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

Citation: *M. G. v. Minister of Employment and Social Development*, 2017 SSTADIS 415

Tribunal File Number: AD-16-954

BETWEEN:

M. G.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Nancy Brooks

Date of Decision: August 17, 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 3, 2016, which determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan* (CPP).

[2] Pursuant to s. 58(1) of the *Department of Employment and Social Development Act* (DESDA), the only grounds of appeal to the Appeal Division are that:

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] An appeal to the Appeal Division may only be brought if leave to appeal is granted: DESDA, s. 56(1). The requirement to obtain leave to appeal to the Appeal Division serves the objective of eliminating appeals that have no reasonable chance of success: *Bossé v. Canada (Attorney General)*, 2015 FC 1142, at para. 34, and leave to appeal will be granted only where an applicant demonstrates that the appeal has a reasonable chance of success on one or more of the grounds identified in s. 58(1) of the DESDA: *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100, at paras. 70−73. In this context, having a reasonable chance of success means "having some arguable ground upon which the proposed appeal might succeed": *Osaj v. Canada (Attorney General)*, 2016 FC 115, at para. 12.

[4] In the application for leave to appeal, Applicant's counsel submits that the General Division:

> (i) erred in law by not correctly applying the legal tests set out by the Federal Court of Appeal in *Villani v. Canada (Attorney General)* 2001 FCA 248, and *D'Errico v. Canada (Attorney General)*, 2014 FCA 94, to the facts before it in determining whether the Applicant suffers from a severe disability;
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> (ii) erred in law by not according substantial weight to the later reports of Dr. Darby and Dr. Teitelbaum on the premise that those reports

> "contradict their earlier treatment promises, their own earlier prognosis and appear to be geared towards the Tribunal rather than being focused on or related to their treatment of the Applicant at the time of these reports";
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> (iii) erred in law by only according "little weight" to the expert report of Gerard Alberts versus those of Dr. Dave and Dr. Sockanathan; and
>
> (iv) based its decision on an erroneous finding of fact when it found that the Applicant's testimony was direct and credible but then only considered a portion of his testimony and a portion of the remaining evidence in arriving at its decision, with the result that its findings were made without regard for all the material that was before it.

[5] The issue before me on this application is whether the Applicant's proposed appeal has a reasonable chance of success.

[6] With respect to the first ground of appeal, the application for leave sets out in some detail the evidence concerning the Applicant's personal characteristics and daily activities, which, in the Applicant's view, should have been taken into account by the General Division member when he applied *Villani*. The Applicant submits that the failure of the General Division member to take this evidence into account was contrary to the Federal Court of Appeal's direction in *Villani* and *D'Errico*, *supra*, and constituted an error of law.

[7] In *Villani*, the Federal Court of Appeal directed that the statutory test for severity under s. 42(2) of the CPP should be applied with reference to the "real world". The Court stated:

> [40] […] Of course, the mandatory requirement [under s. 68(1)(*c*) of the *Canada Pension Plan Regulations*] that applicants supply the Minister with information related to their education level, employment background and daily activities can only indicate that such "real world" details are indeed relevant to a severity determination made in accordance with the statutory definition in subparagraph 42(2)(a)(i) of the *Plan*.

[8] In *D'Errico*, the Court held:

> [4] […] This legal test for severity must be "applied with some degree of reference to the 'real world'," with a view to considering the claimant's employability based on education, employment background and daily activities: *Villani* at paragraphs 38 and 39. Where there is evidence

> of a capacity to work, the claimant must establish she has tried to obtain and maintain employment but has been thwarted by her health problems: *Canada (Attorney General) v. Ryall*, 2008 FCA 164 at paragraph 5.

[9] I note that the leave to appeal process is a preliminary step to being granted the right to argue an appeal on the merits. At the leave stage, the Applicant is required to demonstrate that the proposed appeal has a reasonable chance of success on at least one of the grounds set out in s. 58(1) of the DESDA. On the appeal on the merits, the Applicant will be required to establish on a balance of probabilities that an error was committed by the General Division within the scope of s. 58(1). Thus, the leave to appeal stage presents a different and appreciably lower hurdle than does the appeal stage.

[10] Here, Applicant's counsel concedes that the General Division set out and considered the evidence regarding the Applicant's age, education level, past work experience and transferable skills when looking at the real world context, as mandated by *Villani* and *D'Errico*. However, he argues that the General Division committed an error of law because it failed to take into account his other personal characteristics and daily activities when it made the determination that he did not suffer from a severe disability.

[11] In my view, the Applicant has raised an issue with respect to the General Division's application of *Villani*, which could, if established, lead to a finding of error of law falling within the grounds set out in s. 58(1)(*b*) of the DESDA. There was a significant amount of evidence, both oral and in writing, about the impact of the Applicant's disability on his life, and specifically on his daily activities. In the reasons, there is virtually no discussion of this evidence in the section of the General Division's reasons where the application of the *Villani* factors is considered. On this basis, I am satisfied that the Applicant has raised an arguable ground upon which the proposed appeal might succeed.

[12] Given my finding that this ground of appeal has a reasonable chance of success, I have not at this stage considered the other grounds raised by the Applicant.[1] On the appeal, the Applicant may pursue any of the grounds of appeal raised in the application for leave.

DISPOSITION

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

[14] In accordance with s. 58(5) of the DESDA, the application for leave to appeal hereby becomes the notice of appeal. Within 45 days after the date of this decision, the parties may (a) file submissions with the Appeal Division; or (b) file a notice with the Appeal Division stating that they have no submissions to file: SST Regulations, s. 42. The parties may wish to make submissions regarding the form the hearing of the appeal should take (i.e. in writing, by teleconference, videoconference or in person) together with their submissions on the merits of the appeal.

Nancy Brooks
Member, Appeal Division

[1] In *Mette v. Canada (Attorney General)*, 2016 FCA 276, the Federal Court of Appeal stated that s. 58(2) of the DESDA "does not require that individual grounds of appeal be dismissed. Indeed, individual grounds may be so inter-related that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave" (at para. 15).