Citation: ***C. C. v. Minister of Employment and Social Development,*** **2015 SSTAD 1150**

Date: September 29, 2015

File number: AD-15-990

APPEAL DIVISION

Between:

C. C.

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 5, 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 cites s. 58(1)(c) of the *Department of Employment and Social Development,* (DESD), *Act* as the basis of the Application. She submitted that the General Division decision was incorrect and that it contained errors. She indicated the parts of the decision with which she disagreed by making hand-written annotations next to them on the copy of the decision which she attached to the Application. Despite the fact that the Applicant did not make her submissions in a systematic way, I have read all of the comments to discern her arguments in respect of the decision. More specifically, I have read them with a view to deciding whether they give rise to a ground or grounds of appeal that would have a reasonable chance of success.

ISSUE

[4] The Appeal Division 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

[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[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.

[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,

(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 I must 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 Tribunal is not satisfied that this appeal would have a reasonable chance of success.

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[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."

[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.

The Applicant's Position

[8] In her hand-written annotations the Applicant expressed her frustration with the CPP application process. She took the position that she is entitled to a CPP disability pension because her medical conditions are debilitating; because they have persisted for more than ten years; and because she met the contribution requirements of the CPP. Specifically, the Applicant pointed out that her chronic fatigue syndrome prevents her from staying awake for longer than a couple of hours. She complained that her entire body aches, her mobility is impaired and her ability to do household chores is much diminished. She requires the assistance of her husband to allow her to perform activities of daily life and the Applicant also indicated that her family physician has stated that she is unable to work.

[9] All of the information on which the Applicant relies was before the General Division when it rendered the decision. (GD decision paras. 10-15). The Member has recapped most, if not all, of the information under the Evidence portion of the decision. Essentially then, the Applicant is complaining about the weight the General Division Member gave to the evidence. It is for the General Division Member to assess and weigh the evidence. There must be clear indication that the General Division has erred in its assessment of the evidence before the decision can be disturbed. Disagreeing with the weight a General Division Member places on evidence does not by itself give rise to a ground of appeal that would have a reasonable chance of success. The Application cannot be allowed on this basis.

[10] Similarly, simply disagreeing with the decision is not sufficient to ground an appeal. Among the other sources of the Applicant's dissatisfaction was a statement in the report of the Calgary Headache Assessment and Management Programme to the effect that she had not complied with the entry requirement to their headache programme. She indicated that she did not participate in the programme because it did not have her correct telephone number and did not contact her family physician to obtain it. It would have fallen to the General Division to decide whether the Applicant had provided a reasonable explanation for her failure to participate the Headache Assessment and Management Programme. However, I find the question moot because it is clear that the General Division did not base any aspect of its decision on the report so that this is an issue that simply does not arise.

[11] As well, the Applicant raised several points of divergence from the decision in relation to her adherence to prescribed medical treatment. First, she stated that the General Division erred in stating she had not consulted a headache doctor in Hamilton. She had been seen by Dr. Rose Giammarco. However, the Applicant's comments in this regard are somewhat conflicting. At one point she commented that she had not seen a neurologist because no doctor referred to one. In fact, Dr. Giammarco is a neurologist. On the topic of medications, the Applicant gave several explanations for why she did not maintain certain prescribed medication regimes. Her main explanation was that the side effects of the various medications meant she could not take some of them. e.g. Amitriptyline caused weight gain. Frova did not always alleviate her migraines; Topamax caused an increase in her migraines.

[12] The case law is clear that applicants for a CPP disability pension have a personal responsibility to cooperate in their health care. *Kambo v. MHRD* 2005 FCA 353. However, the case law also recognises that applicants may have reasonable explanations for their failure to follow recommended treatment provisions. *Bulger v. MHRD* (May 18, 2000) CP 9164. Two items arise in this regard.

[13] First, it appears from the decision that the Applicant gave extensive evidence and had ample opportunity to provide her explanations for any failure to follow a treatment recommendation. Second, while the Applicant takes issue with some of the statements in the decision, most of the statements in the decision concerning the medical evidence are no more than a recap of what was contained in the medical reports the Applicant submitted. It must be presumed that the Applicant read these reports before submitting them. Thus, she had ample opportunity well prior to the hearing to refute and to correct any errors the medical reports may have contained. In my view it is now too late to raise them and certainly any error in the content cannot be laid at the feet of the General Division. Accordingly, I am not satisfied that any ground of appeal that would have a reasonable chance of success arises in this regard.

[14] I reach a similar conclusion with regard to the Applicant's contention that, contrary to the General Division's assertion she was taking anti-depressants. At paragraph 14 of the Decision, the General Division Member specifically records the Applicant's testimony that she has "tried every type of anti-depressant" since suffering a bout of depression in December

1995. Even if the General Division Member was wrong about the Applicant's use of anti-depressants, she contradicts herself when she comments at paragraph 46, "have tried many. Makes me worse and suicidal. Cannot move out of bed at all." In my view, the clear inference from this remark is that at the date of the hearing, the Applicant was not taking any anti-depressant. Thus, I find no error on the part of the General Division.

[15] With regard to her attempts to work and her retained work capacity, the Applicant makes the point repeatedly that pain was a large factor preventing her working or from continuing in the jobs she had. The General Division Member found, as a fact, that the Appellant resumed employment in 2013 when she started working for Meadowlands by Riviera on a casual basis. In 2013 she had earnings of $12,329.00. The General Division Member found that the Applicant continues to be employed by Meadowlands.

[16] The Applicant takes issue with the decision where it finds that her continued employment indicates she has been able to cope with her medical challenges. Indeed, this is the crux of the Member's decision. I can find no error in this regard. The Applicant may well have ceased working for Meadowlands by Riviera since the date of the hearing, however, the relevant date by which she had to establish that she had a severe and prolonged disability was December 31, 2014, the end of her minimum qualifying period or MQP. She was still employed at Meadowlands by Riviera as of that date.

The Prolonged Nature of the Applicant's Disability

[17] The Applicant contended that the length of time during which she suffered from her medical condition meant that she met the requirement for a prolonged disability. She submitted that the General Division erred when it did not use this evidence to find that she qualified for a CPP disability pension. I find that the General Division did not err. The case law is clear that the definition consists of two parts and that an applicant must meet the requirements for both parts. In short, an applicant must be found to suffer from a severe disability as well as a prolonged disability to qualify for a disability pension. *Klabouch v. Canada (Minister of Social Development)* 2008 FCA 33. Having found that the Applicant did not meet the definition of severe disability, the Member correctly asserted that he did not need to make a finding concerning whether her disability was prolonged.

CONCLUSION

[18] The Applicant submitted that the General Division erred in its appreciation of the facts surrounding her medical conditions. Having reviews the General Division decision and the medical documents the Applicant submitted to support her application for a CPP disability pension, the Appeal Division is not satisfied that the arguments made by the Applicant give rise to grounds of appeal that would have a reasonable chance of success.

[19] The Application is refused.

Hazelyn Ross
Member, Appeal Division