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

Citation: *B. W. v. Minister of Employment and Social Development*, 2016 SSTADIS 238

Tribunal File Number: AD-16-185

BETWEEN:

B. W.

Applicant

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: June 28, 2016

Canada

REASONS AND DECISION

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

INTRODUCTION

[2] The Applicant applies for leave to appeal from the decision of the General Division of the Tribunal dated November 26, 2015 that dismissed her appeal of a reconsideration decision. The General Division found that she was not eligible for disability benefits pursuant to paragraph 42(2)(a) of the *Canada Pension Plan, (CPP),* (the Application).

GROUNDS OF THE APPLICATION

[3] On the Applicant's behalf, her representative submitted that the General Division erred in law in making the decision, whether or not the error appears on the face of the record. She also submitted that the General Division based its decision on erroneous findings of fact and breached natural justice. (AD1-3)

ISSUE

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

THE GOVERNING STATUTORY PROVISIONS

[5] 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."

[6] Subsection 58(1) of the *Department of Employment and Social Development, (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.

ANALYSIS

[7] 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."

[8] 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 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.

[9] *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.

Did the General Division breach natural justice?

[10] This question is raised by the submission of the Applicant's representative that the General Division Member "used personal/biased judgement" in coming to its decision. The representative posed the question, "how does the tribunal define "well educated"? CPP has not outlined any public criteria."

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

[11] The offending description of the Applicant is contained in paragraph 23 of the decision. It is part of the submissions that were made by counsel for the Respondent. It does not form part of the analysis that was made by the General Division. Therefore the Appeal Division finds the submission not to be substantiated. The General Division did not use personal or biased judgment and did not breach natural justice as the Applicant's representative submitted. Leave to appeal cannot be granted on the basis of this submission.

Did the General Division base its decision on an erroneous finding of fact?

[12] On her behalf, the Applicant's representative submitted that the "The tribunal member mishear/misunderstood answer to question, quoted irrelevant cases." The Appeal Division interpreted this submission to mean that the General Division based its decision on an erroneous finding of fact. Beyond the bald allegation the Applicant's representative did not explain how the General Division misheard or misunderstood the Applicant's answers to questions. Neither did she state which responses were misheard or misunderstood. The Appeal Division cannot guess at the supposed errors of the General Division. Accordingly, the Appeal Division finds that, in relation to this portion of the submission, the Applicant has not raised grounds of appeal that would have a reasonable chance of success.

[13] The other part of the submission was that the General Division quoted irrelevant cases. Again, the Applicant's representative has not pointed to any specific case or otherwise shown that a specific case or cases were irrelevant to the General Division's decision. Thus, the Appeal Division finds that grounds of appeal that would have a reasonable chance of success have not been raised.

Did the General Division err in law?

[14] In this regard, the Applicant's representative submitted that the "tribunal member had not taken medical diagnosis and applied into real world context." The real world context set out in *Villani v. Canada (Attorney General),* 2001 FCA 248 requires that the when deciding whether or not a disability is severe, that is, whether an applicant is incapable regularly of pursuing any substantially gainful occupation, the decision-maker must keep in mind factors such as age, level of education, language proficiency, and past life and work experience. (para. 38)

[15] In the Applicant's case, the General Division examined those factors at paragraph 33 of its decision. The General Division identified the Applicant as being 44 years old, with some proficiency in reading and writing English; fluent in spoken English; with demonstrated capacity to learn; and with work experience that included administrative experience in Poland. The General Division concluded that the Applicant had transferable skills.

[16] The Appeal Division finds that in so far as the General Division cited the requirements of the case law and linked the *Villani* factors to the Applicant's personal circumstances, it committed no error. However, it is clear that the Applicant's representative found the General Division's analysis inadequate. The Appeal Division infers that the Applicant takes the position that General Division should have made a more direct link between her *Villani* factors and the loss of the use of her right arm. The Appeal Division understands the Applicant's position, nonetheless, it is not persuaded that this failure points to an error of law. In *Giannaros v. Canada (Minister of Employment and Social Development),* 2005 FCA 187, the Federal Court of Appeal rejected a similar submission in the following terms:-

> [14] I now turn to the applicant's last submission, which is based on our Court's decision in *Villani, supra*. Specifically, the applicant argues that the Board erred in omitting to consider her personal characteristics, such as age, education, language skills, capacity to retrain, etc. In my view, in the circumstances of this case, this last submission cannot possibly succeed. In *Villani, supra,* at para. 50, our Court stated unequivocally that a claimant must always be in a position to demonstrate that he or she suffers from a severe and prolonged disability which prevents him or her from working:
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> > [50] This restatement of the approach to the definition of disability does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation". Medical evidence will still be needed as will evidence of employment efforts and possibilities. Cross-examination will, of course, be available to test the veracity and credibility of the evidence of claimants and others.
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> [15] As the Board was not persuaded that the applicant suffered from a severe and prolonged disability, as of December 31, 1995, there was, in my view, no necessity for it to apply the "real world" approach.

[17] Well before it considered and the Applicant's "*Villani* factors" the General Division had already concluded that the Applicant had not met her onus to show that she had a disability that

was severe and prolonged as defined by the CPP. Therefore, according to *Giannaros* there was no necessity for it to apply the real world approach. Accordingly, the Appeal Division finds that the General Division did not err in law with respect to its application of the "real world" approach.

CONCLUSION

[18] For all of the above reasons the Appeal Division is not satisfied that the Applicant has raised grounds of appeal that have a reasonable chance of success.

[19] The Application is refused.

Hazelyn Ross
Member, Appeal Division