Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *A. B. v. Minister of Employment and Social Development*, 2016 SSTADIS 88

Date: February 26, 2016
File Number: AD-15-1298
APPEAL DIVISION

BETWEEN:

A. B.

Appellant

and

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Hazelyn Ross

DATE OF DECISION: February 26, 2016

REASONS AND DECISION

DECISION

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

INTRODUCTION

[2] On October 8, 2015, the Tribunal's General Division determined that a disability pension under the Canada Pension Plan, (the CPP)' was not payable to the Applicant. The Applicant has filed an application for leave to appeal, (the Application), the decision of the General Division with the Appeal Division of the Tribunal.

GROUNDS OF THE APPLICATION

[3] Counsel for the Applicant submitted that the General Division breached all three grounds of appeal set out in subsection 58(1)[1] of the Department of Employment and Social Development Act, (the DESD Act).

ISSUE

[4] The Member must decide if the appeal has a reasonable chance of success.

THE LAW

[5] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), "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."

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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.

[6] 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 Federal Court of Appeal has equated a reasonable chance of success to an arguable case*: Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General),* 2010 FCA 63.

ANALYSIS

[7] Counsel for the Applicant made extensive submissions in support of the Application and the Appeal. In his arguments Counsel referred to the medical evidence that had been submitted to the General Division as well as to the testimonies of the Applicant and his wife. Counsel submitted that they provided ample support for a finding that the Applicant suffers from a disability that is severe and prolonged within the meaning of the CPP.

[8] Counsel for the Applicant submitted that the General Division penalised the Applicant for not being able to take prescription medication. The Appeal Division infers that this the breach of natural justice to which Counsel refers. While the General Division did allude to the fact that there was no indication that the Applicant had attended a multi-disciplinary pain management programme, the Appeal Division finds that there is no evidence in the decision that the General Division "penalised" the Applicant because of this.

[9] The General Division decision appears to have focused on how the Applicant's conditions were treated and made certain inferences from the types of treatment that the Applicant received. The Appeal Division is not persuaded that this amounts to "penalising" the Applicant. Accordingly, the Appeal Division finds that the General Division did not breach natural justice. Thus, this is not a ground of appeal that has a reasonable chance of success.

[10] Counsel for the Applicant also submitted that the General Division had committed errors of law. He referred to the General Division's statement that while English was the Applicant's "second language, he spoke it well and with little noticeable accent" contending that this fact was indicative neither of the Applicant's educational background nor of the transferability of his skills. The Appeal Division is not persuaded that the General Division

committed an error of law as the alleged. In the view of the Appeal Division, the statement was made in the process or context of determining the Applicant's ability to engage in a substantially gainful occupation. Language proficiency is one of the personal characteristics specifically mentioned in *Villani*[2] thus; the Appeal Division is baffled by the contention that the ability to speak English well is not one that works to the benefit of the Applicant. Accordingly, the Appeal Division that referring to the Applicant's proficiency in the English language is not an error of law. Leave to appeal cannot be granted on this basis.

[11] As stated earlier, Counsel for the Applicant referred to the medical evidence and made copious submissions on it. He made particular reference to the Applicant's mental health condition, arguing that the effect of his depression on the Applicant's ability to regularly pursue any substantially gainful occupation had been downplayed. He submitted that several medical reports support a finding that the Applicant was disabled by reason of his mental health condition.

[12] In this regard, the General Division had found that the absence of a referral to a mental health care specialist did not support a finding that the Applicant had a severe mental health condition such that it rendered him disabled within the meaning of the CPP. The Appeal Division notes that the medical reports on which Counsel for the Applicant relies all post-date the end of the Applicant's minimum qualifying period, (MQP).

[13] Further, the medical evidence that was before the General Division and which Counsel for the Applicant expressly accepted does not indicate that the Applicant suffered from any serious mental health condition prior to the end of the MQP. This assertion appears in the medical report signed by Dr. Bibic, the Applicant's family physician. However, Dr. Bibic was not treating the Applicant in 2006-2007, therefore, his report which is dated in 2013 cannot, in the view of the Appeal Division, be taken as a reliable indicator of the Applicant's mental health condition as it existed prior to the end of his MQP.

[14] The same argument applies tot the other, post-MQP medical reports on which the Applicant relies. Accordingly, the Appeal Division finds that the General Division's

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[2] *Villani v. Canada (Attorney General)* 2001 FCA 248.

conclusions in regard to the Applicant's mental health conditions do not disclose an error either of law or of fact. This is not a ground of appeal that would have a reasonable chance of success.

CONCLUSION

[15] Counsel for the Applicant submitted that the General Division had committed breaches of natural justice; erred in law; and committed errors of fact. The Appeal Division is not satisfied that the appeal would have a reasonable chance of success on any of the grounds cited as the basis of the appeal because it finds that the submissions of Counsel for the Applicant are not
well-founded.

[16] The Application is refused.

Hazelyn Ross
Member, Appeal Division