Citation: *B. F. v. Minister of Employment and Social Development*, 2015 SSTAD 1440

Appeal No: AD-15-1125

BETWEEN:

B. F.

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: December 15, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated July 10, 2015. The General Division conducted an in-person hearing on June 24, 2015 and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that his disability was not "severe" at his minimum qualifying period of December 31, 2000. The Applicant filed an application requesting leave to appeal on October 16, 2015. The Applicant alleges that the General Division made a number of errors. 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?

SUBMISSIONS

[3] The Applicant submits that the General Division erred as follows, in:

Errors of law

(a) Failing to properly apply subsections 42(2) and 44(1) of the *Canada Pension Plan* when it determined that the Applicant's disability was not severe and prolonged and in particular, failed to resolve any ambiguity in the evidence in the Applicant's favour;

(b) Failing to properly apply *Villani v. Canada (Attorney General)*, 2001 FCA 248, by failing to consider the Applicant's ability to be employed in the "competitive workforce";

(c) Relying solely on *Inclima v. Canada*, 2003 FCA 117, without referencing or considering any jurisprudence upon which the Applicant relied, on the issue of the Applicant's efforts to find work. The Applicant submits that the General Division erred in concluding that the absence of any efforts to find

other types of employment automatically disentitles a claimant from a Canada Pension Plan disability pension;

(d) Other errors of law "as may be presented on hearing" of the appeal;

Erroneous findings of fact

(e) Placing too much weight on the evidence that was unfavourable to the Applicant and failing to place more weight on the evidence that was supportive of the Applicant;

(f) Failing to adequately consider the medical information "in light of the principles enunciated in *Villani";*

(g) Making a patently unreasonable determination and failing to regard or properly consider the information before it and, in particular, the decision of the Workers' Compensation Board (the "Board") that the Application was not competitively employable, as not being "persuasive". The Applicant submits that although the decision of the Board was based on a different statutory scheme and definition for disability, the Board undertook a thorough examination of the evidence. The Applicant submits that the Board found that the Applicant was unable to work either part- or full-time, in any form of employment. The Applicant submits that under the *Canada Pension Plan,* one must consider a claimant's total disability. The Applicant submits that the General Division should have followed the reasoning of the Board; and

(h) Such other erroneous findings and lack of regard for the material that may be presented by the Applicant at the appeal;

[4] The Applicant also requests that the Applicant be permitted to attend and give evidence at the hearing of the appeal.

[5] The Respondent has not filed any written submissions in respect of this leave application.

ANALYSIS

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* sets out the grounds of appeal as being limited to 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.

[7] 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. The Federal Court of Canada recently affirmed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

Errors of Law

[8] The Applicant submits that the General Division failed to properly apply subsections 42(2) and 44(1) of the *Canada Pension Plan.* Paragraph 42(2)(a) of the *Canada Pension Plan* defines when a person is considered disabled, and subsection 44(1) of the *Canada Pension Plan* sets out when benefits are payable. The Applicant however has not provided any specifics, other than to say that the General Division ought to have resolved any ambiguities in the evidence in favour of the Applicant. It is unclear what ambiguities the Applicant envisions ought to have been resolved in favour of the Applicant. Without any specifics, I am not satisfied that this ground has a reasonable chance of success.

[9] The Applicant submits that the General Division failed to properly apply *Villani,* in that it failed to consider the "real world" context in which the Applicant finds himself. The Federal Court of Appeal held that a consideration of the "real world" context means

that a decision-maker should have regard for a claimant's personal characteristics, such as his age, language, education, past work and life experience. The General Division cited *Villani* and then proceeded to consider the Applicant's personal characteristics, including at paragraph 65 of its decision.

[10] The Federal Court of Appeal in *Villani* also cautioned against interfering with a decision-maker's assessment of a claimant's personal characteristics, as deference ought to be accorded to the decision-maker's assessment of the evidence. I am not satisfied that this ground, that the General Division failed to properly apply *Villani,* has a reasonable chance of success.

[11] The Applicant submits that the General Division erred by relying solely on *Inclima*, where his job search efforts were concerned. The Applicant submits that the General Division ought to have referred to and followed the case authorities upon which the Applicant relied. The Applicant submits that the Applicant's authorities show that there is authority to uphold a claimant's entitlement to a disability pension under the *Canada Pension Plan*, and that he is not automatically disentitled by virtue of the fact that he did not undertake any efforts to look for and maintain work.

[12] I presume that the Applicant is referring to *Daly v. MEI* (CP 2919 PAB 1984), which is referred to in the Applicant's submissions before the General Division (GD3-3 to GD3-5). There, the Pension Appeals Board concluded that, "taking a broad view of the evidence, [it was] not persuaded that Mr. Daly could reasonably be expected to successfully retrain for work of a non-physical nature". In the facts of that decision, it was conceded that any type of retraining or other work rehabilitative could be undertaken without first upgrading Mr. Daly's literacy skills, but that too did not appear a reasonable option. It appears that *Daly* was largely fact driven.

[13] While it might have been helpful had the General Division addressed *Daly* or any other legal authorities upon which the Applicant might have relied, the Supreme Court of Canada has held that exhaustive reasons addressing all of the issues before a decision-maker are unnecessary: *Newfoundland and Labrador Nurses' Union v. Newfoundland and*

Labrador (Treasury Board), 2011 SCC 62. Writing on behalf of the Supreme Court of Canada, Abella J. wrote:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion *(Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.,* [1975] 1 S.C.R. 382, at p. 391).

[14] As Stratas J.A. also wrote in *Canada v. South Yukon Forest Corporation and Liard Plywood and Lumber Manufacturing Inc.,* 2012 FCA 165:

> … trial judges are not trying to draft an encyclopedia memorializing every last morsel of factual minutiae, nor can they. They distill and synthesize masses of information, separating the wheat from the chaff and, in the end, expressing only the most important factual findings and justifications for them.

[15] In any event, *Daly* does not have any precedential value as it is a decision of the Pension Appeals Board. It was rendered prior to *Inclima*, which is binding. *Inclima* requires an applicant to show that efforts at obtaining and maintaining employment had been unsuccessful by reason of the person's health condition, where there is evidence of work capacity. Here, the General Division found that the Applicant exhibited work capacity and hence, required that he show that at any efforts to look for and maintain work had been unsuccessful by reason of his health condition. Ultimately, the General Division found that there was simply insufficient evidence at the Applicant's minimum qualifying period of December 31, 2000 to find that he was incapable regularly of pursuing any substantially gainful occupation.

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

Erroneous findings of fact

[17] The Applicant submits that the General Division based its decision on numerous erroneous findings of fact, without regard for the material before it. This submission is based on two alleged erroneous findings of fact that deal with: (1) the assignment of weight and (2) the decision of the Board.

[18] The Federal Court of Appeal has previously addressed this submission in other cases that the trier of fact had failed to properly assign the appropriate weight to the evidence. In *Simpson v. Canada (Attorney General)*, 2012 FCA 82, the Federal Court of Appeal refused to interfere with the decision-maker's assignment of weight to the evidence, holding that that properly was a matter for "the province of the trier of fact". I see no basis to deviate from this practice. I am not satisfied that the appeal has a reasonable chance of success on the ground that the General Division did not apply "due weight" to the Applicant's evidence. I am not satisfied that the appeal has a reasonable chance of success on this ground.

[19] The Applicant submits that the General Division failed to adequately consider the medical evidence in light of *Villani.* This submission lacks sufficient particularity, but in any event, it seems to call for a reassessment of the evidence. As the Federal Court held in *Tracey*, it is not the role of the Appeal Division to reassess the evidence or reweigh the factors considered by the General Division when determining whether leave should be granted or denied. I am not satisfied that the appeal has a reasonable chance of success on this ground.

[20] The Applicant submits that the General Division should have followed the reasoning of the Workers' Compensation Board, as it had conducted a thorough examination of the evidence and ultimately found that the Applicant was not competitively employable. Although the Board may have determined the Applicant to be competitively unemployable, the Social Security Tribunal is not bound by any determinations made by the Board, or for that matter, any other administrative body. The fact that the Applicant may have been subjected to a rigorous examination under a different administrative scheme is of little or no probative value to the issues at hand.

The *Canada Pension Plan* strictly defines disability and the Applicant is still required to prove that he is disabled as defined by the *Canada Pension Plan*. I am not satisfied that the appeal has a reasonable chance of success under this particular ground of appeal.

CONCLUSION

[21] The application for leave to appeal is denied.

Janet Lew
Member, Appeal Division