



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *T. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 621

Tribunal File Number: AD-16-1319

BETWEEN:

T. M.

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: November 9, 2017

REASONS AND DECISION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal), dated August 22, 2016, which determined he was not entitled to 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), there are only three grounds to appeal a decision of the General Division: first, committing a breach of natural justice or otherwise acting beyond or refusing to exercise jurisdiction; second, making an error in law; and third, basing the decision on 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)*, [2015] 4 FCR 108, 2014 FC 1100, at para. 72.

[3] An appeal to the Tribunal’s Appeal Division may only be brought 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 proposed 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 a different and appreciably lower hurdle to be met than the one that must be met at the appeal stage: at the leave to appeal stage, an applicant is required to establish that the appeal has a reasonable chance of success on at least one of the grounds in s. 58(1) of the DESDA, whereas at the appeal stage, an applicant must prove his or her case on the balance of probabilities: *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC). In the context of an application for leave to appeal, 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; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41.

[5] In this appeal, Applicant's counsel submits that the General Division erred in law in two ways: first, by failing to consider the totality of the Applicant's condition, as it should have done in accordance with the principles articulated by the Federal Court of Appeal in *Bungay v. Canada (Attorney General)*, 2011 FCA 47, and second, by failing to apply the principles set out by the Federal Court of Appeal in *Villani v. Canada (Attorney General)*, [2002] 1 FCR 130, 2001 FCA 248.

[6] In *Villani*, the Court held that in assessing whether a disability is "severe", as defined in the CPP, the Pension Appeals Board must adopt a "real world" approach. This "real world" approach requires it to determine whether an applicant, in the circumstances of his or her background and medical condition, is employable, i.e. capable regularly of pursuing any substantially gainful occupation. Employability is not to be assessed in the abstract, but rather in light of the "particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience": *Villani* at para. 38. Although in *Villani* the Court was conducting a judicial review of a decision of the Pension Appeals Board, the same principles apply to the General Division when it carries out its assessment of whether a claimant's disability is severe.

[7] Subsequently, in *Bungay*, the Court clarified that the circumstances identified in *Villani* as relevant to the "real world" approach fall into two categories: the claimant's background (age, education level, language proficiency and past work and life experience) and the claimant's medical condition. A consideration of the latter engages a "broad inquiry, requiring that the claimant's condition be assessed in its totality" (*Bungay* at para. 8).

[8] Counsel for the Applicant submits, "Throughout its analysis of the severity of the Applicant's disability, the General [Division] focused primarily on the Applicant's knee, shoulder and hip problems despite medical evidence, testimony, and submissions that supported a finding that the Applicant also suffered from multiple other conditions, including insomnia, Hepatitis C, and anxiety."¹ Counsel submits that although the member referred to the *Bungay* decision in her reasons, she did not properly apply it.

¹ AD1-5 to AD1-6.

[9] I have reviewed the General Division reasons. The member cited *Bungay*, and properly instructed herself that, in approaching the issue of employability, the claimant's medical condition was to be assessed in its totality. However, although she referred to the Applicant's insomnia, Hepatitis C and anxiety in her recitation of the evidence, she did not refer to these aspects of his condition in her analysis of whether his disability was severe within the meaning of s. 42(2) of the CPP although there was some evidence of these conditions before the member.

[10] On this basis, 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 falling within the scope of s. 58(1)(b) of the DESDA.

DISPOSITION

[11] I find the proposed appeal has a reasonable chance of success and grant leave to appeal pursuant to s. 58(2) of the DESDA.

[12] 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 file submissions with the Appeal Division or 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