Citation: *S. S. v. Minister of Employment and Social Development*, 2015 SSTAD 654

Appeal No. AD-15-214

BETWEEN:

S. 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: Hazelyn Ross

DATE OF DECISION: May 27, 2015

DECISION

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

INTRODUCTION

[2] On February 7, 2015, the General Division of the Social Security Tribunal, (the Tribunal), issued a decision denying the Applicant a *Canada Pension Plan*, (CPP), disability benefit. The Applicant has filed an application seeking leave to appeal, (the Application), the General Division decision.

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." Subsection 58(1) sets out the only grounds of appeal. They include breaches of natural justice; errors of law and errors of fact; and errors of mixed fact and law.[1]

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[1] **58(1) Grounds of Appeal** –

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.

SUBMISSIONS

[6] Counsel for the Applicant has submitted that the General Division made numerous errors of mixed law and fact in arriving at the conclusion that the Applicant did not meet the CPP test for "severe" disability. Counsel alleged that the General Division failed to consider relevant evidence; considered irrelevant evidence; misconstrued evidence; neglected to analyse relevant evidence; and substituted its own opinions for those of medical practitioners.

ANALYSIS

[7] Applications for leave to appeal are the first stage of the appeal process. The threshold is lower than that which must be met on the hearing of the appeal on the merits. However, in order to be granted leave to appeal, the Applicant must present some arguable ground upon which the proposed appeal might succeed: *Kerth v. Canada (Minister of Development)*, [1999] FCJ No. 1252 (FC).

[8] The Federal Court of Appeal has found that an arguable case at law is akin to whether, legally, an applicant has a reasonable chance of success: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63. Therefore, the Tribunal must first determine if the reasons for the Application relate to a ground of appeal that would have a reasonable chance of success.

[9] In the event that the Application is granted the Applicant intends to rely on what she alleges are errors of fact in the General Division's analysis. On her behalf, the Applicant's Counsel submits that the General Division misinterpreted and mischaracterised the Applicant's schooling; ability to do sedentary work; attendance at English Second Language classes; and smoking habits. Counsel submitted that instead of the three years college level education the General Division referred to, the Applicant, in fact, has only the equivalent of a Grade 11 education, albeit from a trade school. Counsel for the Applicant also submits that the Applicant's educational level prevents her from obtaining sedentary work; that she attended ESL classes for two months only and has tried to quit smoking. Counsel takes the position that the Tribunal ought to have given more weight to these factors.

[10] The Tribunal is not satisfied that Counsel's arguments would have a reasonable chance of success on appeal. The General Division decision was based largely on the finding that the Applicant had made no attempt to find alternative work and that she had not proffered a satisfactory reason for not looking for work. In the context of the decision, the General Division discussion of the Applicant's education and work history does not reveal errors that can be considered to be material to the decision.

[11] The General Division Member did not commit an error in regard to the Applicant's level of education because the information that she had three years of post-secondary education came from the Applicant herself.[2] The Tribunal is also not persuaded that the General Division drew improper conclusions or negative inferences in respect of the other issues raised. The Tribunal is not persuaded of the gloss that Counsel has placed on the General Division's comments concerning the Applicant's language abilities. The Tribunal finds the comments were made in the context of the Member having no difficulty understanding the Applicant. Nor, did the Tribunal find that General Division placed reliance on the Applicant's smoking habits. Therefore, these submissions also do not ground the Application.

[12] Counsel for the Applicant argued that the General Division made a further error of fact when it found that the Applicant's family physician was the only physician to support her having a severe disability. Counsel for the Applicant's argument that the opinion of the Applicant's family physician is to be preferred to those of other medical practitioners strikes at the way in which the General Division weighed the evidence that was before it. In the absence of a palpable error on the part of the General Division, the Tribunal is not persuaded of Counsel's argument.

[13] In the Applicant's case, the General Division found there was conflicting medical evidence. Weighing evidence is the purview of the General Division. The General Division Member set out in detail the medical evidence upon which he was relying as well as his reasons for so doing. In doing so, the Member met the test for preferring evidence. Accordingly, the Tribunal finds no error on the General Division's part. Leave will not be granted on this basis.

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[2] Applicant's Questionnaire, Box 2.

[14] The other errors of fact alleged are that the General Division misdescribed the Applicant's medication regime. Counsel for the Applicant submits that contrary to the General Division's opinion, the Applicant was in fact on strong pain medication. In this regard, the Tribunal finds that the Applicant has raised an arguable case. The Tribunal also finds that the Applicant has raised an arguable case with respect to her non-attendance at counselling sessions as it is not clear whether the General Division Member considered the Applicant's language barrier as a factor that negated her participation in counselling. Leave to Appeal is granted in relation to these submissions.

[15] Notwithstanding the fact that the Tribunal has granted the Application, the Tribunal considers it desirable to address certain other submissions of the Applicant. In particular, the submission by Counsel for the Applicant that the General Division failed to properly apply *Villani.*[3] The Tribunal relies on the decision of the Federal Court of Appeal in *Giannaros*[4] for the proposition that such a failure is not necessarily fatal to the decision.

[16] According to the Federal Court of Appeal a "real world" analysis would not be necessary where the decision maker is not persuaded that there is a serious medical condition. Thus, in the Tribunal's view, *Giannaros* would apply to the instant case because the General Division made an anterior finding that the Applicant did not suffer from a severe medical condition. Therefore no error of law arises from any omission to engage in a fulsome discussion of the Applicant's *"Villani"* factors; or to engage in a "real world" discussion.

[17] Counsel for the Applicant also argued that the General Division failed to consider all of the Applicant's medical conditions. The Tribunal is not persuaded of this submission. The General Division specifically addressed the Applicant's' multiple, medical conditions in paragraphs 35 through 41 of its decisions, listing them as well as commenting on the medical treatments prescribed. This submission is, therefore, not a ground of appeal.

[18] With respect to the submission that the General Division failed to consider the decision of the Pension Appeals Board in *Taylor v. MHRD,* (July 4, 1975), CP 4436 (PAB). This decision and the other decision cited by the Applicant stand for the proposition that a false

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[3] *Villani v. Canada (Attorney General),* 2001 FCA 248.
[4] *Giannaros v. Canada (Minister of Social Development),* 2005 FCA 187.

declaration of readiness to work by an Employment Insurance recipient is not necessarily fatal to an applicant's claim for CPP disability benefits. However, other Pension Appeals Board decisions have gone in the opposite direction. Thus, in the Tribunal's view, it was equally to the General Division to make credibility findings in regard of the Applicant's declarations to the Employment Insurance Commission. Leave to appeal is not granted on this basis.

[19] The further submissions of Counsel for the Applicant concerning evidence of capacity to work at the time of the MQP and a philanthropic employer are for the purposes of this Application irrelevant. With regard to the former, the submissions consist largely of Counsel's arguments; with regard to the latter, there was no question raised concerning a philanthropic employer. These submissions, then, are not grounds of the appeal.

CONCLUSION

[20] Counsel for the Applicant presented a number of arguments that he submitted supporting the granting of the Application. Of the arguments made, the Tribunal has found that the Applicant raised an arguable case in relation to the General Division's statement that she was not prescribed strong pain medication. Leave is also granted in relation to the Applicant's scant participation in counselling.

[21] At the Application stage, an Applicant need only succeed in raising one ground of appeal. The Tribunal finds that she has done so. The Application for Leave to Appeal is granted.

Hazelyn Ross
Member, Appeal Division