



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *P. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 761

Tribunal File Number: AD-17-280

BETWEEN:

P. 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: December 21, 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 March 3, 2017, which determined he was not entitled to a disability pension under the *Canada Pension Plan* (CPP).

[2] In accordance with s. 56(1) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Tribunal's Appeal Division may be brought only if leave to appeal is granted. Subsection 58(1) sets out the only grounds of appeal, which 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] Pursuant to s. 58(2), the Appeal Division must refuse leave to appeal if it is satisfied that the appeal has no reasonable chance of success. 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.

[4] In his application for leave to appeal, the Applicant argues that the General Division committed errors falling within all three subsections of s. 58(1) of the DESDA. He argues that the General Division member:

- a) did not give him adequate time to present information at the hearing, an allegation which, if proven, could constitute a failure to observe the principles of natural justice under s. 58(1)(a) of the DESDA;
- b) erred in her application of the principle in *Villani v. Canada (Attorney General)*, 2001 FCA 248. In this regard, he contends that the General Division member incorrectly concluded that he worked in a substantially gainful occupation, and therefore did not meet the meaning of disabled as defined by the CPP; and

- c) based her decision on erroneous findings of fact by omitting material facts from the analysis.

[5] Turning to the Applicant's second ground of appeal, *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). *Villani* also states that decision-makers must apply the ordinary meaning of every word in the statutory definition, including "any substantially gainful occupation", a phrase used in the CPP s. 42(2) definition of severe.

[6] I note that 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).

[7] If the General Division member failed to properly apply the real-world principles articulated by the Court in *Villani*, or erred in its interpretation and application of the concept of substantially gainful occupation, this would constitute an error of law falling within the scope of s. 58(1)(b) of the DESDA. As it is not manifestly clear from the General Division decision whether the member applied the correct legal test, and bearing in mind the relatively low hurdle to be met on a leave application, I am satisfied that the Applicant has raised an arguable case with respect to a possible error of law.

[8] Subsection 58(2) of the DESDA does not require that individual grounds of appeal be considered and accepted or rejected at the leave to appeal stage: *Mette v. Canada (Attorney General)*, 2016 FCA 276. Having concluded that there is an arguable case with respect to the Applicant's contention that the General Division may have failed to apply *Villani* properly, I need not decide on this application whether his other two grounds of appeal have a reasonable chance of success. The Applicant is not restricted in his ability to pursue these grounds on the appeal.

[9] With respect to the argument that the General Division member did not give him adequate time to present information at the hearing, the Applicant has provided no submissions or references to the evidence to substantiate this claim. This allegation, if proven, could give rise to a finding that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction pursuant to s. 58(1)(a) of the DESDA. If the Applicant wishes to pursue this argument on the appeal, he is directed to include, in his submissions to follow, references to the evidence, including the timestamps on the recording of the General Division hearing,¹ that support his claim that he was not afforded sufficient time to present his case.

DISPOSITION

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

[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 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

¹ A copy of the recording of the hearing may be requested and obtained from the Tribunal Registry.