Citation: *I. M. v. Minister of Employment and Social Development*, 2015 SSTAD 655

Appeal No. AD-15-218

BETWEEN:

I. M.

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 refused.

INTRODUCTION

[2] On April 15, 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 issue before the Tribunal is "does the Appeal have 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] The Applicant has submitted that, in making its decision, the General Division erred in law and based its decision on an erroneous finding of fact.

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 Human Resources 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.

Did the General Division err in law?

[9] The Applicant alleged that the General Division erred in law. However, while setting out a number of ways in which it was alleged that the General Division has erred, the Applicant has not stated how these errors constitute errors of law. The reasons set out all appear to be factual errors or submissions refuting the General Division decision. Accordingly, the Tribunal finds that leave cannot be granted on this basis.

Errors of fact

[10] Counsel for the Applicant submitted that the General Division made errors of fact. He stated that Dr. Kevin Grant noted only that surgery was possible; that in 2008 he attempted non-surgical options like physiotherapy. He argues that the numerous medical specialists generally agree that his back presents significant pathology. He further argues that the Applicant attempted to remain in the labour market by continuing to do modified work with his employer as long as possible. At their core, these arguments are no more than expressions of

disagreement with the ways in which the General Division Member weighed the evidence and her findings. While the Member considered the evidence in her decision,[2] ultimately, the decision turned on the absence of sufficient evidence to establish or support a finding that the Applicant's back condition prevented him from pursuing regularly a substantially gainful employment.

[11] The General Division finding is not that the Applicant does not suffer from back pain or has a pathology in his back. Rather, it is that the medical reports and other evidence does not support that the Applicant is disabled from all work. The Tribunal finds that there is no error in the General Division finding. Leave cannot be granted on this basis.

Errors of Mixed Fact and Law

[12] Counsel for the Applicant did not specifically raise this head as a ground of appeal, however, on reading his reasons for appeal, the Tribunal considers it appropriate to examine the Application under this head. The Applicant argues that no doctor guaranteed the success of back surgery. The Tribunal infers that in putting forward this submission, the Applicant is, in fact, saying that he had a reasonable explanation for not taking the surgery. However, the explanation had been put to the General Division Member, who rejected it, noting that there was an 80% chance that the surgery would be successful.

[13] The Applicant also submitted that when the *Villani*[3] factors are considered, he is an unlikely candidate for acquiring either new skills or a new job. He speculated that his back pain would prevent him from engaging in either a "desk or counter" job and he stated that the General Division decision was not reasonable because the Applicant "remained unable to be gainfully or substantially employed" prior to his minimum qualifying period date.

[14] These arguments do not satisfy the Tribunal that the appeal would have a reasonable chance of success. The first argument is speculative. The onus was on the Applicant to show that he could not mitigate his losses, something that the General Division Member found he had failed to do. The second argument is no more than a reiteration of the Applicant's position that

[2] See paragraph 24.
[3] *Villani v. Canada (Attorney General),* 2001 FCA 248.

he is disabled within the meaning of CPP para. 42(2)(a). Accordingly, the Tribunal finds that these submissions fail as grounds of the appeal.

CONCLUSION

[15] Counsel for the Applicant presented a number of arguments that he submitted supporting the granting of the Application. Based on the foregoing, the Tribunal is not satisfied that the appeal would have a reasonable chance of success. Accordingly, the Application for Leave to Appeal is refused.

Hazelyn Ross
Member, Appeal Division