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

Citation: *K. H. v. Minister of Employment and Social Development*, 2017 SSTADIS 127

Tribunal File Number: AD-16-412

BETWEEN:

K. H.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Shirley Netten

Date of Decision: March 29, 2017

Canada

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 7, 2015, 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 "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[4] 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 (Procureur général) c. Bernier*, 2017 CF 120.

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

[6] In her reasons for leave to appeal, the Applicant asserts, among other things, that the General Division erred in law in its analysis of her work capacity. The Applicant refers first to *Villani v. Canada (Attorney General)*, 2001 FCA 248, at paragraph 39:

> It is difficult to understand what purpose the legislation would serve if it provided that disability benefits should be paid only to those applicants who were incapable of pursuing any conceivable form of occupation no matter how irregular, ungainful or insubstantial.

[7] The Applicant goes on to cite *Garrett v. Canada (Minister of Human Resources Development)*, 2005 FCA 84 and *Canada (Attorney General) v. St-Louis*, 2011 FC 492, which reiterate the requirement established in *Villani* of a "real world" analysis of a claimant's background and medical condition. The Applicant asserts, among other things, that the General Division failed to properly take into consideration the true effect of her medical condition on her ability to work; she points to matters not considered or improperly considered, such as a specialist's report, the nature of her delayed endolymphatic hydrops (DEH) attacks, her employment efforts, and the reason for stopping work.

[8] As indicated above, it is not my role at the leave stage to evaluate the merits of the Applicant's claims. Here, the Applicant has raised an issue with respect to the General Division`s interpretation or application of the concept of severe disability which could, if proven, lead to a finding of error of law. While leave ought not to be granted on a purely theoretical basis (*Canada (Attorney General) v. Hines*, 2016 FC 112), I note that, on the face of the General Division decision, there is limited analysis of the impact of the Applicant's DEH on her ability to function in the workplace. I am satisfied that the Applicant has raised an arguable case with respect to a possible error of law.

[9] 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. Subsection 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 her ability to pursue the various grounds raised in her leave application.

CONCLUSION

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

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

Shirley Netten
Member, Appeal Division