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

Citation: *B. D. v. Minister of Employment and Social Development,* 2016 SSTADIS 176

Tribunal File Number: AD-16-173

BETWEEN:

B. D.

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: May 17, 2016

Canada

DECISION

[1] The Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), grants leave to appeal.

INTRODUCTION

[2] The Applicant applies for leave to appeal, (the Application), from the decision of the General Division of the Tribunal issued October 20, 2015, which decision determined that the Applicant was not eligible for a *Canada Pension Plan* disability pension.

ISSUE

[3] The Appeal Division must decide if the appeal has a reasonable chance of success.

THE LAW

[4] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), govern the granting of leave to appeal. As provided by subsection 56(1) of the DESD Act, leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division. According to subsection 56(1) "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(3) provides that "the Appeal Division must either grant or refuse leave to appeal."

[5] In order to obtain leave to appeal, subsection 58(2) of the DESD Act requires an applicant to satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal. 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."

[6] An applicant satisfies the Appeal Division that his appeal would have a reasonable chance of success by raising an arguable case in his application for leave.[1] In *Canada (Minister*

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[1] [1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

of Human Resources Development) v. Hogervorst, 2007 FCA 41 and in *Fancy v. Canada (Attorney General)*, 2010 FCA 63 an arguable case has been equated to a reasonable chance of success.

[7] Subsection 58(1) of the DESD Act sets out the only three grounds of appeal, namely:-

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.

[8] *Tracey v. Canada (Attorney General),* 2015 FC 1300 supports the view that in assessing an application for leave to appeal the Appeal Division must first determine whether any of the Applicant's reasons for appeal fall within any of the stated grounds of appeal

SUBMISSIONS

[9] On the behalf of the Applicant her counsel submitted:-

1. the General Division erred in law by misinterpreting and misapplying the Pension Appeals Board, (PAB), case of *Agostino v. Canada (Minister of Human Resources Development)* CP 04171 March 6, 1997.
2. the General Division erred in law by misapplying the test in *Villani v. Canada (Attorney General),* 2001 FCA 248.
3. the General Division based its decision on erroneous findings of fact that it made perversely or capriciously or without regard for the misconstrued the evidence and applied the wrong test regarding its assessment of the Applicant's residual capacity to work.
4. The General Division misapplied the decision in *lnclima v. Canada (Attorney General)* 2003 FCA 117

ANALYSIS

Did the General Division misinterpret and misapply *Agostino?*

[10] Counsel for the Applicant submitted that the General Division erred in law by misinterpreting and misapplying the decision of the former Pension Appeals Board, (the PAB), in *Salvatore Agostino v. Canada (Minister of Human Resources Development),* CP 04171 March 6, 1997. She charged that the General Division "effectively diagnosed the Appellant with a form of chronic pain syndrome without any medical evidence before him to that effect." (AD1-4)

[11] Counsel's position is based on the statement "presented a similar picture of herself during the hearing" in paragraph 23 of the decision which statement that likened the Applicant's presentation of herself during the hearing to that of the applicant in *Agostino.* She argued that by likening the Applicant to the appellant in *Agostino* the General Division "improperly assumed the role of a "diagnostician." In the view of Counsel for the Applicant this comparison was a serious error of law as well as an excess of jurisdiction because there was no medical evidence before the General Division that the Applicant had been diagnosed with any form of chronic pain syndrome or that she had issues with regard to pain management. Additionally, Counsel for the Applicant submits that the General Division ought to have provided the *Agostino* decision to her in advance of making its decision so as to allow her to make submissions or comment.

[12] While, without some precedential indication, which Counsel for the Applicant did not provide, the Appeal Division is not persuaded that the General Division was under any duty to provide Counsel for the Applicant, or indeed any party, with a copy of the *Agostino* decision prior to making its decision. Nonetheless, the Appeal Division finds that an arguable case has been raised because it is not clear to the Appeal Division how the General Division decision how arrived at its conclusion that the Applicant before him shared similar characteristics to the applicant in *Agostino.* Neither is it clear to the Appeal Division the extent to which this finding influenced the outcome of the decision.

Did the General Division misapply Villani?

[13] Counsel for the Applicant also submitted that the General Division misinterpreted and misapplied *Villani* by making "unfounded assumptions about the Appellant's ability to be gainfully employed in the real world without properly assessing the totality of the evidence before him. (AD1-4)

[14] Counsel for the Applicant submitted that the General Division erred when it found that the Applicant retained work capacity despite finding that she may have limitations in the workforce due to her age, lack of education, lack of English speaking skills and limited employment qualifications. Counsel for the Applicant submitted that the General Division ignored the Applicant's work history and the fact that she had difficulty doing light kitchen duties on a part-time basis.

[15] The Appeal Division does not agree with Counsel's submissions as put forward. Specifically, the Appeal Division finds that there is no contradiction between a finding that the Applicant had limitations that limited her capacity for work and a finding that she retained work capacity. However, again the Appeal Division finds that is not clear how the General Division arrived at the latter conclusion. The Member listed the Applicant's ailments as stated by her family physician. (para 21) Without any analysis, he then states his finding that the conditions that pre-dated the Applicant's MQP were knee and back pain but that the Applicant retained work capacity. Without the proper analysis, the Appeal Division cannot be satisfied that the General Division applied the appropriate legal tests to the Applicant's situation. Thus, the Appeal Division finds that the Applicant has raised an arguable case.

[16] Having come to this conclusion, the Appeal Division finds that it is not necessary to address the other questions raised by Counsel for the Applicant since they are essentially subsumed under the question of how the General Division came to the conclusion that the Applicant had retained work capacity on or before the end of her MQP on December 31, 2013.

CONCLUSION

[17] For the above reasons, the Application is granted.

[18] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Hazelyn Ross
Member, Appeal Division