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

Citation: *S. G. v. Minister of Employment and Social Development*, 2017 SSTADIS 164

Tribunal File Number: AD-16-831

BETWEEN:

S. G.

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: April 13, 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 March 8, 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 "[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, on at least one of the permissible grounds in s. 58(1) of the DESDA. 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] In this appeal, Applicant's counsel submits, among other things, that the General Division did not apply the correct legal test for severity, by failing to properly apply s. 42(2)(*a*)(i) of the CPP and the principles found in *Villani v. Canada (Attorney General)*, 2001 FCA 248. In this respect, he asserts that the General Division failed to consider the evidence of capacity to perform sedentary duties in the full context of the medical evidence and the Applicant's personal characteristics. He also asserts that the General Division improperly reached its conclusion on severity based upon a finding of "capacity to seek alternative employment," rather than determining whether the Applicant was incapable of seeking and maintaining with consistent frequency any truly remunerative occupation.

[6] *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, in addition to the medical condition). *Villani* further states that decision-makers must apply the ordinary meaning of every word in the statutory definition. As it is not manifestly clear from the General Division decision whether the member adequately considered the Applicant's personal and vocational characteristics in reaching his decision, and whether the member applied the correct legal test, I am satisfied that the Applicant has raised an arguable case with respect to a possible error of law.

[7] Having found that there is an arguable case in this respect, 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. The Applicant is not restricted in her ability to pursue the various grounds raised in the leave application.

CONCLUSION

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

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

Shirley Netten
Member, Appeal Division