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

Citation: *Minister of Employment and Social Development v. A. M.,* 2016 SSTADIS 235

Tribunal File Number: AD-16-296

BETWEEN:

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

Applicant

and

A. M.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Hazelyn Ross

DATE OF DECISION: June 27, 2016

DECISION AND REASONS

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

INTRODUCTION

[2] The Applicant appeals from the decision of the General Division dated November 15, 2015 that found the Respondent eligible for disability benefits pursuant to paragraph 42(2)(a) of the *Canada Pension Plan, (CPP),* (the Application).

GROUNDS OF THE APPLICATION

[3] The Applicant submitted that the General Division erred in law and based its decision on erroneous findings of fact made in a perverse or capricious manner or without regard to the material before it.

ISSUE

[4] The Appeal Division must decide if 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.

The General Division erred in law.

[10] Counsel for the Applicant set out four ways in which she alleged the General Division erred in law, namely, that it:-

1. Failed to apply the principles set out by the Federal Court of Appeal, (FCA), in *Inclima v. Canada (A.G.)*, 2003 FCA 117 by failing to assess whether or not the Respondent had been unsuccessful at obtaining and maintaining employment due to his health condition.

2. Failed to apply *Villani v. Canada (Attorney General,)*2001 FCA 248 in its decision and failed to direct its mind specifically to whether the Claimant, in the circumstances of his background and medical condition, is incapable regularly of pursuing any substantially gainful occupation.

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

3. Relied on the medical reports of Dr. Peacock without indicating why it preferred his evidence over the objective medical assessments of specialists and other practitioners. The Applicant submitted that Dr. Peacock's report merely repeated the Respondent's subjective complaints.

4. Relied on *A.K. v. MHRSD*, (September 2. 2009), CP 25905 (PAB), and looked only at the hours of work that the Respondent might be available for work without considering the number of hours that the Respondent had to study and prepare for class.

Did the General Division err in its application of the *Inclima* principles?

[11] *Inclima* requires that where it is shown that an applicant for disability benefits retains work capacity, they must show that their efforts at obtaining and retaining employment were unsuccessful by reason of their health condition.

[12] Counsel for the Applicant submitted that the General Division erred in two regards in relation to the application of *Inclima*. Counsel for the Applicant submitted that while the General Division accepted, on the face of the record, that the Respondent had capacity to work it did not, a) to set out the law, or b) apply the law.

[13] Having examined the decision, the Appeal Division finds the General Division decision to be somewhat contradictory. On the one hand, it found that the Respondent has work capacity of 10 hours a week, but that this did not constitute the capacity regularly to pursue a substantially gainful occupation. On the other hand, the General Division agreed that on the face of the record the Respondent did have capacity to work.

[14] The General Division did not explain how it came to this latter position neither did it explain how it came to the conclusion that the Applicant was working at his maximum capacity in September 2012 and therefore that he had not presented evidence of capacity to work at a substantially gainful occupation. The Appeal Division finds that the ambiguity points to the possibility of the General Division having made an error of law in regard to its analysis of the Respondent's ability to engage in any substantially gainful occupation. This is a ground of appeal that may reasonable chance of success.

Did the General Division fail to apply *Villani?*

[15] Counsel for the Applicant submitted that the General Division erred in that it failed to identify the law in *Villani* and failed to apply the law as stated by the FCA in the case. In *Villani*, the FCA set certain principles that have come to be known as the "real world" approach that requires consideration of an appellant's personal circumstances in the effort to give meaning to the words of paragraph 42(2)(a) of the CPP.

[16] The General Division not only did not identify the law in *Villani* as submitted by the Applicant's counsel, it did not apply this approach, or if it did, it is not clear to the Appeal Division how, as the decision is silent on the underpinnings of the General Division's analysis. Accordingly, the Appeal Division finds that the Applicant has raised grounds that have a reasonable chance of success on appeal.

Did the General Division fail to indicate why it preferred the reports of Dr. Peacock?

[17] Counsel for the Applicant submitted that the General Division placed reliance on the medical report of Dr. Peacock without explaining the reason why it preferred his reports. Counsel submitted that this was an error of law.

[18] Dr. Peacock is the Respondent's family physician. Counsel for the Applicant submitted that the only medical reports from Dr. Peacock that were in evidence appeared to have been solicited by the Respondent and that the General Division had no other evidence of the Respondent's consultations with Dr. Peacock.

[19] The General Division is entitled to prefer evidence, however, it is generally accepted that where it does so, it will state why it did so. In this case, the General Division did not analyse Dr. Peacock's evidence before stating its preference for it. This is an error of law. *Canada (Attorney General) v. Fink*, 2006 FCA 354 at para. 6. Leave to appeal is also granted on this ground.

[20] The final error of law the General Division is alleged to have made is that it relied on A.K. *v. MHRSD* in circumstances where the Respondent had failed to make any efforts to find alternate employment. In *A.K. v. MHRSD* the appellant was able to work for only twelve hours

a week at a wage rate of $20.83 per hour. The Respondent made no attempt to find alternate employment after the May 20, 2010 accident. He returned to school on a full- time basis in September 2012.

[21] In *A.K. v. MHRSD* Pension Appeals Board found that the appellant met the definition of severe disability but not before it had considered her testimony, assessed her credibility, and made a finding that the medical evidence was consistent in stating that she had a severe disability. *A.K. v. MHRSD, supra* at para 21. Moreover, in coming to its determination, the Pension Appeals Board considered a number of cases in relation to persons who had been employed on a part-time basis. The General Division, however, made no such analysis and appears to have merely stated its conclusions. For these reasons, the Appeal Division finds that the Applicant's submissions in this regard constitute grounds of appeal that have a reasonable chance of success.

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

[22] Counsel for the Applicant also submitted that the General Division based its decision on erroneous findings of fact made in a perverse or capricious manner or without regard for the material before it. Counsel submitted that the General Division failed to consider the time the Respondent would necessarily have spent out of class in the pursuit of his studies and that this time ought to have factored in to the General Division's calculation of the Respondent's capacity to pursue regularly any substantially gainful occupation. The Appeal Division finds that an arguable case has been raised in this regard.

[23] In addition, the General Division found that the Respondent had a severe medical condition as of September 2012. Its rationale for this finding was that it was only until the Respondent returned to school that he was able to provide evidence relating to his capacity to work. As the Respondent's motor vehicle accident occurred in May 2010, and as he underwent a period of physiotherapy to address the after effects of the accident, this leaves a gap of more than two years which was not accounted for. Accordingly, the Appeal Division disagrees with the General Division's conclusion that the Respondent was unable to provide evidence of his incapacity prior to September 2012.

[24] The Appeal Division finds that the General Division may have 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.

CONCLUSION

[25] For all of the above reasons, the Application is granted.

Hazelyn Ross
Member, Appeal Division