**Citation:** ***I. D. v. Minister of Employment and Social Development,*** **2015 SSTAD 901**

**Date: July 22, 2015**

**File number: AD-15-374**

**APPEAL DIVISION**

**Between:**

**I. D.**

**Applicant**

**and**

**Minister of Employment and Social Development**
**(Formerly known as the Minister of Human Resources and Skills Development)**

**Respondent**

**Decision by: Hazelyn Ross, Member, Appeal Division**

**Decided on the Record on July 22, 2015**

## DECISION

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

## INTRODUCTION

[2] The Applicant filed an application (the Application) for leave to appeal the decision of the General Division with the Appeal Division of the Social Security Tribunal (the Tribunal). In the decision dated April 14, 2015, the General Division Member found that, on or before the minimum qualifying period (MQP) date, the Applicant was not suffering from a disability that was severe and prolonged as those terms are defined by the *Canada Pension Plan* (CPP). Accordingly, the Applicant was not entitled to a CPP disability pension.

## GROUNDS OF THE APPLICATION

[3] On his behalf, Counsel for the Applicant submitted that errors made by the General Division Member constitute grounds for granting the Application. Counsel submitted that the General Division failed to give adequate consideration to the medical documentation with respect to the nature and extent of the Applicant's multiple injuries and disabilities. Counsel also stated that "Additionally, it is our position the Tribunal failed to weigh the impact all these injuries had."

## ISSUE

[4] In this Application the issue is whether the appeal has a reasonable chance of success.

## THE LAW

[5] The *Department of Employment and Social Development* (DESD) *Act* establishes that 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.

[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] Counsel for the Applicant alleged that the General Division made the following errors:

a. an error of mixed fact and law in that it did not consider or assess the impact of any of the Applicant's functional limitations or abilities with respect to activities of a daily living and employment tasks;

b. did not consider reasonable explanations for the Applicant's inability to apply for new jobs nor did the General Division indicate that there were exceptions for the requirement to seek out new work; and

c. failed to apply the new test for substantially gainful employment.

[8] For the reasons that follow, the Tribunal is not satisfied that the appeal would have a reasonable chance of success.

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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."

[2] **8(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.

[9] First, the Tribunal is not persuaded that the General Division did not consider or assess the impact of the Applicant's functional limitations or abilities with respect to his activities of daily living and employment tasks. The General Division did analyse the Applicant's medical conditions, treatment recommendations and the impact of these conditions on the Applicant's daily life and potential for employment. Several paragraphs of the analysis are dedicated to this examination which culminates in the Member's finding in paragraph 53 of the decision that the Applicant was capable of retraining.

[10] At paragraph 54, the General Division specifically discussed the opinions of the Applicant's multidisciplinary team that he could not participate in employment similar to that which he performed prior to his injury. The General Division went on to conclude that, notwithstanding the opinions, the Applicant was not precluded from some type of sedentary employment. Consequently, the Tribunal finds that the General Division did, in fact, consider the impact of the Applicant's functional limitations and abilities on his ability to obtain and maintain substantially gainful employment. As a result, the Tribunal is not satisfied that this is a ground of appeal that would have a reasonable chance of success.

[11] Similarly, the Tribunal does not accept the submission that the General Division did not consider the Applicant's reasonable explanation for his inability to apply for new jobs. In fact, the General Division did not find the Applicant's explanations, in particular those related to his English language proficiency, to be reasonable and rejected them on that basis.

[12] Nor does the Tribunal accept the submission that the General Division erred by failing to indicate that there are exceptions for the requirement to seek out new work. As the Tribunal understands it, an applicant for CPP disability pension has the onus of showing that his or her condition (mental or physical) renders them incapable regularly of pursuing substantially gainful employment. This requirement was formally set out in *Inclima v. Canada (A.G.),* 2003 FCA 117, however, it is one that appears throughout the case law. The onus is on applicants to provide satisfactory explanations for their failure to seek out alternative employment, which the General Division must weigh in determining whether or not the applicant's disability is severe and prolonged. The Tribunal is not persuaded that there is an onus on the General Division to point this out to applicants. Accordingly, the Tribunal rejects the submission that the General

Division committed an error by failing to point out this "exception" to the Applicant. The Tribunal finds that these submissions do not give rise to grounds of appeal that would have a reasonable chance of success.

[13] The Applicant's final argument is that the General Division failed to apply the new test for substantially gainful employment. The Tribunal addressed this question in C*heddesingh v. Canada (Minister of Employment and Social Development)* AD-15-239. In *Cheddesingh* the Tribunal made the following observation:

> This argument seeks to give retrospective application to a legislative provision that contains no such provision. The Applicant did have earnings in 2010, (resulting in a pro-rated MQP of June 30, 2010); however, the new *Regulations*[3] apply to CPP disability pension applications made after May 29, 2014. The Applicant's application for CPP disability benefits predates the coming into force of the *Regulations,* clearly rendering the argument moot. Thus the General Division committed no error.

Likewise, in this case the Applicant applied for CPP disability benefits in April 2011 which was well before the date on which the new provisions came into force. They do not apply to his case, thus there is no error on the part of the General Division.

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[3] SOR/2014-135, May 29, 2014. - **68.1** (1) For the purpose of subparagraph 42(2)(*a*)(i) of the Act, "substantially gainful", in respect of an occupation, describes an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension. The amount is determined by the formula

$$(A \times B) + C$$

where

- A is .25 × the Maximum Pensionable Earnings Average;
- B is .75; and
- C is the flat rate benefit, calculated as provided in subsection 56(2) of the Act, × 12.

(2) If the amount calculated under subsection (1) contains a fraction of a cent, the amount is to be rounded to the nearest whole cent or, if the amount is equidistant from two whole cents, to the higher of them.

**COMING INTO FORCE**

**2. These regulations come into force on the day on which they are registered.**

**CONCLUSIO**N

[14] The Applicant advanced a number of submissions that he stated gave rise to grounds of appeal that would have a reasonable chance of success. However, the Tribunal is not satisfied that an appeal based on these submissions or any of them would have a reasonable chance of success.

[15] The Application is refused.

*Hazelyn Ross*
Member, Appeal Division