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

Citation: *S. D. v. Minister of Employment and Social Development*, 2016 SSTADIS 354

Tribunal File Number: AD-16-641

BETWEEN:

S. D.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: September 12, 2016

Canada

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal dated February 10, 2016. The GD had earlier conducted a hearing by videoconference and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan* (CPP), as it found that his disability was not "severe" prior to the minimum qualifying period (MQP) ending December 31, 2011.

[2] On May 4, 2016, within the specified time limitation, the Applicant's representative submitted to the Appeal Division (AD) an application requesting leave to appeal detailing alleged grounds for appeal. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

THE LAW

[3] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the AD may only be brought if leave to appeal is granted and the AD must either grant or refuse leave to appeal.

[4] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the AD is satisfied that the appeal has no reasonable chance of success.

[5] According to subsection 58(1) of the DESDA the only grounds of appeal are the following:

> (a) The GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The GD 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.

[6] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada.*[1] The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada.*[2]

[7] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the Applicant does not have to prove the case.

ISSUE

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

SUBMISSIONS

[9] In his application requesting leave to appeal, the Applicant made the following submissions:

(a) He stopped working due to depression and chronic pain in his back, neck, shoulders, right arms and knees. He is subject to many physical restrictions and is unable to perform repetitive tasks. He has difficulty sleeping and is unable to concentrate. He has consulted specialists and taken numerous medications, to little effect.

(b) His family physician, psychiatrist and other treating specialists agree that his prognosis for recovery is poor and he is an unlikely candidate to return to gainful employment.

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[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC)
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63

(c) The GD erred in not taking in to consideration the totality of the evidence and material before it in deciding that the Applicant was not entitled to a disability pension. He suffers from a severe and prolonged disability within the meaning of the paragraph 42(2)(a) of the CPP.

(d) According to *Villani v. Canada*,[3] the GD must keep in mind factors such as age, level of education, language proficiency and past work and life experience. The Applicant was 60 years old at the time of the hearing and has only a grade 10 education from India. He has difficulty expressing himself in English and has only worked in manual labour jobs where he was surrounded by co-workers who spoke Punjabi, his native language. In a real world context, his chances of returning to any suitable occupation are strictly limited.

ANALYSIS

[10] Much of the Applicant's submissions are in essence a restatement of the evidence and argument that was before the GD. He alleges that the GD dismissed his appeal despite medical evidence indicating that his overall condition was "severe," according to the CPP criteria. While applicants are not required to prove the grounds of appeal at the leave stage, they must set out some rational basis for their submissions that fall into the enumerated grounds of appeal. The AD ought not to have to speculate as to the true basis of the application. It is not sufficient for an applicant to state their disagreement with the decision of the GD, nor is it sufficient for an applicant to express his continued conviction that his health conditions render him disabled within the meaning of the CPP.

[11] That said, I think the Applicant raises an arguable case that the GD erred in law by failing to apply *Villani*. In the words of the Federal Court of Appeal:

> …as long as the decision-maker applies the correct legal test for severity—that is, applies the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) he or she will be in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantially gainful occupation.

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[3] *Villani v. Canada (Attorney General)*, 2001 FCA 248

[12] It is true that the GD noted the Applicant's age, limited education, work experience and lack of facility in English in paragraphs 10 and 11 of the decision. It is also true that the GD correctly cited the *Villani* test in paragraphs 51 and 52, but it is not immediately obvious to me that the test was actually applied to the Applicant's personal characteristics. The analysis is almost entirely occupied with a discussion of the Applicant's medical history and what the GD found was his insufficient effort to return to work.

CONCLUSION

[13] I am allowing leave to appeal on the sole ground that the GD may have erred in law by failing to apply the *Villani* principles.

[14] I invite the parties to provide submissions on whether a further hearing is required and, if so, what the type of hearing is appropriate.

Member, Appeal Division