Citation: ***R. M. v. Minister of Employment and Social Development*****, 2015 SSTAD 864**

Date: July 10, 2015

File number: AD-15-365

APPEAL DIVISION

Between:

R. M.

Applicant

and

Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

Decided on the Record on July 10, 2015

REASONS AND DECISION

DECISION

[1] Leave to appeal to the Appeal Division of the Social Security Tribunal of Canada is refused.

INTRODUCTION

[2] On May 11, 2015, the General Division of the Social Security Tribunal of Canada, (the Tribunal), determined that the Applicant was not entitled to a disability pension as she did not have a mental or physical disability that was "severe and prolonged" as defined by the *Canada Pension Plan*, (CPP). The Applicant has filed an application for leave to appeal, (the Application), with the Appeal Division of the Tribunal.

GROUNDS OF THE APPLICATION

[3] The Applicant sought leave to appeal on the basis that she continued to suffer a severe and prolonged disability. Further, she submitted that the decision was based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before the General Division. Accordingly, the General Division breached subsection 58(1)(c) of the *Department of Employment and Social Development (DESD) Act.*

ISSUE

[4] The Tribunal must decide whether the appeal has a reasonable chance of success.

THE LAW

[5] Leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.[1] To grant leave the Appeal Division must be satisfied that the appeal would have a reasonable chance of success. The Federal Court of Appeal has equated a reasonable chance of success to an arguable case: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

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[1] Sections 56 to 59 of the *Department of Employment and Social Development Act*, (DESD Act). Subsections 56(1) and 58(3) govern the grant of leave to appeal, providing that "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal."

[6] The Grounds of Appeal are set out in section 58 of the DESD Act.[2] These are the only grounds on which an Applicant may appeal a decision of the General Division.

ANALYSIS

[7] The General Division denied the appeal because the Member found that the Applicant had retained work capacity well after her minimum qualifying period (MQP) date of December 31, 2005 and that she had failed to establish that she was prevented from obtaining and maintaining employment because of her disability. To this, the Applicant submits that leave to appeal should be granted because she "still continues to suffer a complete disability that is both severe in nature that still continues to enable me to work several years after the motor vehicle accident. I continue to suffer from neck, back and muscle pain and have trouble remembering and concentrating on certain tasks at hand."

[8] In order to grant leave to appeal the Appeal Division must be satisfied that the appeal has a reasonable chance of success. For the following reasons the Tribunal is not satisfied that the appeal has a reasonable chance of success.

[9] Firstly, the Applicant's reasons for the Application are no more than a repetition of the position she presented on the appeal. Her reasons express her subjective assessment of the severity of her disability. This self-assessment, even as it expresses the Applicant's disagreement with the General Division decision, cannot ground an appeal.

[10] Secondly, the General Division found that the Applicant continued to work well past her MQP, with the evidence uncontrovertibly showing that she worked in 2008, 2009 and also in 2013. While there is case law to the effect that the mere fact that an appellant continues to earn money post-MPQ is not a bar to eligibility for a CPP disability pension[3], where they occur,

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[2] **58(1) Grounds of Appeal** –

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] *MSD v. Kuipers* (July 12, 2007) CP 24448 (PAB).

post- MQP earnings are one factor to be considered when assessing whether an appellant has a severe and prolonged disability.

[11] In the Applicant's case, the evidence was that she was a self-employed hairstylist and boutique owner from July 1, 2001 to March 30, 2007. She was employed as a hairdresser from January 13, 2008 until March 30, 2009. The General Division Member found this latter evidence coupled with what he found to be an absence of support in the medical documentation to be conclusive as to the Applicant's retained work capacity as of the MQP. The General Division correctly applied the law in relation to retained work capacity as set out in *Inclima v. Canada (Attorney General)* 2003 FCA 117. The Tribunal finds no error on the part of the General Division.

[12] Furthermore, the Applicant has not shown how the General Division made an erroneous decision, nor, other than the bald statement, how the General Division came to base 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.

CONCLUSION

[13] The Applicant sought leave to appeal on the ground that the General Division based its decision to deny her a CPP disability pension on an erroneous finding of fact. For the reasons set out above the Tribunal finds that the General Division decision is reasonable and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law and the requirements of the CPP. Further, the Tribunal finds that there is no basis on which to grant the Application as it is not satisfied that the appeal would have a reasonable chance of success.

[14] The Application is refused.

Hazelyn Ross
Member, Appeal Division