

Citation: *M. H. v. Minister of Employment and Social Development*, 2014 SSTAD 108

Appeal No. AD-13-15

BETWEEN:

M. H.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Hazelyn Ross

DATE OF DECISION: May 16, 2014

DECISION: LEAVE GRANTED

DECISION

[1] The application for leave to appeal is allowed.

INTRODUCTION

[2] By a decision issued April 11, 2013, a Review Tribunal determined that a Canada Pension Plan disability pension was not payable to the Applicant. The Applicant now applies to the Appeal Division of the Social Security Tribunal for Leave to Appeal the said decision of the Review Tribunal, (the “Application”).

GROUNDS OF THE APPLICATION

[3] Counsel for the Applicant submits that the decision of the Review Tribunal is wrong and that the Applicant should be granted leave to appeal the decision because in making its decision:

- a. The Review Tribunal erred in law. Specifically that the Review Tribunal misapplied the cases of *Bulgur*¹, *Inclima*² and *Villani*³;
- b. The Review Tribunal made erroneous findings of fact with regard to the number of times the Applicant was seen by her psychiatrist.

ISSUE

[4] The issue for decision can be framed as follows:

On the basis of the materials submitted does the Application for Leave to Appeal demonstrate that the appeal has a reasonable chance of success?

THE APPLICABLE LAW

[5] The relevant statutory provisions are found in ss. 56(1), 58(2) and 58(3) of the *Department of Human Resources and Skills Development Act*, (the DHRSD Act). s.56 (1) clarifies that there is no automatic right to an appeal. Thus, an Applicant must seek and obtain leave to

¹ *Bulgur v. Canada (Minister of Human Resources Development)* (May 18, 2000 CP 9164 (PAB))

² *Inclima v. Canada (Attorney General)* 2003 F.C.A. 117.

³ *Villani v. Canada (Attorney General)* 2001 FCA 248

bring his or her appeal before the Appeal Division. s.58 (3) of the *DHRSD Act* mandates that “the Appeal Division must either grant or refuse leave to appeal” while ss.58 (2) sets out on what basis leave to appeal is refused. Leave will be refused where the Appeal Division is not satisfied that the appeal has a reasonable chance of success.

The jurisprudence establishes that the test for whether leave should be granted is whether there is an arguable case.⁴ The Applicant must raise some arguable ground upon which the proposed appeal might succeed.⁵ In *Carroll, O’Reilly J*⁶ stated that an Applicant “will raise an arguable case if she puts forward new or additional evidence (not already considered by the Review Tribunal); raises an issue not considered by the Review Tribunal; or can point to an error in the Review Tribunal’s decision.

In addition to setting out the test for granting leave to appeal *Calihoo*⁷ also stands for the proposition that “in the absence of significant new or additional evidence not considered by the Review Tribunal, an application for leave may raise an arguable case where the leave decision-maker finds the application raises a question of an error of law, measured by a standard of correctness, or an error of significant fact that is unreasonable or perverse in light of the evidence.”

ANALYSIS

[6] Counsel for the Applicant alleges that the Review Tribunal erred in its interpretation and application of the case law, in particular, the *Villani*, *Bulger* and *Inclima* cases. He submits that with respect to *Villani*, the Review Tribunal erred in comparing the Applicant’s personal characteristics in respect of her education, training and language skills to that of Mr. *Villani*, and that the Review Tribunal fell into further error in its application of the *Villani* “real world” factors. Given the subjective nature of the analysis required to apply the *Villani* factors, This Tribunal is not entirely satisfied that the Review Tribunal committed any errors in respect of its application of *Villani*; nonetheless the Tribunal concedes that an arguable case could be made out in this regard.

⁴ *Calihoo v. Canada (Attorney General)*, [2000] FCJ No. 612 TD at para. 15.

⁵ *Canada (Attorney General) v. Zakaria*, 2011 FC 136 at para. 37.

⁶ *Canada (Attorney General) v. Carroll*, 2011 FC 1092.

⁷ *Calihoo* at para. 22.

[7] Counsel for the Applicant also submits that the Review Tribunal committed the following errors of law and/or fact or of mixed law and fact. First, the Review Tribunal misapplied the *Bulgur* decision in its conclusion that the Applicant failed to follow medical direction, namely, to undergo surgery to her right knee. Counsel for the Applicant argues that the Applicant provided a reasonable explanation for her refusal and, therefore, the Review Tribunal ought not to have applied *Bulgur* in the manner that it did. Second, Counsel for the Applicant submits that the Review Tribunal failed to correctly apply *Inclima* when it found that in the face of evidence of her work capacity the Applicant had failed to demonstrate that she had made efforts to obtain and maintain employment. The applicant's counsel submits that the Applicant has a satisfactory explanation for why she applied for regular Employment Insurance benefits.

[8] Thirdly, Counsel for the applicant submits that the Review Tribunal erred when it stated that Dr. Kiraly had not seen the Applicant between February 2010 and May 2010. Counsel for the Applicant states the Review Tribunal failed to consider Dr. Kiraly's April 30, 2010 progress report.

[9] Examining the grounds raised by the Applicant, and without assessing the merits of the Applicant's case on appeal, the Tribunal is satisfied that the Applicant has provided a sufficient basis as would raise an arguable case on appeal, particularly as the case relates to the Applicant's explanation for her failure to undergo the required surgery and the April 30, 2010 progress report. The Tribunal would grant leave to appeal the decision of the Review Tribunal.

CONCLUSION

[10] The Application for Leave to Appeal is granted.

Hazelyn Ross

Member, Appeal Division