Federal Court of Appeal  Cour d'appel fédérale

Date: 20150311

Docket: A-305-14

Citation: 2015 FCA 66

CORAM: **PELLETIER J.A.**
WEBB J.A.
BOIVIN J.A.

BETWEEN:

KIRSTEN KIRALY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on March 10, 2015.

Judgment delivered at Vancouver, British Columbia, on March 11, 2015.

REASONS FOR JUDGMENT OF THE COURT BY: BOIVIN J.A.

CONCURRED IN BY: PELLETIER J.A.
WEBB J.A.

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REASONS FOR JUDGMENT OF THE COURT

[1] This is an application for judicial review of a decision of the Social Security Tribunal, Appeal Division (SST) dated May 22, 2014. Pursuant to subsection 84(1) of the *Canada Pension Plan*, R.S.C., 1985, c. C-8 (CPP) as it read immediately before April 1, 2013, the SST conducted a *de novo* review of the appeal of Ms. Kirsten Kiraly (the applicant) from a November 12, 2012 decision of the Review Tribunal. The SST came to the same conclusion as

the Review Tribunal and determined that the applicant did not qualify for disability benefits under paragraph 44(1)(b) of the CPP.

[2] Our Court recently reviewed for the first time the standard of review applicable to a decision of the SST in *Atkinson v. Canada* (AG), 2014 FCA 187 at paras 22-33, [2014] F.C.J. No. 840 (QL) [*Atkinson*]). It is noteworthy that the *Atkinson* decision involved the same transitional procedure from the former Pension Appeal Board system to the SST and specifically considered the definition of disability found at paragraph 42(2)(a) of the CPP which also applies in this case. Our Court found that decisions of the SST are to be reviewed under the reasonableness standard. The SST decision will therefore be reviewed under that standard.

[3] The issue before the SST was whether the applicant had a physical disability that was severe and prolonged as of the agreed minimum qualifying period (MQP) of December 31, 2011.

[4] In *Villani v. Canada*, 2001 FCA 248, [2002] 1 F.C.R. 130 [*Villani*] our Court found that severity must be assessed in the "real world" context of the applicant, considering factors such as the applicant's age, education, language, and work and life experience. A severe disability makes it impossible for a person to do any type of remunerative work (*Klabouch v. Canada*, 2008 FCA 33, 372 N.R. 385). The threshold for an applicant to demonstrate that his or her disability is "severe and prolonged" within the meaning of subsection 42(2) of the CPP is thus a highly restrictive one (*Atkinson*, supra, at para 3).

[5] Although the SST accepted the medical evidence of the applicant's condition and her subjective experience of pain, the SST found that the applicant had a residual capacity to work. She therefore had to show that her medical condition prevents her from obtaining and maintaining substantial gainful employment (*Inclima v. Canada*, 2003 FCA 117 at para 3, 121 A.C.W.S. (3d) 363).

[6] The SST reached its conclusion on the basis of the evidence adduced. It found that the applicant failed to meet her legal obligation, as she has not sought work within her limitation that does not involve repetitive use of her hands. The SST rejected the applicant's contention that the respondent must demonstrate what job the applicant is capable of performing. It also held that the applicant bears the legal burden throughout the proceeding. The SST finally found, on a balance of probabilities, that the applicant's disability was not severe, and therefore did not consider it necessary to address the prolonged aspect of the test for disability.

[7] On appeal before this Court, the applicant essentially submits that the SST acceptance of the medical evidence that she cannot regularly use her hands in any repetitive capacity precluded its subsequent conclusion that the applicant has some capacity to work. The applicant further contends that this finding contradicts the analytical framework set out by our Court in *Villani*, supra. Accordingly, the SST decision is unreasonable as it fails to consider the "real world" employment opportunities available to the applicant, given her education, past work and life experience, and ability to regularly perform work.

[8] With respect, I am not persuaded by the applicant's arguments for the following reasons.

[9] The present case is mostly fact driven. The record includes significant medical documentation of the applicant's condition both before and after she ceased to work. The SST heard, reviewed and considered the evidence including the applicant's testimony:

> She [the applicant] testified that she was the main caregiver for her horses, and was able to ride her horse. She also testified, however, that she groomed the horses when she was able to. She was not clear about how often she did this. Based on the Appellant's [applicant's] evidence and the medical reports I find that the Appellant [applicant] had some capacity to work at the MQP.
>
> (SST decision, Applicant's Record, vol. 1 at para 49)

[10] While the applicant disputes the SST's assessment of the evidence with respect to her residual capacity to work, the applicant is essentially attempting to convince our Court to re-weigh the evidence. This is beyond the role of this Court on judicial review. I would also add that, contrary to the applicant's submissions, *Villani* does not stand for the proposition that the Minister or the SST is required to identify what other employment may be within the applicant's limitations. (*Villani* at para 45 and 50).

[11] Although I am sympathetic to the applicant's situation, I am of the view that the SST's decision to deny her disability benefits is not unreasonable. The SST examined the evidence and its decision falls within the range of possible, acceptable outcomes defensible on the facts and the law (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras 47-49, [2008] 1 S.C.R. 190).

[12] For the above reasons, I would dismiss the application. The respondent has not asked for its costs and so none should be awarded.

"Richard Boivin"

J.A.

“I agree
J.D. Denis Pelletier J.A.”

“I agree
Wyman W. Webb J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-305-14
STYLE OF CAUSE:	KIRSTEN KIRALY v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MARCH 10, 2015
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CONCURRED IN BY:	PELLETIER J.A. WEBB J.A.
DATED:	MARCH 11, 2015

APPEARANCES:

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