Citation: ***O. V. v. Minister of Employment and Social Development*****, 2015 SSTAD 937**

Date: July 30, 2015

File number: AD-15-407

APPEAL DIVISION

Between:

O. 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 began to receive a *Canada Pension Plan* (CPP) retirement pension in May 2011. Subsequently, she made a request to withdraw her retirement pension in favour of a disability pension. The Respondent denied her request and maintained the denial on reconsideration. The Applicant appealed the denial and on April 2, 2015 a Member of the General Division of the Social Security Tribunal (the Tribunal), denied her appeal. The Member held that, on or before the end of her minimum qualifying period (MQP) date of December 31, 2014, the Applicant did not suffer from a severe and prolonged disability.

GROUNDS OF THE APPLICATION

[3] The Applicant seeks leave to appeal from the General Division decision. On her behalf, counsel for the Applicant submitted that the General Division failed to observe a principle of natural justice as well as erred in law. As grounds of the appeal, counsel for the Applicant stated that the Applicant suffers from a severe and prolonged disability. He suggested that in the alternative her MQP was later than April 30, 2011.

ISSUE

[4] Does the appeal have 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

[1] Sections 56 to 59 of the 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."

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

[6] In order for the Tribunal to grant leave to appeal, the Tribunal 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 the Tribunal is not satisfied that the appeal would have a reasonable chance of success.

[7] I come to this conclusion because although the Applicant has put forward breaches that fall under two of the grounds enumerated under subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act), she has not shown in what way the General Division breached natural justice or how it erred in law. Applications for leave to appeal require some arguable ground. However, other than citing the bare statutory provision the Applicant has not put forward any argument to support her Application.

[8] On an application for leave to appeal an applicant is not required to prove the grounds of appeal, however, at the very least, an applicant ought to set out some particulars of the error or breach of natural justice that he or she is alleging that the General Division committed. It cannot fall to the Tribunal to speculate as to the circumstances that give rise to the Application. The Application is deficient in this regard and, thus, I am not satisfied that the appeal has a reasonable chance of success.

[9] While the Applicant has not provided the Tribunal with a sufficient basis for the Application, subsection 58(1) of the DESD Act nonetheless enables the Appeal Division to determine if there is an error of law, whether or not the error appears on the face of the record.

[10] In the Applicant's case, the General Division Member correctly applied the law in respect of requests to cancel a benefit. The applicable statutory provisions are:

> **66.1.** *Request to cancel benefit* – (1) A beneficiary may, in prescribed manner and within the prescribed time interval after payment of a benefit has commenced request cancellation of that benefit.
>
> **(1.1)** *Exception* – subsection (1) does not apply to the cancellation of a retirement pension in favour of a disability benefit where an applicant for a disability benefit under this Act or under a provincial pension plan is in receipt of a retirement pension and the applicant is deemed to have become disabled for the purposes of entitlement to the disability benefit in or after the month for which the retirement pension first became payable.

[11] The Regulations permit a six-month window after the time a benefit commences in which a beneficiary could submit a written request to cancel the benefit. Subsection 46.2. (1) of the *Social Security Tribunal Regulations, S.O.R./2013-60 as amended by S.C.2013, c. 40, s. 236 provides,*

> **46.2.** **(1)** A beneficiary may submit to the Minister, within the interval between the date of commencement of payment pf the benefit and the expiration of six months after that date, a request in writing that the benefit be cancelled.

[12] Notwithstanding that the Applicant's MQP was December 31, 2014, the Member found that the Applicant's deemed date of disability was April 30, 2011. This is because CPP section 66.1 mandates that the beneficiary who is requesting the cancellation of a benefit cannot be deemed to have become disabled in or after the month that their retirement pension first became payable. Thus, the Applicant had to be deemed to have become disabled at least one month prior to the time payment of her retirement pension began. The Applicant's pension commenced in May 2011. Her deemed date of disability had to be April 2011 at the latest.

[13] The General Division Member examined the evidence concerning the Applicant's medical conditions with a view to determining whether or not they met the CPP paragraph 42(2)(a) criteria for a severe and prolonged disability. However, given that the Applicant had to be found to have become disabled as of the deemed date of disability if she were to be able to cancel the retirement pension in favour of a disability pension; the General Division Member had to find that the Applicant had a severe and prolonged disability on or before April 30, 2011. It

found that she did not. The General Division Member found that the medical evidence did not support that the Applicant's injuries occurred on or before April 30, 2011. She found that the evidence pointed to January 2012 as the date on which the injuries occurred. Accordingly, I find that the General Division made no error in holding that the Applicant cannot be deemed to have become disabled on or before April 30, 2011 and, therefore, was not entitled to a CPP disability pension.

[14] Counsel for the Applicant has submitted that the MQP should be later than April 30, 2011. I find that this is a submission that cannot be maintained. First, in the Applicant's case it is not her MQP that is crucial; it is the deemed date of disability. This date happens to predate her MQP. The General Division is bound by the terms of the statutory provisions that govern cancellation of a retirement pension in favour of a disability pension. The statutory provisions prohibit the General Division from deeming a date in or after the month for which the Applicant's retirement pension first became payable. Thus, there is clearly no error of law, or indeed any error, on the part of the General Division Member in this regard.

CONCLUSION

[15] The Applicant seeks leave to appeal from the decision of the General Division that she did not have a severe and prolonged disability on or before the deemed date of disability of April 30, 2011. The General Division decision means that the Applicant is not entitled to cancel her retirement pension in favour of a disability pension. On the basis of the foregoing analysis, I am not satisfied that the appeal would have a reasonable chance of success.

[16] Leave to appeal is refused.

Hazelyn Ross
Member, Appeal Division