Citation: *H. B. v. Minister of Employment and Social Development*, 2015 SSTAD 675

Appeal No. AD-15-81

BETWEEN:

H. B.

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: Janet LEW

DATE OF DECISION: June 2, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated November 10, 2014. The General Division determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan,* as it found that he did not have a severe and prolonged disability on or before January 31, 2012, the month before his retirement pension became payable. The Tribunal calculated the minimum qualifying period to be December 31, 2012.

[2] Counsel for the Applicant filed an Application Requesting Leave to Appeal to the Appeal Division on February 20, 2015. Leave is sought on the grounds that the General Division made numerous errors of law. To succeed on this application, the Applicant must satisfy me that the appeal has a reasonable chance of success.

SUBMISSIONS

[3] The Applicant submits that the General Division erred in its application and view of the "real world" context as set out in in *Villani v. Canada (Attorney General),* 2001 FCA 248 and in its application of *Lalonde v. Canada,* 2002 FCA 211.

[4] Counsel submits that the Member erred, as the evidence supporting the claim is strong and clear. Counsel submits that even had the Applicant successfully undergone knee surgery, "his long list of severe ailments" strongly suggests that he would still be disabled. Counsel submits that had the General Division properly applied the test for severity, it would have found the Applicant disabled.

ANALYSIS

[5] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC). In *Canada (Minister of Human Resources Development) v. Hogervorst,* 2007 FCA 4, the Federal Court of Appeal found that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success.

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

> (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.

[7] The Applicant must satisfy me that the reasons for appeal fall within any of the grounds of appeal and that at least one of the reasons has a reasonable chance of success, before leave can be granted.

a) *Villani*

[8] Notwithstanding the fact that counsel has pointed to at least two potential errors of law committed by the General Division, he has not set out sufficient particulars for one of them. Counsel submits that the General Division erred in its application and view of *Villani,* yet does not set out how it was in error. At paragraph 25 of its decision, the General Division referred to *Villani* and then proceeded to consider the Applicant's personal characteristics in assessing the severity of his disability. The General Division addressed the Applicant's age, work experience and education, in the context of his capacity to train in other fields, and therefore his capacity regularly of pursuing any substantially gainful occupation.

[9] I note the words of Isaac J.A, at paragraph 49 in *Villani*, that, "The assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere". Unless counsel identifies the specific error of law or an error appears on the face of the record, there is no basis upon which I would interfere with the *Villani* assessment undertaken by the General Division.

(b) *Lalonde*

[10] As for *Lalonde*, the General Division stated that it had to consider whether the Applicant's refusal to undergo treatment was reasonable and what impact that refusal might have on his disability status, should that refusal be considered unreasonable. The General Division found that it was unreasonable for the Applicant to have refused surgery, given its success rate. Counsel does not explicitly dispute this finding of the General Division. In this regard, the Applicant has not satisfied me that there is a reasonable chance of success under this particular ground.

[11] Counsel submits however that the General Division erred when it effectively concluded that the Applicant would not be considered disabled after knee surgery. The General Division found that the Applicant stood a good chance that he would regain function in his knees and possibly increase his standing tolerance following knee surgery. Counsel submits that the General Division failed to appreciate that the Applicant has other multiple "severe ailments", apart from his knee, which render him disabled. In other words, Counsel submits that the General Division failed to properly conclude that these other multiple conditions render the Applicant disabled. Characterized this way, the Applicant essentially seeks a reassessment of the evidence.

[12] For the purposes of a leave application, I am restricted to considering only those grounds of appeal which fall within subsection 58(1) of the DESDA. The subsection does not permit me to undertake a reassessment of the evidence. The Applicant has not satisfied me that there is a reasonable chance of success under this particular ground.

CONCLUSION

[13] The application is refused.

Janet Lew
Member, Appeal Division