

Citation: *G. O. v. Minister of Employment and Social Development*, 2015 SSTAD 1048

Date: September 4, 2015

File number: AD-15-882

APPEAL DIVISION

Between:

G. O.

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 September 4, 2015

DECISION

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

INTRODUCTION

[2] In a decision issued April 30, 2015, the General Division of the Social Security Tribunal of Canada (the Tribunal), found that the Applicant did not meet the criteria for payment of a *Canada Pension Plan* (CPP) disability pension. By an Application received August 6, 2015, the Applicant seeks leave to appeal the decision, (the Application).

GROUND OF THE APPLICATION

[3] The Applicant's minimum qualifying period date (MQP), is December 31, 2012. He submitted that he meets the criteria for receipt of a CPP disability pension because his chronic back pain prevents him from engaging in any sustained activity.

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 success². In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 as well as in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, the Federal Court of Appeal equated a reasonable chance of success to an arguable case.

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 The DESD Act, subsection 58(2) sets out the criteria on which leave to appeal is granted, namely, "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[6] There are only three grounds on which an appellant may bring an appeal. These grounds are set out in section 58 of the *Department of Employment and Social Development (DESD) Act*. They are,

- (1) a breach of natural justice;
- (2) that the General Division erred in law; and
- (3) the General Division based its decision on an error of fact made in a perverse or capricious manner or without regard for the material before it.³

ANALYSIS

[7] In order 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, were the matter to proceed to a hearing,

- (a) at least one of the grounds of the Application relate to a ground of appeal; and
- (b) there is a reasonable chance that the appeal would succeed on this ground.

For the reasons set out below I am not satisfied that this appeal would have a reasonable chance of success.

The Errors

[8] The Applicant, a former deck hand, gave the following reason for applying for leave to appeal.

³ **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.

I am appealing because I can no longer do anything of any endurance without pain or getting sharp shots of pain in lower or main back then tightens up. I have to use pills, osteo, massage, chiro, phsyio, accup. etc. to just exist. I spent the last 20 yrs. working, hiding the effects of the work and made it worse. I don't know one employer who would hire me if he knew the story behind my back.

[9] The Applicant attached two recent medical reports to his Application. The first report is a letter from a physiotherapist, Wendy Waterman at Rehab Service, DGH. Ms. Waterman wrote that, "Mr. G. O. has been seen by Physiotherapy at DGH presently, since May 29th 2015 for relief of his chronic back and hip pain." The Applicant attached a similar letter signed by Dr. P. Bachand. In his letter Dr. Bachand stated that he has been treating the Applicant since January 2001 for lower back pain radiating in both buttocks. Both medical personnel state that their treatments have given the Applicant some measure of relief for a problem that will continue to affect him for the rest of his life.

[10] I find that the grounds for the Application that the Applicant has put forward do not relate to a ground of appeal that would have a reasonable chance of success. The Applicant's submissions speak to his present medical situation but do not reveal that there has been or could have been a breach of natural justice. Nor do the submissions allude to an error of law, whether or not the error appears on the face of the record or an error of fact that was made in a perverse or capricious manner or ignoring the material that was before the General Division. In short, the Applicant's submissions merely repeat that he suffers from back pain and that he has done so for the past twenty years.

[11] The General Division did not dispute that the Applicant has chronic back pain, however, based on the Applicant's testimony and the medical evidence, the General Division found that he retained work capacity and was not disabled from all work, which is the requirement of paragraph 42(2)(a) of the CPP. Given that the Applicant testified that he could do some kind of work and also given that the medical evidence did not support that he could not be engaged in any substantially gainful employment, I find that it was reasonably open to the General Division to conclude that the Applicant did not meet the severe prong of the CPP disability definition.

[12] Furthermore, in neither of the two medical reports that the Applicant submitted with his Application do the medical practitioners state that he was disabled from all work. Referring to the Applicant's back pain, Dr. Bachand states, "over the years, this problem has consistently been bothering Mr. G. O. and has repeatedly mentioned how his problem has been preventing him from doing and performing his job to the best that he could." The physiotherapist observed that the Applicant's pain has been an ongoing issue for many years and progressively worsening. However, the Applicant only commenced physiotherapy intervention in May of this year, so this additional evidence would hardly be a reliable indicator of the severity of the Applicant's medical condition prior to December 31, 2012.

[13] For all of the above reasons, I am not satisfied that the Applicant has raised an arguable case or that the appeal would have a reasonable chance of success. Accordingly, I would dismiss the Application.

CONCLUSION

[14] The Application is refused.

Hazelyn Ross
Member, Appeal Division