Citation: ***K. V. v. Minister of Employment and Social Development*****, 2015 SSTAD 936**

Date: July 30, 2015

File number: AD-15-414

APPEAL DIVISION

Between:

K. V.

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 30, 2015

DECISION

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

INTRODUCTION

[2] The Applicant seeks leave to appeal (the Application) a decision of the General Division of the Social Security Tribunal of Canada (the Tribunal) that was issued on May 29, 2015. In the decision the General Division found that the Applicant did not meet the criteria for payment of a *Canada Pension Plan* (CPP) disability pension.

GROUNDS OF THE APPLICATION

[3] Counsel for the Applicant submitted that, contrary to the conclusion of the General Division, the Applicant meets the criteria for "severe and prolonged" as defined by CPP paragraph 42(2)(a). In Counsel's submission the General Division erred in law by concluding that the Applicant's participation in a job retraining programme indicates that she had the capacity to obtain and maintain substantially gainful employment. He argued that, in assessing the Applicant's ability to obtain and maintain substantially gainful employment, the General Division relied too heavily on the conclusions of the Vocational Rehabilitation and Job Search Report.

[4] Counsel for the Applicant also submitted that the General Division made erroneous findings of fact, which it made in a perverse or capricious manner or without regard for the material before it. He stated that the Workplace Safety and Insurance Board (WSIB) had found that the Applicant had a 40% impairment by virtue of her mental health condition of depression. The clear inference being that the General Division ignored or disregarded the WSIB finding in reaching its conclusion.

[5] Counsel for the Applicant also included the medical report required by the CPP. He stated that he was sending it in with the Application because the Applicant's family physician had neglected to send it in.

ISSUE

[6] The Tribunal must decide whether the appeal would have a reasonable chance of success.

THE LAW

[7] 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.

ANALYSIS

[8] In order to grant leave to appeal I must be satisfied that the appeal would have a reasonable chance of success. This means that I must first find that at least one of the grounds of the Application relate to a ground of appeal that would have a reasonable chance of success if the matter were to proceed to a hearing. For the reasons set out below I am not satisfied that the appeal would have a reasonable chance of success.

[9] First, I find that the General Division did not make the errors cited by Counsel for the Applicant. Specifically, I find that the General Division's view of the Applicant's participation in a job retraining programme does not disclose any error of law. The case law has found both for and against claimants on the issue of retraining. In *Fraser v. MHRD,* (September 20, 2000 CP 11086, the Pension Appeals Board (PAB) held that there was "no principle of law equating the applicant's school experience with a position in the workforce of modified or light duty. Each case turns on its own facts." I find that *Fraser* clarifies the appropriate treatment of an applicant's school experience, namely that each case must be decided on its own facts. Thus, for example in *MNHW v. Dupuis, (July 1985) CCH 8502* the PAB held that the fact that *Dupuis* had

[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."

had the ability to pursue a reasonably demanding course of study can be equated to the capability of pursuing a substantially gainful employment. *MNHW v. Dupuis,* (July 1985) CCH 8502. In *Buchanan v. MNHW,* (August 11, 1993) CP 2643 it was decided that" the physical demands on the applicant of full-time university attendance was equal to some form of modified or sedentary work."

[10] In the Applicant's case, the General Division considered her attendance in a full-time retraining programme consisting of four hours a day and lasting for nearly two years. At paragraph 33 of the decision the General Division noted that while the Applicant had trouble using the computer she was able to complete the training programme as well as complete a work placement with Walmart, albeit with some difficulty. Further, at the end of the retraining programme the Applicant was assessed as having skills that would permit her to re-enter the workforce. Based on this assessment, I find that the General Division made the individual assessment required in respect of the Applicant's attendance in the retraining programme. Further, I find that the General Division came to conclusions that were, on the facts that were before it, entirely reasonable.

[11] Accordingly, I reject the submission that in assessing the Applicant's ability to obtain and maintain substantially gainful employment, the General Division relied too heavily on the conclusions of the Vocational Rehabilitation and Job Search Report. I find that it does not support a ground of appeal that would have a reasonable chance of success.

[12] Similarly, I reject the submission that the General Division made erroneous findings of fact, which it made in a perverse or capricious manner or without regard for the material before it. The fact that WSIB found the Applicant to have a 40% impairment by virtue of her depression does not alter the position as far as the CPP is concerned. *Halvorsen,* stands for the proposition that successfully qualifying for another disability support programme does not automatically qualify an applicant to a CPP disability pension: *Halvorsen v. Canada (Minister of Human Resources Development),* 2004 FCA 377. Thus, the General Division did not err when it placed no reliance on the Applicant's WSIB award.

[13] Finally, Counsel for the Applicant has submitted a completed CPP medical questionnaire and a prescription drug report for the Applicant. While the medical report states that the Applicant's prognosis for recovery is guarded, the report is dated June 9, 2015. The report was not issued contemporaneously with the Applicant's initial application for a CPP disability pension as it ought to have been. In my view, the report is in the nature of new facts or additional information. As such it is of little value to the determination of this Application, and cannot ground the appeal.

CONCLUSION

[14] The Applicant seeks leave to appeal on the basis that the General Division breached the provisions of CPP subsections 58(1)(a) and (c). In light of the foregoing the Tribunal finds that the Applicant's submissions are not supported. Accordingly, the Tribunal is not satisfied that the appeal would have a reasonable chance of success.

[15] The Application is refused.

Hazelyn Ross
Member, Appeal Division