Citation: *K. M. v. Minister of Employment and Social Development*, 2015 SSTAD 877

Appeal No. AD-15-344

BETWEEN:

K. 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: July 14, 2015

DECISION

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

INTRODUCTION

[2] On March 10, 2015, the General Division of the Social Security Tribunal of Canada (the Tribunal), issued a decision in which it denied the Applicant's appeal from a decision refusing him payment of a *Canada Pension Plan* (CPP), disability pension. The Applicant seeks leave to appeal this decision. Counsel for the Applicant argues that the General Division erred in law by failing to consider evidence of,

a) the Applicant's personality disorder;
b) the Applicant's depression;
c) the Applicant's medical condition in assessing his efforts to obtain employment; and by
d) failing to conduct its analysis in accordance with the principles set out in *Villani*.

ISSUE

[3] The Tribunal must decide whether the appeal has a reasonable chance of success.

THE LAW

[4] The applicable legislative provisions are found at 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]

SUBMISSIONS

[5] Counsel for the Applicant made several submissions in relation to the errors the General Division is alleged to have made. The first submission is that the General Division elected to proceed by way of teleconference rather than in-person as requested by the Applicant. Secondly, that there is no audio recording of the hearing.

[6] With respect to the errors that the Applicant submitted the General Division made, his Counsel stated that the General Division failed to consider evidence regarding

a) the Applicant's personality disorder; and
b) the Applicant's depression;
c) did not consider the Applicant's medical condition in assessing the Applicant's efforts to obtain employment; or
d) conduct its analysis in accordance with the principles set out in *Villani*.

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.

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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.

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 fail to consider evidence of the Applicant's personality disorder?

[9] Counsel for the Applicant submits that there was ample medical documentation before the General Division to establish that the Applicant was suffering from a personality disorder and depression, both of which conditions were severe. She submitted that the only time the General Division mentioned the Applicant’s personality disorder was in paragraph 13 when it summarised the Applicant’s submissions. Counsel for the Applicant went on to state that there was ample evidence before the General Division that the Applicanthad a personality disorder, which evidence “included reports from the Appellant's family physician of 10 years and three psychiatrists.” Counsel for the Applicant cites Dr. Nemtean as stating in his report of February 6, 2013 that the Applicant’s personality disorder would prevent him from integrating into the workforce, and she argued that the General Division ignored the Applicant’s testimony about his difficulties with his temper, thereby committing an error of law.

[10] While it is true that the General Division did not make specific findings about the Applicant’s personality disorder, the Tribunal is hard-pressed to find an error of law. The General Division Member did find that it was the Applicant’s evidence that his mental health had improved and that he was taking an antidepressant. In light of this finding the Tribunal is not satisfied that the appeal would have a reasonable chance of success on this ground.

Did the General Division fail to consider evidence regarding the Applicant’s depression?

[11] Counsel for the Applicant submits that in its assessment of whether the Applicant had a severe disability the General Division did not consider all of the evidence regarding his depression. She made the further submission that the General Division “appears to have relied heavily on the Appellant's evidence that ’his mental health was better as he had begun to see a psychiatrist again in 2013’ (paragraph 12).” On his behalf, Counsel for the Applicant submitted that this statement indicates that the General Division erred by failing to consider evidence which showed that the Applicant’s condition remained severe after this point. Counsel argued that from

the fact that the Applicant was hospitalised shortly after his MQP, indicates that he had been suffering from a severe mental health condition as of the MQP.

[12] Outside of an acknowledgement that the Applicant suffers from "some mental limitations, albeit showing improvement over time," the General Division decision contains scant reference to the Applicant's mental condition in its analysis. Counsel for the Applicant contends that the Applicant gave ample evidence concerning his mental health condition post hospitalisation. She begs the inference that given the proximity to his MQP, this evidence serves as testimony to the Applicant's pre-MQP mental health disability. The Tribunal finds that she has raised an arguable case that supports the grant of leave.

[13] Having been successful on this ground, it is not necessary for the Tribunal to examine the other grounds of appeal raised by the Applicant. Nonetheless, the Tribunal would comment on the other two grounds raised by the Applicant.

[14] Counsel for the Applicant submitted that the General Division erred in law by failing to consider the Applicant's medical condition in assessing his efforts to obtain employment. In the Tribunal's view, this ground of appeal has not been made out, for while Counsel accepts that drugs and alcohol were a factor in the Applicant's inability to maintain employment, her assertion that his personality disorder was also a contributing factor is more in the nature of additional evidence. Notably, this evidence was before the General Division as was the evidence that the Applicant made no effort to obtain alternative employment of any kind. In the Tribunal's view, given that the General Division found that the Applicant had previously managed to find employment in his field, when weighed against the evidence of the Applicant's mental health condition, it was reasonable for the General Division to conclude that the Applicant had not provided an adequate explanation for his lack of effort at finding alternative employment.

[15] Counsel for the Applicant also submits that the General Division erred in law in that it failed to properly apply the principles set out in *Villani v. Canada (Attorney General),* [2002] 1 FCR 130, 2001 FCA 248, notably that the severe criterion be assessed in a "real world context." She notes that the General Division failed to analyse and consider the *Villani* factors in conjunction with the Applicant's medical conditions.

[16] The General Division's discussion of the *Villani* factors as they relate to the Applicant is brief indeed. The Tribunal finds that the analysis is deficient in that, while the General Division listed the Applicant's age, educational level, language proficiency and work history, the General Division did not show how these factors gave rise, in the Applicant's case, to a failure to meet the severe criterion. Thus the Tribunal finds that the General Division erred in law in this regard. Thus a second ground of appeal is established.

CONCLUSION

[17] Counsel for the Applicant submitted that the General Division erred by ignoring evidence of the Applicant's personality disorder, his depression and by failing to consider his mental condition in assessing his efforts to obtain employment. Counsel for the Applicant also contended that the General division failed to properly apply *Villani.* The Tribunal has found that an arguable case has been raised in respect of points three and four. Thus, the Application for Leave to Appeal is granted.

Hazelyn Ross

Member, Appeal Division