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

Citation: *R. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 439

Tribunal File Number: AD-16-753

BETWEEN:

R. S.

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 30, 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 April 15, 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. 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] 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, an 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, an 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, an applicant is presented with a different and appreciably lower hurdle at the leave to appeal stage than at the appeal stage.

[5] The Appeal Division should not weigh the evidence at the leave stage or dispose of the case on the merits; leave to appeal should be granted unless the Appeal Division is convinced

that no ground of appeal has a reasonable chance of success: *Canada (Procureur Général) c. Bernier*, 2017 FC 120, at para. 5.

[6] In the application for leave to appeal, counsel for the Applicant asserts, among other things, that the General Division member failed to properly apply the Federal Court of Appeal's decision in *Inclima v. Canada (Attorney General)*, 2003 FCA 117. He asserts:

> […] it is submitted that it is an erroneous finding of fact to determine that merely applying for work supports the fact that the Appellant is able to work or that it establishes that fact. It is well established in law that a negative inference is found when an Applicant for Canada Pension Plan disability is unwilling to try and secure employment. 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 appellant's health condition, *Inclima*, (2003) FCA 117.

[7] While couched in terms of an erroneous finding of fact, the gravamen or essence of counsel's argument seems to be that the General Division member erred in concluding the Applicant had a capacity to work and in his application of *Inclima.* These allegations, if proven, could constitute an error of law or an error of mixed fact and law.

[8] The member determined that the Applicant had a capacity to work based in part on the fact that after the Applicant injured his back he attempted to find light, less physical work within his employer (at para. 42), though he was unsuccessful in being hired for the position. The General Division's finding regarding work capacity was material to the determination that the Applicant did not have a severe disability by the end of his minimum qualifying period. As it is not manifestly clear from the General Division decision whether the member properly applied *Inclima*, I am satisfied that the Applicant has raised an arguable case with respect to a possible error of law or mixed fact and law, which ought to be fully explored on the merits.

[9] For purposes of this application, I need not decide whether all of the grounds of appeal put forward in the application for leave to appeal raise an arguable case, as I have found that the Applicant has raised at least one ground that does so: see *Mette v. Canada (Attorney General*), 2016 FCA 276.

DISPOSITION

[10] The application for leave to appeal is granted. Success at the leave to appeal stage is not, of course, determinative of whether the appeal itself will succeed.

[11] 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: *Social Security Tribunal Regulations*, s. 42.

Nancy Brooks
Member, Appeal Division