* requires. In my view, this aspect of the decision's unreasonableness is sufficient basis on which to grant judicial review.

[38] I wish to add that the Applicant, during the hearing before me, said that she was unable to obtain work because of her speech impediment, which, as was noted by CPP staff, is a significant impairment. She advised that employers she contacted declined to hire her because her speech impediment would be disruptive to other staff and upsetting to customers. She stated she was not wanted because of the speech impediment she was born with. She said she could not even get employment in a back room of a chain restaurant because of her speech impediment. She says she was dismissed on account of her speech impairment. She challenges one record

suggesting otherwise: an employer said she ceased working because she moved and, although she had moved, it was only from Sackville to Bedford, which she said is a 20 minute drive.

[39] The jurisprudence, as the SST-GD acknowledged, establishes that the 'severity' criteria for CPP disability pension purposes must be assessed in a "real world" context: *Villani v Canada (A.G.)*, 2001 FCA 248, which entails keeping in mind factors such as age, level of education, language proficiency and past work, life experience and, importantly, employability.

[40] In my view, in making these verbal submissions to the Court at the hearing, the Applicant raises her "real world" considerations which, if accepted, might entitle her to the disability pension she seeks because these submissions speak directly to the core issue of her employability. *Villani* requires consideration of the "real world" matters of her significant speech impediment, and employability which may be related, in the assessment of her alleged severe disability.

[41] The Federal Court of Appeal describes the "real world" approach. In the words of Isaac, J.A. (as he then was):

> [33] The "real world" approach was first adopted by the Board in *Edward Leduc v. Minister of National Health and Welfare*, CCH Canadian Employment Benefits and Pension Guide Reports, Transfer Binder 1986-1992 at ¶ 8546, pp. 6021-6022 (January 29, 1988). In that case, the Board found for the applicant on the following basis:
>
> > The Board is advised by medical authority that despite the handicaps under which the Appellant is suffering, there might exist the possibility that he might be able to pursue some unspecified form of substantially gainful employment. In an abstract and theoretical sense, this might well be true.

> However, the Appellant does not live in an abstract and theoretical world. He lives in a real world, people [sic] by real employers who are required to face up to the realities of commercial enterprise. The question is whether it is realistic to postulate that, given all of the Appellant's well documented difficulties, any employer would even remotely consider engaging the Appellant. This Board cannot envision any circumstances in which such might be the case. In the Board's opinion, the Appellant, Edward Leduc, is for all intents and purposes, unemployable.

[42] The Federal Court of Appeal in *Villani* requires that the SST-GD and SST-AD interpret and apply the *CPP Act* in a large and liberal manner: paragraph 27 of *Villani* states:

> In Canada, courts have been especially careful to apply a liberal construction to so-called 'social legislation.' In *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 at para 36, the Supreme Court emphasized that benefits-conferring legislation ought to be interpreted in a broad and generous manner and that any doubt arising form the language of such legislation ought to be resolved in favour of the claimant…. has been adopted in a number of Supreme Court decisions dealing with the *Unemployment Insurance Act, 1971*.

[43] At paragraph 28, *Villani* also notes that the *CPP Act* is benefits-conferring legislation, and at para 29 states that any ambiguity flowing from its words must be resolved in favour of a claimant for disability benefits. Also of importance for the case at bar is that *Villani* requires that the proper application of the severity test involves consideration of the applicant's employability:

> **44** In my respectful view, the Board has invoked the wrong legal test for disability insofar as it relates to the requirement that such disability must be "severe". The proper test for severity is the 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.

[44] The failure to reasonably determine the Applicant's workforce attachment means that her *Villani* real-world assessment was incomplete at best. This is further reason why judicial review must be granted. The Applicant had a statute-established right, supported by the case law, to a more comprehensive disability review that considers her employability in the "real world" in which she lived and lives. In my view, she did not have such a review.

[45] In this connection, I doubt very much that a proper *Villani* assessment may take place without a *de novo* hearing before the SST-GD given her limited education and limited ability to make written representations, her speech impediment as documented by CPP staff, coupled with the difficulty she has expressing her thoughts.

[46] While the Applicant did not explicitly raise these real world considerations in her written filings, they certainly were on the record as a result of her discussions with CPP staff. As outlined above, the paper record reviewed by the SST-GD contained a CPP staff member's note that the Applicant had a "significant speech impairment". In addition, to reiterate, the same CPP staff stated that: "[H]er speech impediment prevents her from doing phone work as well as her education."

[47] Importantly, this Applicant is still in the system and in my view should have an opportunity to have these considerations addressed; they are important to her, they were raised on the record, but were not considered either by the SST-GD, or by the SST-AD. In my respectful view, it is not safe to leave them unaddressed.

[48] In my view, the Applicant's "real world" issues and employability are best assessed in a *de novo* appeal before the SST-GD.

[49] I am concerned as all parties must be with delay in resolving the Applicant's rights. Her significant speech impediment and "real world" situation and employability were first documented by CPP staff more than five years ago: the relevant CPP's Development Contact Record is dated September 28, 2011. Given this and the importance of bringing this matter to a resolution, and in light of the fact that the Applicant is now disabled, and considering subsection 18.3(3) of the *Federal Courts Act*, I considered but decided against directing that the SST-AD cause the SST-GD to proceed with a fresh appeal *de novo* so that the Applicant's real world employability may be assessed as required by *Villani,* together with other issues the Applicant may raise. I decline to do so because this is a matter for the SST-AD to determine.

VIII. Conclusion

[50] Judicial review is granted.

IX. Costs

[51] The Respondent did not seek costs; in my view this is not a case for costs.

X. Procedural Note – Style of Cause

[52] The Respondent correctly requests that the style of cause in this matter be amended to show the respondent as the Attorney General of Canada. The Applicant consents and therefore it is so ordered, effective immediately.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to show the Attorney General of Canada as the Respondent, effective immediately.

2. Judicial review is granted and the Decision of the SST-AD dated October 8, 2015 is set aside.

3. This matter is remitted to a differently constituted SST-AD for redetermination.

4. There is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-192-16
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PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	SEPTEMBER 13, 2016
JUDGMENT AND REASONS:	BROWN J.
DATED:	NOVEMBER 2, 2016

APPEARANCES:

Daphne Murphy	ON HER OWN BEHALF
Hasan Junaid	FOR THE RESPONDENT

SOLICITORS OF RECORD:

- NIL -	SELF-REPRESENTED APPLICANT
William F. Pentney Deputy Attorney General of Canada Department of Justice ESDC Legal Services Gatineau, Quebec	FOR THE RESPONDENT