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

Citation: *M. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 80

Tribunal File Number: AD-16-391

BETWEEN:

**M. B.**

Applicant

and

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

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division

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Leave to Appeal Decision by: Shirley Netten

Date of Decision: February 28, 2017

## REASONS AND DECISION

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal), dated December 2, 2016, which determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable.

[2] The only grounds of appeal to the Appeal Division are those identified in s. 58(1) of the *Department of Employment and Social Development Act* (DESDA):

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.

[3] Pursuant to s. 56(1) of the DESDA, "An appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(2) of the DESDA provides that "Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[4] I note that the leave to appeal proceeding is a preliminary step to an appeal on the merits. It is an initial and appreciably lower hurdle to be met; the Applicant does not have to prove the case at the leave stage: *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC). Rather, the Applicant is required to establish that the appeal has a reasonable chance of success. This means having, at law, some arguable ground upon which the proposed appeal might succeed: *Osaj v. Canada (Attorney General)*, 2016 FC 115, *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41. The Appeal Division should not weigh the evidence at the leave stage, or dispose of the case on the merits; leave should be granted unless the Appeal Division concludes that "no one could reasonably believe in [the appeal's] success": *Canada (Attorney General) v. Bernier*, 2017 FC 120.

[5] In this matter, I must therefore determine if the Applicant has an arguable case on at least one of the permissible grounds in s. 58(1) of the DESDA.

[6] In his reasons for appeal, the Applicant's representative states generally that the General Division "erred in deciding that the appellant's physical condition did not constitute a severe and prolonged disability" under the CPP. More specifically, he first asserts that "the erroneous assumption at the general division [sic] was that the appellant had continued to work on a regular basis and did not consider the reality of the work situation."

[7] The General Division decision is brief, yet it is apparent from paragraph 15 of the decision that the crux of the decision rests on the lack of evidence of efforts to retrain or seek less strenuous employment, after the Applicant could no longer continue with his previous employer:

> [15] Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition *(lnclima v. Canada (A.G.),* 2003 FCA 117). Although the Appellant tried unsuccessfully to return to his employment as no modified or lighter duties were available, there is no file information extant that he sought any other alternate form of work within his limitations.

[8] Accordingly, the General Division did not base its decision on the Applicant's experience (regular or not) with his previous employer, but rather on the Applicant's efforts, or lack thereof, once he had stopped working for that employer in 2001. As such, the Applicant has not raised an arguable error of fact under s. 58(1)(*c*) in this respect. However, the Applicant's representative further argues that the employment efforts were not considered in the context of the *Villani* decision (*Villani v. Canada (Attorney General)*, 2001 FCA 24).

[9] *Villani* stands for the proposition that the question of whether an individual is incapable regularly of pursuing any substantially gainful occupation, by reason of his or her disability, must be considered in the context of the individual's particular circumstances (age, education level, language proficiency and past work and life experience). As it is not plain and obvious from the General Division decision that the member considered the Applicant's personal and vocational characteristics in reaching his decision, I am satisfied that the Applicant has raised an arguable case with respect to a possible error of law.

[10] Having found that there is an arguable case on one ground of appeal, I need not consider any other grounds raised by the Applicant at this time. S. 58(2) does not require that individual grounds of appeal be considered and accepted or rejected: *Mette v. Canada (Attorney General)*, 2016 FCA 276. Given the potential interrelationship between grounds of appeal, the Applicant is not restricted in his ability to pursue the various grounds raised in his leave application.

[11] I note, however, that I have not admitted the new documents submitted by the Applicant (letters of September 10, 2001 and February 27, 2006) into evidence. New evidence is generally not admitted at the Appeal Division, since the appeal does not constitute a hearing *de novo*: *Marcia v. Canada (Attorney General)*, 2016 FC 1367. The documents that were not before the General Division in December 2015 can have no bearing on a claim that an error of fact or law was made by the General Division at that time. Moreover, the existence of new evidence is not an independent ground of appeal to the Appeal Division, under the DESDA.

[12] Finally, I see that the possibility of *res judicata* was mentioned in the Respondent's Reconsideration Adjudication Summary of November 15, 2012 ("There is no period of adjudication"), but this was not raised before, nor addressed by, the General Division. The parties are invited to provide submissions on any implications this may have on the present appeal, together with their submissions on the grounds of appeal raised by the Applicant.

**CONCLUSION**

[13] The application for leave to appeal is granted.

[14] This decision does not presume the result of the appeal on the merits of the case.

Shirley Netten
Member, Appeal Division