Citation: *A. K. v. Minister of Employment and Social Development*, 2015 SSTAD 817

Appeal No. AD-15-338

BETWEEN:

A. K.

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 26, 2015

DECISION

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

INTRODUCTION

[2] On May 13, 2015 the General Division of the Social Security Tribunal of Canada, (the Tribunal), denied the Applicant's appeal from a decision refusing payment of a *Canada Pension Plan,* (CPP), disability pension. The General Division Member found that the Applicant's medical conditions were not severe and prolonged as of the minimum qualifying period (MQP) date of December 31, 2013.

[3] The Applicant seeks leave to appeal this decision, (the Application).

ISSUE

[4] To grant leave to appeal the Tribunal must decide whether the appeal has a reasonable chance of success.

THE LAW

[5] The applicable legislative provisions are found in 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." To grant leave the Appeal Division must be satisfied that the appeal would have a reasonable chance of success, a reasonable chance of success being equated to an arguable case: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63. The Grounds of Appeal are set out in section 58 of the DESD Act[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] On his behalf, Counsel for the Applicant submitted that the General Division erred when it decided that the Applicant was not entitled to a CPP disability benefit. He argued that the decision contained errors of law; errors of fact; and breached natural justice. Counsel's submissions can be conveniently grouped under four heads: failing to consider or properly consider medical reports; failing to consider or properly consider the oral evidence of the Applicant and his witness; failing to properly apply the legal test in *Villani v. Canada (AG),* 2001 FCA 248 and a failure to properly assess the credibility of the Applicant and his witness.

[7] The Respondent made no submissions in regard to this Application.

ANALYSIS

[8] 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 for the Tribunal to grant 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). Determining whether there is an arguable case does not involve determining the merits of the case. It does, however, involve a consideration of the applicable law and the evidentiary foundation presented.

Did the General Division fail to consider or properly consider medical reports?

[9] Counsel for the Applicant submitted that the General Division failed to consider or properly consider certain medical reports that, in his submission, support a finding that the Applicant has a severe disability as defined by CPP ss. 42(2)(a). The General Division Member specifically mentions and summarises the medical reports in question at paragraphs 12 and 14 through 22 of her decision. In addition, the Member devoted several paragraphs of her analysis to the medical reports; the results of the Functional Abilities Evaluation as well as to the oral

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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.

evidence of the Applicant and the witness, whose oral evidence is summarised at paragraphs 35-38.

[10] The Tribunal finds that no error is revealed by the General Division's treatment of the medical reports and the Functional Abilities Evaluation. The Member analysed these reports paying attention to their statements about the Applicant's level of function and prognoses for recovery. Clearly, the Applicant disagrees with the conclusions the Member drew from the evidence. In the Tribunal's view, essentially, the Applicant is asking it to reweigh the evidence. This, the Tribunal cannot do. The Tribunal relies on the statement of the Federal Court of Appeal in *Dossal v. Canada (Pension Appeal Board)* 2005 FCA 387, namely that the "PAB is not required to refer to every one of what may be a considerable number of reports before it. Furthermore, it is entitled to prefer some evidence over other evidence, as long as that evidence is not of such probative significance that doing so would amount to a failure to discharge its elementary duty to engage in meaningful analysis of the evidence. It is not the function of the Federal Court of Appeal to reweigh the evidence and retry the case."

[11] By analogy to the function of the Pension Appeals Board, the Tribunal finds that it is not the function of the Appeal Division to reweigh the evidence that was presented to the General Division. The possibility that the evidence before the General Division might be reassessed in the Applicant's favour upon an appeal does not give rise to an arguable case or a reasonable chance of success sufficient to grant leave to appeal. Accordingly, the Applicant's submissions in this respect cannot ground the appeal.

Did the General Division fail to consider or properly consider the oral testimony?

[12] The Applicant has submitted that the General Division did not consider or did not properly consider either the Applicant's oral testimony or that of the witness, his wife. At paragraphs 10 and 11 of the decision, the Member recorded the Applicant's evidence from the questionnaire accompanying his application for CPP disability benefits. The Applicant's oral testimony is summarised at paragraphs 23-34. That the General Division did consider the oral testimony of both the Applicant and the witness is clear from the Member's statements at paragraphs 47 and 48. The Tribunal finds that once again the Applicant is asking it to reweigh the evidence, which, for the reasons given earlier, the Tribunal declines to do.

[13] Furthermore, the Tribunal finds no error on the part of the General Division with respect to the testimony of the Applicant and his wife in regard to his ability to perform the activities of daily life. The Member summarised the evidence, and gave an explanation for why she preferred those aspects of the witness' evidence that she did. In the circumstances, the Tribunal finds that the General Division's decision was within the range of outcomes acceptable and defensible on the facts and the law. The decision was therefore reasonable. Thus, the Applicant has not raised an arguable case in this respect.

Did the General Division fail to properly apply the legal test in *Villani?*

[14] The Applicant submitted that the General Division failed to properly assess the severity of the Applicant's disability in a real world context as required by *Villani.* The Tribunal is not persuaded by this submission. At paragraph 50 of the decision, the General Division analyses the effect of the Applicant's *Villani* factors on his ability to obtain and maintain a substantially gainful occupation. The General Division Member noted that the Applicant's age and education were factors that weighed against him but concluded that the absence of language difficulty, and his transferable experience in supervision and sales would have worked to the Applicant's favour.

[15] Counsel for the Applicant submits that the General Division came to the wrong conclusion about the Applicant's employability. However, in light of the Member's analysis of the Applicant's employment experience the Tribunal finds that the decision fell within the range of outcomes that were acceptable and defensible on the facts and law and, therefore, it is reasonable. Leave will not be granted in this regard.

Did the form of hearing hinder the General Division's credibility assessment?

[16] The Applicant's last major submission is that the form of hearing chosen, namely teleconference, prevented the General Division from properly assessing the Applicant's credibility. This submission raises questions of procedural fairness, in respect of which the following issues can be framed:

(a) Did the General Division deny the Applicant the opportunity to be heard by its choice of form of hearing?

(b) Can the Applicant raise a breach of procedural fairness for the first time on appeal?

Form of hearing

[17] The applicable law with respect to the form of hearing is found at s. 21 of the *Social Security Tribunal Regulations.*

> 21. *Notice of hearing* – If a notice of hearing is sent by the Tribunal under these Regulations, the Tribunal may hold the hearing by way of
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> (a) Written questions and answers;
> (b) Teleconference, videoconference or other means of telecommunication or
> (c) The personal appearance of the parties.

[18] The General Division sent the Applicant a Notice of Hearing advising him of the date, time and form of the hearing. The Notice also set out why the particular form of hearing was selected. The General Division noted that its choice of form of hearing was influenced, partly by the fact that the Applicant was represented by Counsel. The Tribunal finds that a concern with the form of hearing and its possible impact on the Applicant's credibility would likely have arisen at the time that the Applicant received the Notice of Hearing. In those circumstances, the Tribunal is of the view that it is reasonable to expect that any such concerns would have been raised in a timely fashion as opposed to being raised at the appeal stage.

[19] Moreover, the Applicant was able to testify in person and to call a witness; his Counsel appears to have had ample opportunity to present the Applicant's case. Further, there is no suggestion that there were technical or other difficulties during the hearing that could have hindered the Member's apprehension of the evidence. In light of these circumstances the Tribunal is not satisfied that the Applicant has raised an arguable case in this regard.

Assessment of Credibility

[20] The case law makes it clear that the Tribunal must be able to assess an appellant's credibility. To this end, much emphasis is placed on having appellants testify in person;

Dinas v. MHRD (April 25, 1997), CP 4024 (PAB). Negative credibility inferences have been drawn from an unexplained failure to testify in person. In *Di Caro v. MHRD* (April 24, 1997), CP 4068 (PAB), the PAB noted that "the claimant's failure to testify in person, unless adequately explained, will weigh heavily in the balance against the genuineness of the claim."

[21] The Applicant submitted that because the hearing took the form of a teleconference the General Division could not properly assess either his credibility or the credibility of his witness. This submission assumes that a credibility assessment can properly take place only if the decision-maker is able to see an appellant. Even if this were true, the Applicant's credibility appeared not to have been at issue in the Member's decision-making process. The only point where a credibility assessment is alluded to is in relation to the conflicting testimony of the Applicant's witness, when she testified about his ability to perform household chores. In the Tribunal's view the General Division Member provided a reasonable and rational explanation for why she preferred the witness' earlier unqualified statement that the Applicant was able, regularly, to clean the kitchen and make the dinner meals.

CONCLUSION

[22] Arguing that its decision contains errors of law; errors of fact; and breaches of natural justice, Counsel for the Applicant argued that the General Division erred when it decided that the Applicant was not entitled to a CPP disability benefit. He raised a number of points on which he submitted the General Division erred and which Counsel contended gave rise to an arguable case. For the reasons set out above the Tribunal is not satisfied that the Applicant has raised an arguable case.

[23] At the Application stage an Applicant need only succeed in raising one ground of appeal. The Tribunal finds that the Applicant has not done so. The Tribunal is not satisfied that the appeal would have a reasonable chance of success.

[24] The Application for Leave to Appeal is refused.

Hazelyn Ross

Member, Appeal Division