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

Citation: *D. D. v. Minister of Employment and Social Development*, 2017 SSTADIS 493

Tribunal File Number: AD-16-1087

BETWEEN:

D. D.

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: September 27, 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 June 22, 2016, which determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable.

[2] Pursuant to s. 58(1) of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds to appeal a decision of the General Division: first, a breach of natural justice or otherwise acting beyond or refusing to exercise jurisdiction; second, an error in law; and third, an erroneous finding of fact made in a perverse and capricious manner or without regard to the material before it. The use of the word "only" in s. 58(1) means that no other grounds of appeal may be considered: *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100, at para. 72.

[3] An appeal to the Appeal Division may be brought only if leave to appeal is granted: DESDA, s. 56(1). According to s. 58(2) of the DESDA, leave to appeal is to be refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success. Therefore, the issue before me on this application is whether the Applicant's appeal has a reasonable chance of success.

[4] The leave to appeal proceeding is a preliminary step to an appeal on the merits. It presents an appreciably lower hurdle to be met than the one that must be met at the appeal stage; 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 reviewable 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 need 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 FC 120, at para. 9.

[5] In this appeal, Applicant's counsel submits, among other things, that the General Division did not apply the correct legal test for severity because it failed to properly apply s. 42(2)(*a*)(i) of the CPP and the principles set out by the Federal Court of Appeal in *Villani v. Canada (Attorney General)*, 2001 FCA 248. In this regard, she asserts that the General Division failed to consider how the cumulative effect of the Applicant's medical conditions and personal characteristics affected his employability in the real-world context, which she says constitutes an error of law.

[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 totality of the individual's medical condition). It is not manifestly clear from the General Division decision whether the member adequately considered the totality of the Applicant's medical condition in reaching his decision and, consequently, whether he applied the correct legal test. Therefore, bearing in mind the lower threshold that needs to be met by the Applicant to be granted leave to appeal, 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, at this time I need not consider any other grounds raised by the Applicant. 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 (CanLII). The Applicant is not restricted in his ability to pursue the various grounds raised in the leave application.

DISPOSITION

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

[9] 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.

[10] The Applicant made submissions to request, in the event leave to appeal was granted, that the hearing of the appeal proceed by personal appearance. The Respondent may wish to make submissions regarding the form the hearing of the appeal should take (e.g. teleconference, videoconference, in writing or in person) together with its submissions on the merits of the appeal.

Nancy Brooks
Member, Appeal Division