Citation: *E. T. v. Minister of Employment and Social Development*, 2015 SSTAD 710

Appeal No. AD-15-245

BETWEEN:

E. T.

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: June 5, 2015

DECISION

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

INTRODUCTION

[2] The Applicant has filed an application seeking leave to appeal, (the Application), the decision of the General Division of the Social Security Tribunal, (the Tribunal), issued on March 16, 2015, and its finding that he is not entitled to a *Canada Pension Plan*, (CPP), disability benefit.

ISSUE

[3] The Application raises the following issue:

> Did the General Division reach its decision on erroneous findings of fact that it made without regard to the Applicant's medical evidence that was before it?

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

SUBMISSIONS

[6] The Applicant submitted that, in making its decision, the General Division committed errors of law by misapplying case law as well as erroneous findings 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.

[9] The Tribunal is required to first determine whether any of the Applicant's reasons for appeal fall within any of the grounds of appeal and whether any of them have a reasonable chance of success, before it can grant the Application.

Did the General Division err in Law?

[10] The Applicant submits that the General Division misapplied the case of *Inclima v. Canada (A.G.)*[2] The Applicant points to paragraph 43 of the decision where the General Division stated, "in this case, aside from his experience as a self-employed window cleaner, the Appellant has not provided the Tribunal with any evidence that he has been looking for work or

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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.

[2] *Inclima v. Canada (Attorney General)*, 2003 F.CA.C117.

tried to find a more suitable employment." In the Applicant's submission, the General Division looked at the wrong time period when it made its decision. He submits that the correct period of inquiry is that period that commenced after he ceased being self-employed. He argues that *Inclima* does not apply to the Applicant's case.

[11] It is possible to see how the Applicant arrived at this conclusion. The statement is ambiguous as to the time period that the General Division considered. As the question of retained work capacity is at the heart of the General Division's determination, there ought to be no ambiguity respecting the process by which the General Division came to its decision. Thus, while the Tribunal does not agree that *Inclima* is inapplicable to the Applicant's case, it is satisfied that the Applicant has raised an arguable case with respect to its proper application.

The General Division's treatment of *Villani*[3]

[12] The Applicant makes the further argument that the General Division did not properly apply *Villani* to his case. The Applicant submits that in giving an example of the type of work the Applicant could do, the General Division fell afoul of the tenet in *Villani* that prohibits the General Division from "postulating". With respect, the Tribunal finds that the only reference in *Villani* to the term "postulate" comes within the following statement: "The question is whether it is realistic to postulate that, given all of the Appellant's well documented difficulties, any employer would even remotely consider engaging the Appellant." Notwithstanding that decision-makers, generally, do not give examples of hypothetical employment; the Tribunal is not persuaded that *Villani* prohibits a Tribunal from giving examples of the types of work that an appellant could do. The Tribunal finds no error in this regard, or even if there is an error, it would not be so material as to warrant the grant of leave.

Did the General Division base its decision on an Erroneous Finding of Fact?

[13] The Applicant submitted the General Division erred by comparing and preferring the medical report of Dr. Bhesania, a cardiologist to that of Dr. Nejad, a chiropractor. The Member reported that Dr. Nejad concluded that the Applicant was unable to work and that work activities would have a negative impact on his hearth and health. For the very reasons set out by

[3] *Villani v. Canada (Attorney General),* 2001 F.C.A. 248

Counsel for the Applicant, primarily that "Dr. Nejad could comment only on the Applicant's physical condition, not his heart" the Tribunal finds no error on the part of the General Division.

[14] The Applicant also takes issue with the Member's finding that depression was not among the conditions listed on the CPP medical report. As Counsel for the Applicant notes, the second CPP medical report lists "fatigue/lethargy with ADLs (Activities of Daily Living), domestic tasks, anxiety/stress, insomnia." These are reported as elevated. Notwithstanding these conditions being listed, the Tribunal is of the view that the General Division Member correctly noted that depression was not among them. Therefore, there is no error on her part in this regard.

[15] The Applicant makes further submissions that the General Division Member misapprehended Dr. Mallia's diagnosis. The Tribunal rejects this submission. The Applicant is seeking to rely on Dr. Mallia's initial diagnosis as opposed to his final diagnosis, which did diagnose the Applicant as suffering "Major Depressive Illness, moderate form". Consequently, the Applicant's submission that the General Division Member made erroneous findings of fact made in a perverse or capricious manner is not supported.

[16] As stated earlier, at the application stage an applicant is not required to prove the grounds of appeal, however, some arguable ground on which the appeal might succeed is required. The Tribunal finds that the Applicant has raised an arguable case with respect to the process by which the General Division applied *Inclima* in its assessment of the Applicant's retained work capacity. The Application is granted in this regard.

CONCLUSION

[17] The Application for Leave to Appeal is granted.

Hazelyn Ross
Member, Appeal Division