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

Citation: *S. B. v. Minister of Employment and Social Development,* 2016 SSTADIS 305

Tribunal File Number: AD-16-253

BETWEEN:

S. 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: August 9, 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 November 30, 2015. The decision determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan,* (CPP).

GROUNDS OF THE APPEAL

[3] Counsel for the Applicant submitted that the General Division erred in fact and in law by neglecting to consider real world factors including the Applicant's level of education and learning disability when stating that the Applicant should be retrained for work. Counsel for the Applicant also submitted that the General Division based its decision on an erroneous finding of fact without regard for the material before it. (AD1-1)

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] 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.”

[7] 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.

[8] 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.

[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.

ANALYSIS

The General Division neglected to consider real world factors

[10] Real world factors refer to those elements that per *Villani v. Canada (A.G.)* 2001 FCA 238 a decision-maker must consider when determining whether an applicant for CPP disability benefits is incapable regularly of pursuing any substantially gainful occupation. *Villani* identified these factors as including age, educational level, language proficiency and past work and life experience.

[11] Counsel for the Applicant submitted that the “record and the testimony of Mr. S. B. showed that he had only a 9th grade education and learning disability.” (AD1-2) He contended that these facts would have a serious impact on the Applicant’s inability to retrain. Therefore,

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

the General Division erred when it stated that the Applicant “should be able to be re-trained” with mention being given only to his young age. (AD1-2)

[12] The Appeal Division is not persuaded by this submission. In its view, the statement must be read in its entirety and in context. The entire statement is:- “The Tribunal noted that he Appellant had done only heavy, physical labour in the past, but also noted that the Appellant is still young and should be able to be retrained for work that is more suitable for his limitations.” When so read, it is clear that the General Division had more than the Applicant’s young age in mind. Moreover, it is also clear that the General Division had the Applicant’s limitations in mind. The General Division recorded that the Applicant testified both to a learning disorder (para.8) and to his physical limitations. In light of its finding the Appeal Division finds that the submission does not give rise to a ground of appeal that would have a reasonable chance of success.

The General Division mischaracterised evidence

[13] Counsel for the Applicant submitted that in finding that a severe psychological problem could be ruled out the General Division mischaracterised the evidence before it. He alleged that while the General Division stated that Dr. Wendling’s report of November 2012 did not report any mental health issues, the report had included anxiety and depression as diagnoses for the Applicant.

[14] The statements of which Counsel for the Applicant complains are found in paragraph 48 of the General Division decision.

> [48] In her initial medical report of November 2012, Dr. Wendling did not report any mental health concerns. In January, 2012, Dr. Hussain, Psychiatrist, noted that the Appellant did not appear to be overly distresses or anxious. In fact, the Appellant, in his oral testimony, stated that he was not depressed. This would rule out a severe a severe psychological problem that would preclude all work. In addition, the mental health association closed his file as there were no further concerns.

[15] Counsel’s submissions with regard to Dr. Wendling’s report are correct. At Box 3 of the CPP medical Report, Dr. Wendling lists, fibromyalgia, Lumbar disc disease, depression/anxiety, degenerative joint disease knees bilateral, and restless leg syndrome –severe

as the Applicant's diagnoses. (GD3-371). In stating that in her initial medical report of November 2012, Dr. Wendling did not report any mental health concerns, the General Division erred as the statement disregards the evidence that was before the GD. Thus, the Applicant has raised a ground of appeal that would have a reasonable chance of success.

[16] The General Division, however, did not err with respect to its statements regarding Dr. Hussain's comments. The full text of Dr. Hussain's statements (GD3-259) regarding the Applicant's mental status is:-

> **Mental Status:** 33 year old male, who appears older than his stated age, eye contact was good, did not appear overly anxious or depressed, mainly preoccupied and concerned with his physical problems and nobody is able to help him with these problems. He would like to go on disability but his depression is not that severe that he cannot work. If he has to go on disability, it will be because of his back pain and his inability to work. He denied having any suicidal ideations. He is oriented to time, place and person. He said suicide is always at the back of his mind but he does not have the nerve to do it because of his wife is still dealing and he himself feels like he cannot go through with it and he does not make any plans. He feels that no support is available for him and he would like to discuss and talk about his problems so that he can learn how to cope with them.
>
> **Diagnosis:** Axis I - Depression, major mood disorder, improving Axis II Deferred
> Axis III - Chronic back pain
> Axis IV - Moderate psychosocial stressors GAF - 45 to 50.
>
> I did say I would refer him for counselling and he said he is will to give it a try. I will see him again in a few months.

[17] Counsel for the Applicant submitted that the General Division took Dr. Hussain's comments out of context; that the report, in fact, "described a recent incident when the Applicant visited the emergency department of the hospital because he felt like killing himself." This is correct to the extent that the report did not state when the hospital visit occurred, n or is it clear to the Appeal Division from the report what, if any, intervention had to be made. In any event, the Appeal Division is satisfied that in regard to Dr. Hussain's report, the General Division may have disregarded material that was before it. Leave to appeal is granted in this respect.

The General Division erred in respect of the applicant's functional limitations

[18] Counsel for the Applicant made a number of submissions regarding the General Division's treatment of the medical evidence that he argued constituted errors on the part of the General Division. These included its conclusions concerning the Applicant's treatment regime, which he submitted was not, as the General Division described, conservative. He argued that the General Division may not have considered that no other treatment options were available to the Applicant. The Appeal Division is not persuaded that, in the present case, the General Division erred as it had to examine the actual treatments that the Applicant underwent.

[19] He also submitted that the General Division misconstrued the rheumatologist's report and failed to explain why it preferred it to that of Dr. Wendling with regard to her diagnosis of fibromyalgia. In the context of a diagnosis of fibromyalgia in the initial CPP medical report, the Appeal Division finds that the General Division likely erred when it made no reference to the report in its finding that Dr. Pope did not diagnose the Applicant with fibromyalgia.

[20] Counsel for the Applicant also submitted that the General Division erred by failing to cite 2013 reports that were supportive of the Applicant while relying on older reports that were not. For similar reasons the Appeal Division finds that the General Division likely erred when it failed to address the 2013 reports in its analysis.

[21] In addition, Counsel for the Applicant submitted that the General Division failed to consider the idea of a "competitive workforce" and did not factor the Applicant's functional limitations into any consideration of his ability to perform any job that might exist in a "competitive workforce." The Appeal Division is not entirely clear what Counsel for the Applicant means when he refers to a "competitive workforce". It notes that in *Atkinson v. Canada (Attorney General)* 2014 FCA 187 the Federal Court of Appeal discussed this concept in the context of accommodations made by a benevolent employer.

[22] It is clear that Counsel for the Applicant is arguing that the Applicant's many health conditions rendered him incapable of pursuing regularly any substantially gainful occupation and that the General Division ignored this evidence. However, the Appeal Division finds that it is as much a question of what weight the General Division placed on the evidence. Given the

Applicant's testimony concerning his capacity to work, the Appeal Division is not prepared to find that the General Division erred in this regard. Leave to appeal will not be granted on the basis that the General Division failed to address the Applicant's ability to work in a competitive workforce.

CONCLUSION

[23] Counsel for the Applicant submitted that the General Division erred in law and based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it. The Appeal Division had found that the Application raises a number of grounds that have a reasonable chance of success on appeal. Accordingly, the Application is granted.

[24] Leave to appeal is granted.

Hazelyn Ross
Member, Appeal Division