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

Citation: *I. D. v. Minister of Employment and Social Development,* 2016 SSTADIS 281

Tribunal File Number: AD-16-247

BETWEEN:

I. D.

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: July 27, 2016

Canada

REASONS AND 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 31, 2015, which decision determined that the Applicant was not eligible for a *Canada Pension Plan,* (CPP), disability pension.

REASONS FOR THE APPLICATION

[3] Counsel for the Applicant submitted that the General Division erred in law, stating that:- "If the Member had applied the correct test for severe and prolonged disability under the CPP and correctly interpreted the facts that were before her she would have concluded that Ms. I. D. has suffered from a severe and prolonged disability from the time she last worked."

[4] In the schedule to her Application, Counsel for the Applicant amplified the above reasons, submitting that the General Division did not only err in law, it also based its decision on erroneous findings of fact and made errors of mixed fact and law.(AD1-20 et seq.).

ISSUE

[5] Does the appeal have a reasonable chance of success?

THE LAW

[6] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act*, (DESD Act), govern the grant of leave to appeal. Subsection 56(1) provides that "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Thus, leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.

[7] Subsection 58(3) provides that "the Appeal Division must either grant or refuse leave to appeal." In order to obtain leave to appeal, an applicant must satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal.[1]

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

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.

[10] *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.

ANALYSIS

[11] Counsel for the Applicant made several submissions alleging that the General Division erred in law and in fact in coming to its conclusion that the Applicant did not meet the CPP definition of severe and prolonged disability. These submissions included a failure to make a proper, real world analysis as well as making perverse findings about the Applicant's treatments.

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

The General Division erred in law

[12] Counsel for the Applicant submitted that while the General Division cited *Villani v. Canada (Attorney General),* 2001 FCA 248, it did not properly apply the “real world” analysis to the evidence as it requires. A failure to cite or to conduct an analysis in accordance with the principles in *Villani* is an error of law: *Garrett v. Canada (Minister of Human Resources Development),* 2005 FCA 84.

[13] At paragraph 35 of its decision the General Division cited *Villani,* setting out the factors it states a decision maker must consider when it decides the question of disability. However, it makes no further analysis of these factors in relation to the Applicant’s personal circumstances. The Appeal Division agrees that, without more, this would be an error of law as described in *Garrett*. However, the Federal Court of Appeal,(FCA), by its decision in *Giannaros v Canada (Minister of Social Development),* 2005 FCA 187, has indicated that in certain circumstances the *Villani,* real world analysis may not be necessary. Commenting on this issue, the FCA stated:-

> [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.

[14] Turning to the General Division decision, the Member summarised as well as conducted an extensive analysis of the Applicant's testimony and the medical evidence regarding her medical conditions and her retained work capacity. The General Division found, on a balance of probabilities, that the Applicant had not met her onus to establish that she suffers from a disability that was severe and prolonged within the meaning of the CPP. Therefore, following *Giannaros,* there was no necessity for the General Division to apply the "real world" approach of *Villani.* Accordingly, this submission does not disclose a ground of appeal that may have a reasonable chance of success.

The General Division decision is based on an erroneous finding of fact

[15] Counsel for the Applicant submitted that the General Division made several erroneous findings of fact when it found that:

1. the Applicant was treated conservatively with Tylenol. Referring to paragraph 19 of the decision, Counsel submitted that the evidence shows that the Applicant was treated with several other medications.
2. because the Applicant was treated conservatively with Tylenol she was not prevented from doing light or sedentary work within her limitation. Counsel submitted that the General Division linked the Applicant's "conservative" treatment with Tylenol to the Applicant's retained work capacity.
3. there was no evidence of the Applicant receiving injections for her right shoulder, in the face of clear evidence that she did; and
4. the Applicant did not see or receive treatment from any specialist when there was clear evidence that she did.

[16] With regard to the Applicant being treated with Tylenol only, Counsel for the Applicant referred the Appeal Division to paragraph 19 of the decision. The Appeal Division notes that the General Division referred to the Applicant's left shoulder ailment, degenerative disc disease, osteoarthritis of the lumbar spine, chronic depression and anxiety, bilateral carpal tunnel syndrome, hypothyroid, hypercholesterolemia, pelvic pain and sleep apnea. The General

Division also mentioned that the Applicant had been prescribed medications Paxil, Celebrex, Synthroid and Lipitor. The medical report is dated August 8, 2012. (GT1-42)

[17] In paragraph 38 the General Division addressed the main conditions that the Applicant testified prevented her from working. It was in relation to these conditions and the Applicant's shoulder pain that the General Division remarked that she "had been treated conservatively with Tylenol." The Appeal Division notes that the General Division referred to the Applicant's "right" shoulder; however, all the references in the Tribunal Record are to the Applicant's left shoulder, which may well point to an erroneous finding of fact with respect to the Applicant's medication regime.

[18] The Appeal Division is not persuaded by the submission that the General Division linked the Applicant's "conservative" treatment with Tylenol to the Applicant having retained work capacity. In the view of the Appeal Division, this submission misconstrues the thrust of the General Division's decision. As the Appeal Division sees it, the General Division made the finding in relation to the Applicant's medical conditions themselves and not her medical treatment. Thus, a ground of appeal that would have a reasonable chance of success does not arise.

[19] The last two submissions that were made by Counsel for the Applicant claim that the General Division disregarded evidence, specifically that the Applicant had received injections and had consulted with specialists. Having reviewed the Tribunal record, the Appeal Division finds that there was evidence at GT6-3 and GT6-4 which speaks to the Applicant receiving injections and the outcome as well as receiving treatment from specialists. In the face of this material, the General Division may well have been made on erroneous findings of fact.

[20] Having come to this conclusion, the Appeal Division finds that the Applicant has raised a sufficient basis on which to allow the appeal.

[21] Counsel for the Applicant also submitted that the General Division came to an erroneous conclusion concerning the Applicant's anxiety and depression, dismissing the Applicant's evidence and that of physicians. Other submissions included a failure by the General Division to set out the evidentiary basis for its conclusion that the Applicant would have been referred to a

mental health specialist had her condition been severe and failed to analyse and consider the totality of the applicant's medical conditions; and also did not provide reasons for discounting medical evidence . Committed an error of mixed fact and law when it failed to adequately consider the Applicant's cognitive difficulties.

[22] It is well settled that an Applicant need only put forward one ground that would have a reasonable chance of success on appeal in order to be granted leave to appeal. Having found that the Applicant has raised grounds of appeal in relation to the General Division treatment of his medication and treatment regimes, the Appeal Division finds that it is not necessary to address these other submissions at this time.

CONCLUSION

[23] For the above reasons, the Appeal Division is satisfied that the Applicant has raised an arguable case that would have a reasonable chance of success on appeal.

[24] The Application is allowed.

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

Hazelyn Ross
Member, Appeal Division