

Citation: *S. C. v. Minister of Employment and Social Development*, 2015 SSTAD 609

Appeal No. AD-15-211

BETWEEN:

S. C.

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: Hazelyn Ross

DATE OF DECISION: May 20, 2015

DECISION

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

INTRODUCTION

[2] On February 6, 2015, the General Division issued its decision wherein it determined that the Applicant was not entitled to a *Canada Pension Plan*, (CPP), disability benefit. The Applicant seeks leave to appeal this decision. The Social Security Tribunal, (the Tribunal), received his application for leave, (the Application), on April 24, 2015.

ISSUE

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

THE LAW

[4] Appeals of a General Division decision are governed by sections 56 to 59 of the *Department of Employment and Social Development Act*, (DESD Act). Subsections 56(1) and 58(3) govern the grant of leave to appeal, providing that “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(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

[6] On his behalf, Counsel for the Applicant submitted that the General Division made several errors of law, namely that the General Division:

- a. failed to consider the Applicant’s medical condition in assessing his compliance with treatment recommendations;
- b. did not take the Applicant’s depression into consideration;

- c. drew a negative inference from the fact that the Applicant continued to look for work; and
- d. failed to conduct an analysis in accordance with the principles enunciated in *Villani*.

ANALYSIS

[7] The Tribunal notes that, in support of the Application, the Applicant's representative has repeated much of the submissions she made at the General Division hearing. On the face of the Record the Tribunal is not entirely persuaded that the General Division committed any of the claimed errors. The decision contains a substantial analysis of the Applicant's *Villani* factors that are related to his ability to obtain past and future employment. It also analyses the Applicant's retained work capacity in the context of his health conditions and physical limitations including his speech defect.

[8] As well, the Tribunal disagrees that the General Division drew negative inference from the Applicant's continued job search. In the Tribunal's view the statements that were made by the General Division are no more than an acknowledgement of the Applicant's honesty. The pertinent test is "substantially gainful employment" so that even had the Applicant secured employment, it would still have been open to him to show that the employment was not "substantially gainful employment". Leave will not be granted in this regard.

[9] Notwithstanding these conclusions the Tribunal notes that, on the face of the Record, the General Division may not have correctly determined the burden of proof required. The Tribunal makes no finding on the matter, but notes the General Division stated "the Appellant failed to convince the Tribunal that he suffered from a severe disability as that disability is defined under the *Canada Pension Plan*" as opposed to simply stating that the Applicant has not met the burden of proof. Accordingly, leave is granted on this narrow ground only.

CONCLUSION

[10] The Application is granted, subject to the limitation that the issue to be considered is whether or not the General Division applied the appropriate burden of proof.

Hazelyn Ross

Member, Appeal Division