Citation: *H. S. v. Minister of Employment and Social Development*, 2015 SSTAD 1147

Appeal No. AD-15-972

BETWEEN:

H. S.

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: September 29, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated May 28, 2015. The General Division conducted a teleconference hearing on April 15, 2015 and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan,* as it found that her disability was not "severe" at her minimum qualifying period of December 31, 2013. The Applicant's representative filed an application requesting leave to appeal on August 31, 2015, alleging that the General Division made numerous errors of law and that it based its decision on numerous erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

[2] Does the appeal have a reasonable chance of success?

HISTORY OF PROCEEDINGS

[3] The Applicant applied for a Canada Pension Plan disability pension on April 11, 2011 (GT1-25 to GT1-28). The Respondent denied the application initially and upon reconsideration. The Applicant appealed the Respondent's reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT).

[4] Under section 257 of the *Jobs, Growth and Long-term Prosperity Act* (JGLPA), any appeal filed before April 1, 2013 under subsection 82(1) of the *Canada Pension Plan,* as it read immediately before the coming into force of section 229 of the JGLPA, is deemed to have been filed with the General Division of the Social Security Tribunal on April 1, 2013. On April 1, 2013, the OCRT transferred the Applicant's appeal of the reconsideration decision to the Social Security Tribunal.

[5] On March 24, 2014, the Applicant's representative filed a Notice of Readiness – Appellant, and on May 13, 2014, a Hearing Information Form.

[6] On November 13, 2014, the Social Security Tribunal advised the parties that the General Division Member intended to proceed by way of personal appearance on February 24, 2015 (GT0). The Social Security Tribunal notified the parties that they had until December 29, 2014 to file additional documents or submissions and until January 26, 2015 to file any response materials. Documents filed after these dates would be considered only at the Tribunal Member's discretion.

[7] On January 28, 2015, the Applicant's representative filed letters from the Applicant's employers (GT6), and on February 11, 2015, the Respondent filed an addendum to the submissions of the Minister (GT7).

[8] The hearing proceeded on February 24, 2015, but was necessarily adjourned due to interpretation issues (GT0A). Another in-person hearing was rescheduled for March 23, 2015 but that hearing too was adjourned, due to unexpected conflicts with the hearing room. Instead, a teleconference hearing was scheduled for April 15, 2015 (GT0B).

[9] The hearing proceeded on April 15, 2015 and the General Division rendered its decision on May 28, 2015. The General Division found that there was insufficient medical evidence to demonstrate that the Applicant was incapable of any substantially gainful employment in 2013. The General Division considered the Applicant's personal characteristics in a real world context and found that while the Applicant had language difficulties, educational limitations and limited work experience, the General Division found that there was insufficient evidence that it was unrealistic or difficult to overcome these obstacles. The General Division also found that while the medical opinions precluded manual labour, they did not exclude the possibility of sedentary work. The General Division wrote, "Without the medical evidence to establish the nature of the [Applicant's] physical and psychological limitations, the level of the [Applicant's] disability is unclear".

SUBMISSIONS

[10] The Applicant's representative submits that the General Division erred in law and based its decision on various erroneous findings of fact that it made in a perverse or capricious

manner or without regard for the material before it. In particular, he submits that the General Division erred as follows, that it:

Error of Law

(a) erred in concluding that the Applicant's disability could not be severe and prolonged under the *Canada Pension Plan*, despite its findings set out in paragraph 56;

(b) misapplied the "*Villani* test" (*Villani v. Canada (Attorney General)*, 2001 FCA 248);

(c) did not find the Applicant's disability to be severe and prolonged or that she is not incapable regularly of pursuing any substantially gainful occupation;

Erroneous findings of fact

(d) in finding that the Applicant's disability could not have been severe at her minimum qualifying period if there was a lack of prescription medication to deal with her pain and if she was not seeing any specialists; and

(e) misapplied the *Villani* test when it did not consider social factors.

[11] The Applicant's representative submits that the General Division did not consider the material as a whole "in a practical light" when rendering its decision.

[12] The Respondent has not filed any written submissions in response to the leave application.

ANALYSIS

[13] 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). The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[14] Subsection 58(1) of the *Department of Employment and Social Development Act* sets out that the only grounds of appeal are 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.

[15] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted.

Error of law

(a) Paragraph 56

[16] At paragraph 56 of its decision, the General Division wrote:

> [56] The Tribunal finds that while the medical evidence leads to the conclusion that the Appellant could not do any physical substantially gainful employment, the medical evidence provides insufficient evidence of a medical reason why the Appellant could not do substantially gainful employment.

[17] The Applicant's representative submits that this statement shows that the General Division found the Applicant's disability to be severe and prolonged for the purposes of paragraph 42(2)(a) of the *Canada Pension Plan,* which stipulates that "a person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation".

[18] While it is true that the General Division found the Applicant unable to do any substantially gainful employment, it was restricted to substantially gainful employment of a

physical nature. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(b) *Villani* test

[19] The Applicant's representative submits that the General Division erred in law as it misapplied the *Villani* test.

[20] It would have been helpful had the Applicant's representative provided me with some particulars to support the allegation that the General Division misapplied the *Villani* test. From what I can determine, the General Division noted the *Villani* test at paragraph 57 when it indicated that the severe criterion must be assessed in a real world context, and that the General Division had to consider factors such as age, level of education, language proficiency and past work and life experience. The General Division then proceeded to consider the Applicant's personal characteristics.

[21] 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 that 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. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(c) Restatement of test

[22] The Applicant's representative submits that the General Division erred as it did not find the Applicant's disability to be severe and prolonged or that she is not incapable regularly of pursuing any substantially gainful occupation. While the Applicant's representative alleges that this amounts to an error in law, this is not a proper ground of appeal, as it speaks to the test which the Applicant must meet to qualify for a disability pension under the *Canada Pension Plan* and the ultimate conclusion drawn by the General Division. What an applicant must show is how the General Division might have erred in coming to its final decision as to whether an applicant qualifies for a Canada Pension Plan disability pension.

Erroneous findings of fact

(d) Lack of prescription medication

[23] The Applicant's representative submits that the General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it, when it concluded that the Applicant's disability could not have been severe at her minimum qualifying period if there was a lack of prescription medication to deal with her pain and if she was not seeing any specialists.

[24] Characterized this way, it cannot be said that there was an erroneous finding of fact, given that there was an evidentiary foundation upon which the General Division could base its decision, and given that it could have drawn this conclusion on the evidence before it. Whether a different finding of fact could have been made is not the test. I am not satisfied that the appeal has a reasonable chance of success, based on how this ground has been characterized.

[25] If the General Division had concluded that these two bases alone were determinative of whether an applicant could be found disabled for the purposes of the *Canada Pension Plan,* I might have been inclined to find that the appeal might have a reasonable chance of success, but clearly, the General Division reached its conclusions based on a number of other considerations.

(e) *Villani*

[26] The Applicant's representative further submits that the General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it, when it misapplied the *Villani* test by failing to consider social factors.

[27] The General Division seems to have defined "social factors" (in the context of its decision) as the Applicant's personal characteristics. The General Division looked at the Applicant's personal characteristics, such as her age, language skills, education and work experience. The General Division noted when the Applicant was born and concluded that her

age would not preclude any employment or retraining. The General Division noted the opinions of two different physicians; one physician wrote in November 2011 that with the Applicant's level of education, she could only get manual work and would be unable to do anything that would involve bending, pushing, pulling, lifting or carrying. Another physician wrote that it would be difficult for the Applicant to find work, given her difficulties with mobilization and lack of trained skills. The General Division accepted these opinions in finding that indeed the Applicant is hampered by both physical limitations and limited education. The General Division found that the Applicant has language difficulties, educational limitations and limited work experience. Hence, it cannot be said that the General Division failed to consider "social factors".

[28] If the Applicant's representative is requesting that we reassess the Applicant's personal characteristics in a real world context in the Applicant's favour, this goes well beyond the scope of a leave application.

[29] I am not satisfied that the appeal has a reasonable chance of success on the ground that the General Division failed to consider "social factors" or the personal characteristics of the Applicant.

CONCLUSION

[30] The Application is refused.

Janet Lew
Member, Appeal Division