Citation: *A. I. v. Minister of Employment and Social Development*, 2015 SSTAD 81

Appeal No. AD-14-576

BETWEEN:

**A. I.**

Applicant

and

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

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division – Leave to Appeal Decision

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SOCIAL SECURITY TRIBUNAL MEMBER: Hazelyn Ross

DATE OF DECISION: January 20, 2015

## DECISION

[1] The Application for Leave to Appeal is refused.

## BACKGROUND

[2] The Applicant requests Leave to Appeal, ("the Application"), from the decision of the General Division of the Social Security Tribunal, ("the Tribunal"), issued on September 8, 2014. The Applicant was found not to be a person described under paragraph 42(2)(a) of the *Canada Pension Plan*, ("CPP"). Therefore, she was not entitled to a CPP disability benefit.

## GROUNDS OF THE APPLICATION

[3] On her behalf, Counsel for the Applicant submits that the General Division made a number of errors in respect of the decision. Counsel alleges that the General Division committed errors of law in its interpretation and application of case law, in particular, the Federal Court of Appeal decisions *Warren*[1] and *Kambo*[2] and the Supreme Court of Canada decision of *Janiak v. Ippoloto.*[3] Counsel for the Applicant also alleges that the General division based its decision on erroneous findings of fact that it made without regard for the material before it. Specifically, the General division failed to properly consider the effect of the Applicant's low back pain and her defective knees. As well, that the General Division erred by misapprehending the evidence concerning the Applicant's motivation.

## THE LAW

### What must the Applicant establish on an Application for Leave to Appeal?

[4] The applicable statutory provisions governing the grant of Leave are found in the *Department of Employment and Social Development Act*, ("the DESD Act"). Subsection 56(1) requires that Applicants first obtain leave to appeal before they can actually bring the appeal. Subsection 58(3) mandates that the Appeal Division must either "grant or refuse leave to

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[1] *Warren v. Canada (A.G.). 2008 FCA 377.*
[2] *Kambo v. Canada (Human Resources Development),* 2005 F.C.A. 353 (CAN LII).
[3] *Janiak v. Ippoloto ¨(1985) 1 A.C.R.146*

appeal," while subsection 58(2) provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success".

[5] Case law establishes that the test for granting a leave application is "whether there is some arguable ground on which the appeal might succeed."[4] It is generally accepted that the threshold for granting an Application for Leave to Appeal is lower than that which must be met on the hearing of the appeal on the merits.

**ISSUE**

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

**ANALYSIS**

**Did the General Division misapprehend and misapply the case law?**

[7] Counsel for the Applicant alleges several errors of law. He argues the General Division mistakenly relied on *Warren* to support its position that as a matter of law, the Applicant was required to provide objective medical evidence of her disability. Counsel takes the position that not all of the medical evidence which is provided to the Tribunal must be objective. The Tribunal is not persuaded that the General Division is in error. At paragraph 26 of its decision, the General Division states that an Appellant must provide "some objective medical evidence of his or her disability." The Tribunal finds that this is a far cry from stating that all of the Applicant's medical evidence must be objective. In the circumstances, the Tribunal is not satisfied that this ground has a reasonable chance of success.

[8] Counsel for the Applicant also submits that the General Division erred in its application of *Kambo*. In Counsel's submission, the General Division erred when it relied on *Kambo* to support its position that the Applicant had a personal responsibility to cooperate in her health care. Counsel offered the alternative interpretation that *Kambo* "merely reviews the evidence heard at the pension appeal board where observations were made that the appellant had consistently received medical advice to increase her physical activity but had unreasonably failed to do so." The Tribunal disagrees with this interpretation of *Kambo.* While brief, *Kambo*

[4] *Canada (A.G.) V. St. Louis*, 2011 FC 492

upholds the Pension Appeals Board finding that the Appellant had failed to cooperate in her health care by consistently disregarding medical advice to increase her physical activity. This necessarily implies that the Pension Appeals Board findings on Ms. Kambo's responsibility to cooperate in her health care were ratified. Counsel for the Applicant offers two explanations for the Applicant's failure to follow recommended medical treatment, namely, cost of the drugs and ineffectiveness of the physiotherapy. While a failure to follow recommended medical treatment is not always fatal to the decision, the Tribunal finds that there is nothing in the decision that indicates that the General Division failed to consider any reasonable explanation for the Applicant's failure in this case. At paragraph 28, the General Division examined the Applicant's participation in recommended medical treatment and concluded that it was less than satisfactory. The Tribunal is not persuaded that the General Division misapplied the law with respect to the Applicant's obligation to cooperate in healthcare. Accordingly, the Tribunal is not satisfied that the appeal would have a reasonable chance of success on this basis.

[9] Counsel for the Applicant has also submitted that the General Division based its decision on several erroneous findings of fact and that it made these findings without regard for the material before it. Counsel for the Applicant submits that the General Division failed to consider the effects of the Applicant's low back pain, her inability to stand for more than 10 minutes at a time or to walk more than a short distance. The General Division decision shows that at paragraph 26-27 of its decision, the General Division did, in fact, turn its mind to these factors and possible limitations. Nonetheless, the General Division concluded that these limitations did not preclude the Applicant from all forms of employment. The test by which to grant an application for leave is "reasonable chance of success on appeal". On these facts and in these circumstances, the Tribunal is not satisfied that the appeal has a reasonable chance of success.

[10] Finally, Counsel for the Applicant submitted that the General Division misapprehended the evidence with respect to the Applicant's motivation to find alternative employment or retrain for other employment. Counsel submits that pain prevented the Applicant from seeking alternative employment or retraining. He also submits that she was accommodated in her previous employment without the knowledge of her employer, and that her limited English language skills would prevent her from working as a bookkeeper.

[11] The Tribunal is not persuaded by Counsel's submissions. First, the Applicant apparently testified that she took an over-the-counter medication to address her pain. Secondly, it is difficult to see how the Applicant could be accommodated without the knowledge of the employer and lastly, the test is not a "specific job" but any substantially gainful occupation. Accordingly, the Tribunal is not satisfied that any of these factors would be sufficient to ground an appeal.

**CONCLUSION**

[12] In deciding the issue, the Tribunal is required to determine whether any of the Applicant's reasons for appeal fall within any of the grounds of appeal and then to assess the possibility of success on appeal. While the Tribunal finds that the Applicant's reasons for appeal fall within subsections 58(2) and 58(3) of the DESD Act, the Tribunal is not satisfied that, if leave is granted, the appeal would have a reasonable chance of success.

[13] The Application is refused.

*Hazelyn Ross*
Member, Appeal Division