

Federal Court



Cour fédérale

Date: 20210126

Docket: T-947-18

Citation: 2021 FC 88

Fredericton, New Brunswick, January 26, 2021

PRESENT: Madam Justice McDonald

BETWEEN:

HARJINDER BHAMRA

Applicant

and

**THE ATTORNEY GENERAL
OF CANADA**

Respondent

JUDGMENT AND REASONS

[1] Ms. Harjinder Bhamra's application for a Canada Pension Plan (CPP) disability pension was denied by the Minister of Employment and Social Development (the Minister) and by the Social Security Tribunal (SST) General Division (GD). From the GD, Ms. Bhamra appealed to the SST Appeal Division (AD). The AD denied her leave to appeal. Ms. Bhamra asks this Court to review the AD decision. Ms. Bhamra claims that she is entitled to a CPP disability pension. She represents herself on this application.

Background

[2] Ms. Bhamra was employed as an orderly/cleaner until November 2013, when she stopped working as a result of fracturing her ankle. Ms. Bhamra is 53 years old with a grade 7 education. English is not her first language.

[3] In July 2014, Ms. Bhamra applied for the Canada Pension Plan (CPP) disability pension. To be eligible for CPP disability benefits, Ms. Bhamra had to establish that she was disabled as of December 31, 2013, being the date of her minimum qualifying period (MQP).

[4] In her CPP application, Ms. Bhamra lists her disabling condition as ovarian cancer. In her submissions, Ms. Bhamra explains that she has been left with ongoing pain from chemotherapy treatments and she also suffers from depression.

[5] At the first level of consideration, the Minister denied Ms. Bhamra's application because her fractured ankle was neither a "severe and prolonged" disability as required by section 44(2) of the *Canada Pension Plan*, RSC 1985, c C-8.

[6] Ms. Bhamra appealed the Minister's decision to the GD. On December 12, 2017, the GD concluded that based on her ankle injury, Ms. Bhamra did not have a disability that was severe and prolonged as of December 31, 2013.

[7] Ms. Bhamra sought leave to appeal the GD decision to the Appeal Division (AD). On April 23, 2018, the AD refused her request to appeal.

[8] By way of medical background, Ms. Bhamra has several health issues. As noted, she suffered an ankle fracture on November 21, 2013. Although the medical evidence suggests that Ms. Bhamra would make a full recovery from the ankle injury, Ms. Bhamra states that her ankle continues to cause her pain.

[9] In March or April of 2014 Ms. Bhamra was diagnosed with ovarian cancer for which she underwent surgery and chemotherapy treatments.

[10] During her oral submissions, Ms. Bhamra explained that she continues to suffer from significant side effects from the chemotherapy treatments. These side effects include fatigue and depression.

Issue

[11] The only issue is if the Appeal Division decision to refuse leave to appeal was reasonable.

Standard of Review

[12] In reviewing the decision of the SST AD, the task for the Court is to assess if the decision is reasonable. In considering this, the Court looks at the decision-making process and its outcome. The Court looks for "internally coherent reasoning" and "the presence of justification, transparency and intelligibility". The Court considers if the decision is "justified in relation to the relevant factual and legal constraints that bear on the decision" (*Canada (Minister of*

Citizenship and Immigration) v Vavilov, 2019 SCC 65 at paras 12, 86 and 99 [*Vavilov*];
Dunsmuir v New Brunswick, 2008 SCC 9 at para 47).

Analysis

[13] Ms. Bhamra argues that the GD and the AD got it wrong because they failed to appreciate the disabling nature of her ovarian cancer and the problems she continues to experience today. She explains that while she was still disabled from her fractured ankle, she experienced symptoms that were later diagnosed as ovarian cancer. She recounts an episode on the bus while on the way to a physiotherapy appointment for her ankle when she fell very ill and had to attend the hospital emergency department. Although this was prior to her cancer diagnosis, she attributes this episode to cancer.

[14] In her written submissions, Ms. Bhamra states it this way: "my disability never ended, I was in the middle of my broken ankle still in June 2014, and in middle of my abdominal pain in March 2014, so my disability has been starting in 2013, 2014, and to date."

[15] In considering Ms. Bhamra's leave to appeal, the AD had to determine if the appeal had a "reasonable chance of success" by assessing if any of the three factors outlined in the legislation applied to the findings made by the GD. The AD had to consider if there was (a) a breach of natural justice; (b) an error of law; or (c) an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before it (*Department of Employment and Social Development Act*, SC 2005, c 34 s 58(1)).

[16] Before turning to the AD decision, it is useful to summarize the findings made by the GD.

[17] In considering Ms. Bhamra's claim, the GD states that "there is very little evidence about her cancer and not enough to support a conclusion that it made her disabled on or before the end of December 2013." The GD also noted that "the [Applicant] thought a fever she had in July 2013 might have been early symptoms of cancer. However, there is no medical evidence about that illness and the [Applicant] continued to work through and beyond that time."

[18] The GD makes notes of the fact that Ms. Bhamra's family physician "felt the [Applicant's] main disability was her ankle and he expected full recovery and return to work."

[19] Ms. Bhamra relies upon the decision in *Villani v Canada (Attorney General)*, 2001 FCA 248 to argue that her circumstances need to be assessed realistically considering her age, level of education, language proficiency, and past work and life experience. The GD considered the *Villani* case. However, the GD had to determine if Ms. Bhamra's condition met the requirements of a "severe and prolonged disability" as of December 31, 2013. On this issue, the GD noted at paragraph 42, as follows:

I must consider the effect the [Applicant's] condition or conditions had on her ability to work on or before the end of her MQP. The evidence leads me to conclude that she stopped work for an ankle injury and would have been able to return to work after she recovered from the injury. The conditions that now affect her ability to work did not affect her ability on or before December 31, 2013.

[20] Based upon this information, the GD found that Ms. Bhamra's cancer did not affect her ability to work until after her MQP, December 31, 2013.

[21] In considering the GD findings, the AD noted that the GD decision contains a "detailed summary of the evidence that was before it" and noted that GD "did not overlook or misconstrue any important information."

[22] The AD specifically considered the fact that Ms. Bhamra was diagnosed with cancer while she was recovering from the ankle fracture at paragraph 9 of its decision where it states:

...the General Division acknowledged that the [Applicant] based her disability claim on her cancer and resulting conditions. The General Division concluded, correctly, that the evidence would have to show that the cancer and associated limitations would have caused the [Applicant] to be disabled prior to December 31, 2013, for her appeal to succeed...Although the General Division did not focus on the [Applicant's] cancer and resulting conditions, it made no error in this regard because these conditions presented after the minimum qualifying period.

[23] Ms. Bhamra relies upon a number of cases including: *R T v Minister of Employment and Social Development*, 2016 SSTADIS 453, and *B D v Minister of Employment and Social Development*, 2017 SSTADIS 44) to support her position that the AD did not apply the "real world" test found in *Villani* to her circumstances.

[24] However, the problem for Ms. Bhamra is the lack of medical evidence to support her claim that she had a severe and prolonged disability as of December 31, 2013 (the MQP date). Although it is undisputed that Ms. Bhamra fractured her ankle in November 2013, she was not diagnosed with cancer until March 2014, which is after the MQP date.

[25] I conclude that the AD correctly identified the grounds of appeal and reasonably considered Ms. Bhamra's arguments and the evidence. Although the application of the CPP disability criteria to Ms. Bhamra's circumstances appears to have harsh consequences, that does not make the AD decision unreasonable.

[26] To establish an entitlement to CPP disability benefits, the qualifying criteria must be satisfied. That is done by providing evidence of a disability before the qualifying date. In order to prove that she qualified for CPP, Ms. Bhamra needed to show that she was unable to work because of a severe and prolonged disability that began prior to December 31, 2013. The information relevant to Ms. Bhamra's qualifying period does not support a claim for disability as of December 31, 2013, because her cancer diagnosis and the treatment for cancer happened after December 2013. As disabling as her cancer might be, unfortunately, it cannot be relied upon to support her claim that she was completely disabled as of December 2013.

[27] While I sympathize with Ms. Bhamra's circumstances, this Court cannot provide the remedy she seeks as no error has been established with the decision of the AD.

Charter

[28] In her written materials, Ms. Bhamra makes *Charter* arguments. However, there is no factual basis to support the *Charter* arguments made in her submissions. In any event, not qualifying for CPP disability benefits because of a lack of evidence to support the claims, does not amount to discriminatory treatment.

Costs

[29] Neither party is seeking costs, and none are awarded.

JUDGMENT in T-947-18

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed
without costs.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-947-18

STYLE OF CAUSE: HARJINDER BHAMRA v THE ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: HELD BY VIDEOCONFERENCE
BETWEEN FREDERICTON, NEW BRUNSWICK,
AND WINNIPEG, MANITOBA

DATE OF HEARING: JANUARY 12, 2021

JUDGMENT AND REASONS: MCDONALD J.

DATED: JANUARY 26, 2021

APPEARANCES:

Harjinder Bhamra

APPLICANT
ON HER OWN BEHALF

Hilary Perry

FOR THE RESPONDENT

SOLICITORS OF RECORD:

- Nil -

SELF-REPRESENTED APPLICANT

Attorney General of Canada
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FOR THE RESPONDENT