Citation: *R. S. v. Minister of Employment and Social Development*, 2015 SSTAD 326

Appeal No. AD-15-85

BETWEEN:

R. S.

Applicant

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: March 9, 2015

DECISION

[1] Time to file the Application Requesting Leave to Appeal to the Appeal Division of the Social Security Tribunal is extended;

[2] Leave to appeal to the Appeal Division of the Tribunal is granted.

INTRODUCTION

[3] The Applicant applied for a *Canada Pension Plan* disability pension. He claimed that he was disabled by a number of ailments. The Respondent denied his claim initially and after reconsideration. The Applicant appealed to the Office of the Commissioner of Review Tribunals. Pursuant to the *Jobs, Growth and Long-term Prosperity Act* the matter was transferred to the General Division of the Social Security Tribunal on April 1, 2013. After a videoconference hearing the General Division dismissed the Applicant's appeal.

[4] The Applicant sought leave to appeal to the Appeal Division of the Tribunal. He filed the Application Requesting Leave to Appeal to the Appeal Division with the Tribunal on February 23, 2015. This appeared to be after the time to do so had expired. The Applicant submitted that the Application was filed late because he was ill, his relationship with his representative broke down and he had an arguable case.

[5] Regarding the request for leave to appeal, the Applicant presented a number of arguments as grounds of appeal. He asserted, first, that the General Division erred in its application of various court decisions to the facts of his case and disagreed with the applicability of one such decision to his circumstances. He also contended that the General Division erred in fact by not correctly setting out statements made in various reports that were before it and that these errors were significant, that the Respondent's written submissions contained errors, that the General Division erred in its consideration of whether his business was a substantially gainful occupation both before and after the Minimum Qualifying Period to be eligible to receive a *Canada Pension Plan* (CPP) disability pension, and that the disability" drop out" provision of the CPP should have

been applied in his case. Finally, the Applicant argued that the General Division hearing breached the principles of natural justice and he wished to introduce new evidence to support his case.

[6] The Respondent filed no submissions.

ANALYSIS

Application Filed Late with the Tribunal

[7] The *Department of Employment and Social Development Act* provides that an Application for leave to appeal must be filed with the Tribunal within 90 days of the decision being communicated to the Applicant. In this case, the General Division decision was communicated to the Applicant on October 21, 2014. He filed the Application Requesting Leave to Appeal with the Tribunal on February 23, 2015. This was after the time to do so had expired.

[8] Section 57(2) of the *Department of Employment and Social Development Act* permits the extension of time to file an application for leave to appeal. I must therefore decide whether to extend the time for the Applicant to file the Application. In assessing this, I am guided by decisions of the Federal Court. In *Canada (Minister of Human Resources Development) v. Gatellaro*, 2005 FC 883 this Court concluded that the following factors must be considered and weighed when deciding this issue:

a) A continuing intention to pursue the application;

b) There is a reasonable explanation for the delay;

c) There is no prejudice to the other party in allowing the extension; and

d) The matter discloses an arguable case

[9] The weight to be given to each of these factors may differ in each case, and in some cases, different factors will be relevant. The overriding consideration is that the interests of justice be served (*Canada (Attorney General) v. Larkman*, 2012 FCA 204).

[10] In this case, the Application was filed with the Tribunal approximately one month after the time to do so had expired. The Applicant wrote that he had been ill and his relationship with his representative had broken down to explain the delay. He provided copies of medical notes to substantiate his illness. I am therefore satisfied that the Applicant had a continuing intention to pursue the appeal, and a reasonable explanation for his delay.

[11] Neither party made any submissions on the issue of prejudice that may be caused if this matter proceeds. As the Application was filed within a fairly short time after the time to do so had expired, it is difficult to imagine that either party would be prejudiced, however, I make no finding on this.

[12] The remaining consideration is whether the Applicant has presented an arguable case on appeal. The Federal Court of Appeal decided 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. v. Canada (Attorney General)*, 2010 FCA 63. This is the legal test to be met to be granted leave to appeal, so will be analyzed below for this purpose and regarding the granting of leave to appeal.

Leave to Appeal

[13] The *Department of Employment and Social Development Act* (the Act) governs the operation of the Tribunal. Section 58 of the Act sets out the only grounds of appeal that can be considered on an application for leave to appeal (see Appendix to this decision).

[14] The Applicant sought to introduce new evidence to support his case on appeal including financial statements for his business, medical records and information regarding 282MEPS, a medication that he had been taking. Section 58 of the Act does not permit the consideration of new evidence when deciding whether to grant leave to appeal. This is not a ground of appeal that has a reasonable chance of success on appeal.

[15] The Applicant also argued that the General Division erred in its application of the legal principles set out in *Villani v. Canada (Attorney General)* 2001 FCA 248. He contended, first, that the General Division did not conduct a proper "real world" analysis as

is required by this decision. The General Division decision noted the Applicant's age, education and work experience, and considered this. There was no information regarding any language restrictions. The Applicant did not suggest that there were other relevant personal factors that should have been considered. Therefore, I am not satisfied that this argument is a ground of appeal that has a reasonable chance of success on appeal.

[16] The Applicant also argued that the General Division conclusion that he had transferrable skills and could manage and run a business was hypothetical, and cautioned against in the *Villani* decision. The General Division decision set out the evidentiary basis for this finding of fact. It is not for the Tribunal considering whether to grant leave to appeal to reweigh the evidence to reach another finding of fact as that is the province of the General Division (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). Therefore, this argument is not a ground of appeal that has a reasonable chance of success.

[17] The Applicant also relied on the reasoning in *Garrett v. Canada (Minister of Human Resources Development)* 2005 FCA 84, which stated that a failure to cite or conduct an analysis in accordance with *Villani* principles is an error in law. This is correct. However, the General Division decision did cite the *Villani* case, and referred to the Appellant's circumstances. Hence, I find that this argument does not disclose a ground of appeal that has a reasonable chance of success.

[18] Further, the Applicant argued that the General Division decision referred to a medical report that concluded that he could not complete the "essential duties" of his work. The General Division summarized this as not being able to do the "duties" of his work. He argued therefore that the analysis did not consider commercial realities as required in *Villani* and *Inclima v. Canada (Attorney General)*, 2003 FCA 117. The General Division decision contained a summary of all of the medical evidence before it. This was considered and weighed in making the decision. This argument is not a ground of appeal that has a reasonable chance of success on appeal.

[19] The Applicant also made submissions regarding the application of the reasons in *Inclima* to his case. He asserted that the fact that he was considering changing the nature of his business in December 2002 but not able to pursue this because of a vehicle accident on

January 10, 2003 should not be "held against him" but should establish his efforts to meet the obligation to try to find alternate work set out in the *Inclima* decision. The General Division decision contained this information, and made no negative inference from the fact that although he planned the change his business, the Applicant was unable to do so. Therefore, this argument is not a ground of appeal that has a reasonable chance of success.

[20] Further, the Applicant alleged that the General Division decision erred when it concluded that he continued to operate the business from his home by choice and not because of his limitations. The Applicant alleged that this conclusion did not have any evidence to support it. It is not clear whether this was so. In order for such a finding of fact to have a reasonable chance of success on appeal it must have been made in a perverse or capricious manner, or without regard to the material before it. The General Division decision does not set out the basis for reaching this conclusion so that this can be determined. This argument may have a reasonable chance of success on appeal.

[21] The Applicant submitted, in addition, that his situation was similar to that described in the *Boyle v. MHRD* (June 2003, CP18508) where the Pension Appeals Board concluded that the claimant did not have to establish that he had looked for alternate work because his job was open to him whenever he could return to it. The Applicant argued that because he was self-employed, his job was similarly open to him whenever he could manage it. Therefore he should not have to establish that efforts at obtaining or maintaining work were unsuccessful because of his disability.

[22] The General Division decision did not refer to the *Boyle* decision. This was a decision of the Pension Appeals Board, so is not binding on the General Division. However, the General Division may not have considered the legal principle contained in the *Boyle* decision. This may be an error that is a ground of appeal that has a reasonable chance of success on appeal.

[23] The Appellant also wrote that his insurer was obligated to repay his income replacement, business loss and other benefits. This was not considered by the General Division in its decision. However, the legal test for disability under the CPP is different than the various tests for disability and other benefits offered by various insurance companies.

The General Division made no error by not referring to this information. This is not a ground of appeal with a reasonable chance of success on appeal.

[24] In his Application, the Applicant referred to the *Stanziano v. MHRD* (November 2002, CP17926) decision of the Pension Appeals Board. This decision states that the mere fact that a claimant continues to work after the Minimum Qualifying Period should not automatically preclude his entitlement to CPP disability pension. The Applicant then wrote that his business had been inactive from 2008, not operating as the General Division decision inferred. He argued that this inference was an error in law and an error of substantial fact made by the General Division as it failed to consider the *Stanziano* decision. Again, a decision of the Pension Appeals Board is not binding on this Tribunal. The General Division decision made no reference to the Applicant's work or his business after the Minimum Qualifying Period in 2002. It made no inference in this regard. Therefore, this argument is not a ground of appeal that has a reasonable chance of success on appeal.

[25] The Applicant also presented a number of arguments regarding whether his occupation was substantially gainful. At the General Division hearing he relied on my decision in *G.T. v. Minister of Human Resources Development* 2013 SSTAD 5. The General Division considered this and decided that the facts were not similar to the matter before it and therefore placed no weight on this decision. As the trier of fact, the General Division made no error in doing so. Therefore, any argument that the General Division erred by not relying on this decision does not have a reasonable chance of success on appeal.

[26] The Appellant also contended that the General Division erred when it rejected his argument that he was disabled because he did not have substantially gainful earnings. He argued that the General Division came to this conclusion on conjecture as it did not refer to any medical evidence or any reasoning behind it. The General Division concluded that low income was a pattern of earnings throughout much of the Applicant's work life. The General Division decision referred to the Applicant's earnings as reported in the Record of Earnings produced by the Respondent, based on the Applicant's Income Tax Returns. As the evidentiary basis for this finding of fact was clear, this is not a ground of appeal that has a reasonable chance of success on appeal.

[27] In addition, the Applicant submitted that the General Division erred in considering his gross sales as an indication of income without also considering the cost of materials, labour and other items. The General Division did not consider the cost of materials or labour when discussing the Applicant's income. It relied on the information before it. It is incumbent on a disability pension claimant to present evidence in support of his case at the hearing. He did not allege that the General Division ignored or failed to consider any such evidence. I am not persuaded that this argument has a reasonable chance of success.

[28] Finally on this issue, the Applicant also submitted that the General Division did not consider whether he could regularly pursue substantially gainful employment, and erred in law by not doing so. I agree that it would be an error not to consider this. In the decision, however, the General Division considered this argument, and concluded that the Applicant's income did not reflect his capacity to work. It concluded, based on the evidence, that the Applicant had the capacity to work managing his business. Therefore, this argument is not a ground of appeal that has a reasonable chance of success on appeal.

[29] The Applicant argued, in addition, that the General Division decision contained only a cursory and selective recitation of the evidence, and only vague generalizations regarding the medical issues in its analysis. The General Division made profitability the deciding factor in the case without regard to the medical and other evidence before it. I am satisfied that the General Division decision summarized the medical evidence that was before it. This was considered in reaching the decision. The Applicant's income and business profitability was also considered. There was scant reference in the decision, however, to the Respondent's testimony or what he was physically capable of doing. Hence, this argument points to an error that may have a reasonable chance of success on appeal.

[30] The Applicant also argued that the General Division decision did not consider the totality of his medical conditions and impairments before and after the Minimum Qualifying Period. The decision contains very little analysis of the Applicant's physical abilities or his participation in any work activities. It is not clear what the Applicant's exact limitations were in operating his business. I am satisfied that this argument also points to an error, and it may have a reasonable chance of success on appeal.

[31] The Applicant also contended that the General Division erred when it stated that the Applicant was not consulting with specialists or taking anti-inflammatory medication. He pointed to specific documents that contained lists of medications and listed a number of specialists who he had seen or was to see. The General Division decision did not contain this information in the summary of medical evidence. Nonetheless, the Federal Court of Appeal has decided that the decision maker is presumed to have considered all of the evidence before it. Each and every piece of evidence need not be mentioned in the written decision (*Simpson*). On this basis, I am not persuaded that this argument is a ground of appeal that has a reasonable chance of success on appeal.

[32] The Appellant submitted, further, that he should be able to "drop out" his contributions to the CPP for January 2003 to assist his case. The CPP does not permit years or partial years of contributions to be "dropped out" unless a person has been found to be disabled. Therefore, no ground of appeal is disclosed by this.

[33] The Applicant also complained about how the Respondent worded its written argument for the General Division hearing. No ground of appeal is disclosed by this. It is not the Respondent's argument that is to be examined, but the decision of the General Division.

[34] Finally, the Applicant contended that the General Division breached the principles of natural justice in three ways. First he stated that as the Respondent did not appear at the hearing, "apparently the Tribunal Member became their representative" and if it had appeared some different questions would have been asked. The Applicant provided no evidence or information to substantiate the allegation that the General Division Member became partisan in any way. Without this, I am not satisfied that the Member conducted the hearing improperly. The Tribunal cannot compel any party to attend a hearing. No ground of appeal is established because a party did not attend a hearing, or did not ask questions at a hearing.

[35] Second, the Applicant alleged that because the General Division decision was dated the day following the hearing, the Member's mind must have been made up prior to the hearing having taken place. Again, the Applicant provided no evidence or information to

substantiate this. I am not satisfied that this ground of appeal has a reasonable chance of success.

[36] Finally, the Applicant asserted that he had not issued a Notice of Readiness, and that the hearing was conducted before he was ready. I note that the Applicant applied for CPP disability pension in July 2008. In May 2014 (almost six years later) he filed a Hearing Information Form with the Tribunal, which contained dates he was not available for the hearing. The hearing was scheduled on a date that he was available. There is no indication that the Applicant asked that the hearing be adjourned or postponed. Therefore, I am not satisfied that this is a ground of appeal that has a reasonable chance of success on appeal.

CONCLUSION

[37] The Applicant has presented an arguable case on appeal for the reasons set out above. When considered with other relevant factors regarding the late filing of the Application I am satisfied that it is in the interest of justice that the time for him to file the Application Requesting Leave to Appeal be extended.

[38] Leave to appeal is also granted because the Applicant has presented at least one ground of appeal that may have a reasonable chance of success on appeal.

[39] 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

APPENDIX

Department of Employment and Social Development Act

58. (1) The only grounds of appeal are that

(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.

58. (2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.