Citation: *M. B. v. Minister of Employment and Social Development,* 2014 SSTAD 135

Appeal No. AD-13-48

BETWEEN:

M. B.

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: June 3, 2014

DECISION

[1] The Tribunal grants Leave to appeal to the Appeal Division of the Social Security Tribunal.

BACKGROUND

[2] The Applicant seeks Leave to appeal the decision of the Review Tribunal issued to the parties on April 25, 2013. The Review Tribunal determined that a *Canada Pension Plan*, (CPP), disability pension was not payable to the Applicant as it concluded that the Applicant did not meet the severe criterion in paragraph 42(2)(a) of the CPP. The Social Security Tribunal, the (SST), date stamped the Application Requesting Leave to Appeal, ("the Application"), to the Appeal Division on July 30, 2013, which is outside the time permitted for filing under the *Department of Employment and Social Development Act* (DESD Act). This was not the only irregularity in the Application as the Applicant failed to file a copy of the Review Tribunal decision with the Application as he was required to do. Notwithstanding these irregularities, the Tribunal concluded that it was appropriate to extend the time to file the Application as the record shows that on or around July 18, 2013, the SST did receive some appeal documents from Counsel for the Applicant.

ISSUE

[3] Does the appeal have a reasonable chance of success?

THE LAW

[4] Although an Application for Leave to Appeal is a first, and lower, hurdle to meet than the one that must be met on the hearing of the appeal on the merits, some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

[5] Subsections 56(1) and 58(3) of the DESD Act provide, "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal."

[6] Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[7] Subsection 58(1) of the DESD Act sets out the grounds of appeal as being limited to the following situations:

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.

[8] For our purposes, the decision of the Review Tribunal is considered to be a decision of the General Division.

SUBMISSIONS/GROUNDS OF THE APPLICATION

[9] On his behalf, Counsel for the Applicant submits that the Review Tribunal did not use the real world context as set out in *Villani*[1]; nor did it properly apply *Inclima*[2].

ANALYSIS

The real world context

[10] In *Villani,* the Federal Court of Appeal, ("the FCA"), articulated the "real world" approach to an assessment of an applicant's disability. According to the FCA, "this approach requires the Board to determine whether an applicant, in the circumstances of his or her background or medical condition, is capable regularly of pursuing any substantially gainful occupation." Para. 32.

[1] *Villaniv. Canada (A. G.),* 2001 FCA 248.
[2] *Inclima v. Canada(A.G.),* 2003 FCA 117.

[11] And at para. [38] after analyzing the legislative intent behind the requirement that an applicant be incapable regularly of pursuing any substantially gainful occupation, and distinguishing it from a requirement that an applicant be incapable of pursuing any conceivable occupation, the FCA concluded …"it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience."

[12] The latter have come to be referred to as the *Villani* factors.

[13] The Review Tribunal observes that the severe criterion of CPP para. 42(2)(a) must be assessed in the context of the *Villani* factors. However, at para. 81 of the decision, the Review Tribunal makes the finding that Villani does not apply because of the appellant's relatively young age, his ability to converse in English, and because he has transferable skills…"

[14] Without addressing the merits of the case, the Tribunal finds that the *dicta* of the FCA in *Villani* provide a clear direction that the Review Tribunal was bound to follow. Therefore, it was an error of law for the Review Tribunal to state, as it did, that the *Villani* case does not apply.

[15] Leave will be granted on this basis.

Did the Review Tribunal err in its application of *Inclima*?

[16] Having made the decision to grant leave the Tribunal is of the view that it is not strictly required to address the other ground of the Application, namely that the Review Tribunal failed to properly apply *Inclima*. Notwithstanding this position, the Tribunal deems it prudent to do so.

[17] At paras. 76-79, the Review Tribunal examined and applied *Inclima* in its assessment of the severe criterion in the face of evidence of work capacity. In doing so, the Review Tribunal examined the Applicant's work and retraining history after his claimed date of disability. This, in the Tribunal's view is the exact analysis that *Inclima* demands.

[18] On the evidence that was before it, the Review Tribunal found that the Applicant had failed to demonstrate to its satisfaction that his efforts at maintaining employment had been unsuccessful by reason of his health condition. The Applicant disagrees with the result of the Review Tribunal's conclusion; however, he does not show in what way the Review Tribunal's conclusion erred in its application of *Inclima*. Accordingly, the Tribunal finds no error in the Review Tribunal's application of *Inclima* to its assessment of the severe criterion.

CONCLUSION

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

Hazelyn Ross
Member, Appeal Division