Citation: ***M. W. v. Minister of Employment and Social Development,*** **2015 SSTAD 1140**

Date: September 28, 2015

File number: AD-15-988

APPEAL DIVISION

Between:

M. W.

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 September 28, 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 July 16, 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. The Applicant seeks leave to appeal the decision, (the Application).

GROUNDS OF THE APPLICATION

[3] Counsel for the Applicant provided the following ground for the Application. He submitted that "the General Division erred in law in making its decision by failing to take into consideration and apply the correct test to determine if the appellant suffered from a severe and prolonged medical condition on or before the relevant minimum qualifying period."

ISSUE

[4] The issue to be decided is: 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 that the appeal would have a reasonable chance of success[2]. 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.

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[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."

[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] Section 58 of the *Department of Employment and Social Development* (DESD), *Act* sets out three grounds of appeal. These are the only grounds on which an appeal could be brought. They are that,

(1) there has been a breach of natural justice;
(2) 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 the Application, the Appeal Division 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,

(1) at least one of the grounds of the Application relate to a ground of appeal; and
(2) 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 Alleged Errors of Law

[8] Counsel for the Applicant fleshed out his submissions under the heading "REASONS FOR APPEAL" Counsel stated:

> The General Division erred in law in making its decision by,
> i) holding at paragraphs 51 and 52 that the test for determining whether the Appellant's condition was "severe", was dependent on whether or not her

[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.

> condition precluded her from performing "all work" prior to the relevant minimum qualifying period;
>
> ii) failing to hold and apply the correct test for determining if the appellant's condition was "severe" based on whether the appellant suffered from a condition which made her regularly incapable of pursuing gainful employment;
>
> iii) failing to take into consideration the cumulative effect of the appellant's conditions as making her regularly incapable of pursuing gainful employment; and
>
> iv) failing to consider whether the minimal casual employment available to the appellant could be considered "gainful" prior to the minimum qualifying period.

[9] With regard to these alleged errors, at paragraph 51 the General Division commented on the cumulative effect of the applicant's medical conditions vis-à-vis meeting the definition for "severe" disability. The General Division found that the Applicant had two possible minimum qualifying periods, (MQP), dates: December 31, 2005 and, on a pro-rata basis, a possible second date of August 2006. The Member noted that prior to August 2006 the Applicant's medical conditions were not of a nature that brought her within the CPP definition of severe disability.

> [51] The Appellant submitted that the Tribunal should take into account the cumulative effects of all her medical conditions. The Tribunal notes that many of the Appellant's medical condition are either unsubstantiated or of a minor nature that would not be considered a serious medical condition that would preclude all work at the time of MQP of August, 2006.

[10] Counsel for the Applicant submitted that the General Division applied the wrong test in its determination of whether she had a severe disability. At paragraph 52 of his decision, the General Division Member set out case law applicable to the determination of "severe disability". This paragraph states:

> [52] It is not the diagnosis of the illness that determines the severity of the disability but whether the disability stops the Appellant from earning a living: Granovsky v. Canada (Minister of Employment and Immigration), [2001] SCR 703. It is the Appellant's capacity to work and not the diagnosis of [his/her] disease that determines the severity of the disability under the CPP: Klabouch v. Minister of Social Development, [2008] FCA 33. The Tribunal is mindful of the above decisions and has determined that the Appellant did not have a serious medical condition that would have preclude all work at the time of her MQP. This

determination is also based on the fact that the Appellant had gainful earnings in 2008.

[11] The Appeal Division finds no error with regard to the restatement of the case law by the General Division Member. That the claimed disability must have the effect of preventing an applicant for a CPP disability pension from pursuing (i.e. engaging) regularly any substantially gainful employment is a tenet that runs through the case law. As early as 2001, the Federal Court of Appeal made the point in *Villani v. Canada (Attorney General) 2001 FCA 248,* that a severe disability was one that would "render an applicant incapable of pursuing with consistent frequency any truly remunerative occupation."

[12] In its 2003 decision in *Inclima v. Canada (Attorney General) 2003 FCA 117,* the Federal Court of Appeal amplified its position stating that for an applicant for CPP disability pension "to come within the definition of "severe" disability, a claimant must not only show that he or she has a serious health problem but where there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition." In the instant case, the General Division Member found, on the basis of the Applicant's continued employment as a casual employee of her employer, she had demonstrated that she had work capacity, at least until 2011, when she stopped work.

[13] More recently, the Federal Court of Appeal reaffirmed this very principle *in Ferreira v. Canada (Attorney General) 2013 FCA 81,* when it stated, "the key question in these cases is not the nature or name of the medical condition, but its functional effect on the claimant's ability to work."

[14] It is clear that Counsel for the Applicant takes issue with the General Division's use of the term "all work" in paragraph 52. While the test for a "severe disability" is properly stated as "incapable regularly of pursuing any substantially gainful occupation" I am not persuaded that in the overall context of the decision that this is a material error. The General Division Member based the decision on the Applicant's continuing ability to pursue a substantially gainful occupation for some three years after the MQP end date. The General Division Member also based the decision on the Applicant's own statement of when she could no longer work,

namely in April 2011, which is almost five years after the pro-rated MQP end date of August 2006.

[15] Furthermore, there is existing case law in which the test is expressed in similar terms e.g. in *Crosset v, MEI (May 8, 1996), CP 337* the PAB stated that "the applicant must be totally disabled, with no residual capacity to work. In *Mapplebeck v MHRD (May 19, 2000)* CP 08904, the PAB also stated that the "test is whether a person is unable to do any kind of job". While these are not verbatim restatements of the CPP test, they do convey the sense that to come within the definition an applicant must be incapable regularly of pursuing any substantially gainful occupation. In the circumstances, I am not satisfied that Counsel's submissions are such that they would have a reasonable chance of success on appeal.

[16] Counsel for the Applicant has also raised arguments concerning the General Division's treatment of the cumulative effect to the Applicant's condition and the nature of the remuneration that the Applicant would garner from any available casual employment. However, given the findings concerning the Applicant's retained work capacity, I am not satisfied that these arguments give rise to a ground of appeal that would have a reasonable chance of success.

CONCLUSION

[17] Counsel for the Applicant submitted that the General Division made several errors of law in respect of the test it applied to its determination of whether the Applicant suffered from a "severe" disability. For the reasons set out above the Appeal Division is not satisfied that Counsel's submissions disclose a ground of appeal that would have a reasonable chance of success. Accordingly, the Application is refused.

Hazelyn Ross
Member, Appeal Division