Citation: *R. M. v. Minister of Employment and Social Development*, 2014 SSTAD 202

Appeal No: AD-14-207

BETWEEN:

R. M.

Appellant

and

Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: VALERIE HAZLETT PARKER

DATE OF DECISION: August 15, 2014

DECISION

[1] Leave to appeal to the Appeal Division of the Social Security Tribunal is granted.

INTRODUCTION

[2] On January 23, 2014, the General Division of the Social Security Tribunal (the "Tribunal") determined that a Canada Pension Plan disability pension was not payable. The Applicant filed an application for leave to appeal (the "Application") with the Appeal Division of the Tribunal on April 17, 2014.

ISSUE

[3] The Tribunal must decide whether the appeal has a reasonable chance of success.

THE LAW

[4] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development (DESD) Act*, "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".

[5] Subsection 58(1) of the DESD Act states that the only grounds of appeal are the following:

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.

[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".

SUBMISSIONS

[7] The Applicant made the following arguments in support of the Application:

a) The General Division decision did not properly apply the *Villani v. Canada (A.G.)*, 2001 FCA 248and *Inclima v. Canada (A.G.)*, 2003 FCA 117 decisions in this case;

b) The General Division decision based its conclusion on erroneous findings of fact;

c) The General Division decision did not consider all of the medical evidence put before it; and

d) The Applicant sought to produce new evidence to support his claim.

[8] The Respondent made no submissions.

ANALYSIS

[9] Although a leave to appeal application 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 in order for leave to be granted: *Kerth v. Canada (Minister of Development)*, [1999] FCJ No. 1252 (FC).

[10] Furthermore, the Federal Court of Appeal has found that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 4, *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[11] The Applicant presented a number of arguments to support his claim for leave to appeal. First, he argued that the General Division decision did not correctly apply the legal principles set out in the *Inclima* decision to the facts of this case. He argued that the General Division member postulated about the Applicant's ability to obtain or maintain employment,

without considering his medical needs and limitations. He argued, further, that the General Division decision incorrectly applied the legal test of disability as it was clarified in the *Villani* decision, where the decision stated that it could "imagine" that the Applicant could work.

[12] The *Villani* decision stands for the legal principle that a CPP disability pension claim must be examined in the "real world context", and the claimant's capacity to work or to maintain employment, must be determined in light of all of his limitations in a regular work setting. Similarly, the *Inclima* decision concluded that when a claimant is found to have capacity to work that he should also provide evidence that he could not obtain or maintain work because of his disability in order to be found disabled. Postulation about the Applicant's capacity to work or his ability to find work within his limitations may not fall within these legal tests. Therefore, these arguments may have a reasonable chance of success on appeal.

[13] The Applicant also argued that the General Division decision was based on erroneous findings of fact. In particular, he argued that the General Division decision noted only some parts of Dr. Pilowsky's report, and reached conclusions without considering the entire report in proper context. In *Oliveira v. Canada (Minister of Human Resources Development)*, 2003 FCA 213 the Federal Court of Appeal concluded that the Tribunal decision need not make express reference in its reasons to all the oral and documentary evidence presented.

[14] While this may be so, leave to appeal can be granted if some of the evidence presented at a hearing is ignored. In this case, while the General Division decision recognized that the Applicant relied on Dr. Pilowsky's report, it did not refer to all of the doctor's conclusions in the decision. I am left to wonder if they were all weighed in reaching the decision in this case. This argument therefore also may have a reasonable chance of success on appeal.

[15] Finally, the Applicant submitted additional medical evidence to support his claim. Section 58 of the DESD Act sets out very narrow grounds of appeal. The provision of additional evidence is not one of these grounds of appeal. Therefore the provision of new

evidence therefore is not a ground of appeal that has a reasonable chance of success on appeal.

CONCLUSION

[16] The Application is granted for the reasons set out above.

[17] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Valerie Hazlett Parker
Member, Appeal Division