Citation: ***M. S. v. Minister of Employment and Social Development,*** **2015 SSTAD 1149**

Date: September 29, 2015

File number: AD-15-916

APPEAL DIVISION

Between:

M. S.

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 29, 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 May 13, 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] The Applicant's minimum qualifying period date, (MQP), is December 31, 2013. He submitted that the General Division made certain errors of law and fact in holding that he did not meet the requirements for a severe and prolonged disability that are set out in ss. 42(2)(a) of the CPP. Specifically, he argued that since 2011, his chronic asthma condition has prevented him from engaging regularly in any type of substantially gainful employment.

ISSUE

[4] The Appeal Division of 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 success[2]. In *Canada (Minister of Human Resources Development) v. Hogervorst, 2007 FCA 41* as well as in *Fancy v. Canada (Attorney*

[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."

General), 2010 FCA 63, the Federal Court of Appeal equated a reasonable chance of success to an arguable case.

[6] There are only three grounds on which an appellant may bring an appeal. These grounds are set out in section 58 of the 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 Appeal Division must be satisfied that the appeal would have a reasonable chance of success. This means that the Appeal Division 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 the Appeal Division is not satisfied that this appeal would have a reasonable chance of success.

[8] The Applicant submitted that the General Division erred in the following manner:

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[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.

1. The learned tribunal member erred in law by not appreciating the appellant is suffering from severe and prolonged disability or incapacity to work in any capacity on part or full time basis.

2. The learned tribunal member erred in law by not appertaining that there are no evidence or insufficient, contradictory or convoluted evidence and failed to discharge onus that the appellant can engage in any employment.

3. Record conforms that appellant has not worked since 2011 due to severe chronic asthma conditions or due to incapacitated lungs precludes the appellant from doing any work.

4. The appellant admits he has worked 19 years of his adult life in healthily years prior to year 2011 but denies his grade 12 education has ever been assessed in Canada equal to Canadian high school.

[9] The Appeal Division find that these submissions do little more than set out the Applicant's dissatisfaction and disagreement with the General Division decision. Outside of his assertion that the qualifications he earned in his native country have not been assessed in Canada, the Applicant has not shown what error or errors of law (or of fact) were made by the General Division. Furthermore, the Appeal Division finds that the General Division made no error in respect of its description of the Applicant's qualifications as it did not suggest that his qualifications had at any time been reassessed in Canada.

[10] The General Division decision is short. Nonetheless, in the context of determining the severity of his disability, the decision contains a succinct examination of the Applicant's medical history including his diagnosis of bronchial asthma; the treatments he received; and the prognoses made by his treating physicians. These are set out at paragraph 11 of the decision, namely:

> [11] The Appellant's internal medicine physician, Dr. Alegado, has treated him with Symbicort, Ventolin, Singulair and Prednisone to which he has had a fair response and his overall prognosis is defined as good. His symptoms are wheezing, shortness of breath, and a dry cough. His health care is also

> provided by Dr. Tarlo, a respirologist since 2005 and Dr. Purewal, his family physician since 1995.He has required no hospitalization as may be indicated by a severe malady as part of his treatment and has been able to maintain his job with the condition since 1999. He is able to drive for 60 minutes and walk two blocks although he requires some assistance with his personal care. He noted that he is able to sit without difficulty and that he suffers from no other medical conditions.

[11] As well, in the context of determining the Applicant's ability to pursue regularly any substantially gainful employment prior to his MQP, the General Division examined his work history in Canada finding that:

> [10] The Appellant was forty-nine years of age on his MQP date. He has a grade 12 education from Pakistan and has worked as a car parts assembler since 2001. The Appellant claims disability on the day he quit work, March 12, 2010 but it is noted that he had earnings for 2011 which revised his MQP date. He has had and been treated for bronchial asthma since 1999 and claims this malady as the reason for his leaving his employment.

[12] The General Division reached the conclusion that the Applicant's circumstances and medical condition did not preclude him in engaging in all forms of work; paragraphs 15 and 16 pertinent paragraphs of the decision:

> [15] The Appellant's age (49) and education (Grade 12) should allow him to find alternative work within his physical limitations, be it sedentary or require some retraining. His Record of Employment (ROE) indicates 19 years of employment and life experience since 1993.
>
> [16] The Appellant has worked with his limiting condition (asthma) since 1997 and has had a fair response from his medications and overall, his prognosis is good. He is still able to drive and sit with no difficulty as well as walk two blocks. He also indicated an interest in an upgrading of his work skills but has not sought any alternative work opportunities. The Tribunal finds that the Appellant has failed to prove on a balance of probabilities a severe disability on or before his MQP.

[13] The Applicant has submitted that the General Division decision contains errors of law. However, the Appeal Division has found no error in either the General Division's reasoning or in the way the law was applied to the facts of the Applicant's case. Consequently, the Appeal Division finds that the Applicant has not raised an arguable case.

CONCLUSION

[14] The Applicant has failed to satisfy the Appeal Division that his appeal has a reasonable chance of success. Therefore, the Application is refused.

Hazelyn Ross
Member, Appeal Division