Citation: *N. A. v. Minister of Employment and Social Development*, 2015 SSTAD 858

Appeal No. AD-15-364

BETWEEN:

N. A.

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: July 8, 2015

DECISION

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

INTRODUCTION

[2] On March 16, 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." The grounds of appeal are set out in subsection 58(1). They include breaches of natural justice; errors of law and errors of fact.[1] These are the only grounds of appeal.

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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] On the behalf of the Applicant his Counsel submitted that the General Division made several errors of law as well as made its decision without regard for the material before it.

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.

Alleged Errors of Law

[9] Counsel for the Applicant cited a number of instances in the General Division decision that he submits amounts to an error of law. First, he submits that while the General Division discussed whether or not the Applicant had a severe disability, the General Division did not discuss whether his disability was prolonged. Counsel for the Applicant submitted that this failure amounted to a failure to consider material that was before it and a breach of natural justice. Due to the cumulative nature of the requirements of the definition of disability as "severe and prolonged", the Tribunal rejects this argument. This is the position that the Federal Court of Appeal took in *Klabouch v. Canada (Minister of Social Development)* 2008 FCA 33. In *Klabouch,* the Pension Appeals Board had concentrated on the "severe" part of the test and had made no finding on the "prolonged" part of the test. On appeal, the Federal Court of Appeal clarified the position, stating that, "the two requirements of paragraph 42(2)(a) of the CPP are cumulative, so that if an applicant does not meet one or the other condition, his application for a disability pension under the CPP fails."

[10] Counsel for the Applicant also submitted that the General Division erred in that it did not consider the Applicant's employability in a real-world context. He argued that the General Division's analysis of whether the Applicant suffers from a prolonged disability omits any discussion of his functional abilities, his psychological impairments, his past work history and limited computer skills.

[11] This submission raises the question of whether the General Division errs by not considering employability in a real world context. The Tribunal finds that a failure to apply the real world context is not always an error. In *Villani*[2], the Federal Court of Appeal issued clear direction mandating such an analysis. Thus, it would appear, on its face that the absence of a "real world" analysis would necessarily point to an error of law. However, in its later decision in *Giannaros*[3], the Federal Court of Appeal indicated that such a failure was not necessarily fatal to the decision. No error would arise where an anterior finding of retained work capacity has been made. This is the situation in the Applicant's case; therefore, the Tribunal finds that the General Division has not committed an error of law in this regard.

[12] The third submission that Counsel for the Applicant makes is that the General Division misapplied *Villani* in its consideration of the Applicant's particular circumstances and his ability to obtain alternate employment. Counsel submitted that while the General Division found that there was evidence of work capacity in some form, part-time or seasonal, as of the December 31, 2012 MQP date, in the real world, the 57 year-old Applicant was not employable. Counsel took the position that as the Applicant had visible mobility issues (used a cane), inability to lift, chronic pain, a college certificate in food preparation, extremely limited computer skills, and 18 years of employment as a chef, he would not be able to find seasonal or part-time work which typically involves computer skills and/or physical labour.

[13] Relying on *Villani*, Counsel argued that the General Division neglected to consider the Applicant's particular circumstances, thereby erring in law.

[14] The Tribunal finds that this argument is tied to the prior argument that the General Division's analysis of whether the Applicant suffers from a prolonged disability omits any

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

discussion of his functional abilities, his psychological impairments, his past work history and limited computer skills. The Tribunal applies the same analysis to this argument. Leave to appeal cannot be granted on this submission.

[15] Counsel for the Applicant went on to submit that in its analysis of whether the Applicant suffers from a severe disability, the General Division failed to take into account the Applicant's psychological condition considering only his main disabling condition as opposed to his entire condition. Counsel relied on *J.B. v. Canada (Attorney General),* 2011 FCA 47, for her submission that the omission was an error in law.

[16] As far back as in *Taylor v. MHRD*, (July 4, 1997), CP 4436, the Pension Appeals Board stated that where multiple medical conditions are cited, the applicant's physical condition must be considered as a whole. The Applicant's family physician cited "Major Depression" among his diagnoses. As well, in a report to Dr. A. Somogyi, dated February 28, 2011, Dr. S.W. Joseph Wong diagnosed the Applicant as suffering from "Adjustment Disorder with mixed anxiety and depressed mood and phobia." Thus, there was evidence of the Applicant's psychological condition before the General Division. The decision made no reference to this evidence. The Tribunal finds, that following *Taylor,* the General Division was bound to consider, not simply note this evidence. Therefore the General Division erred by failing to consider the evidence of the Applicant's psychological condition when it assessed the severity of his disability.

[17] Lastly, Counsel for the Applicant submitted that the General Division erred in law when it failed to appreciate and consider the medical evidence before it. The General Division did summarise the medical evidence, however, the focus of the decision appears to have been on the Applicant's failure to obtain or to attempt to obtain alternative employment, leading to a finding that he had retained work capacity. As several of the medical reports cited by Counsel for the Applicant speak directly to the Applicant's employability the Tribunal finds an arguable case has been raised.

CONCLUSION

[18] 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

an arguable case has been raised with respect to the General Division's failure to consider the totality of the Applicant's medical conditions as well as certain medical reports that supported the Applicant's position. The Applicant need only be successful on one ground of appeal for leave to be granted. This he has done.

[19] The Application for leave to appeal is granted.

Hazelyn Ross
Member, Appeal Division