Citation: ***B. E. v. Minister of Employment and Social Development,*** **2015 SSTAD 1152**

Date: September 29, 2015

File number: AD-15-446

APPEAL DIVISION

Between:

B. E.

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 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 April 15, 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 (MQP), ended on December 31, 2013. Counsel for the Applicant submitted that she had a severe and prolonged disability before this date.

[4] On her behalf, Counsel for the Applicant submitted that the General Division breached subsection 58(1) of the *Department of Employment and Social Development* (DESD) *Act*, in that the General Division committed a number of errors of law as well as based its decision on erroneous findings of fact which it made in a perverse or capricious manner or without regard for the material before it.

ISSUE

[5] The Tribunal must decide whether the appeal has a reasonable chance of success.

THE LAW

[6] 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.

[7] 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) 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

[8] In order to grant leave to appeal, the Tribunal 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.

[9] Counsel for the Applicant submitted that the General Division made the following errors of law:

a) ignored the medical opinion of the Applicant's family doctor and specialist without providing reasons for doing so;
b) did not address the Applicant's ability to work at all, which is an essential component of the test for disability;
c) did not consider the "real world" in determining whether the Applicant qualified for disability; and
d) erred in requiring specific medical evidence be provided, rather than considering the entire evidentiary foundation. (AD1-7)

[10] In addition, Counsel for the Applicant submitted that the General Division misconstrued the opinion of Dr. Langlois and, acting on its misinterpretation of Dr. Langlois' opinion, the General Division made erroneous findings of fact, in a perverse or capricious or without regard for the material before it.

[11] The Tribunal examined the General Division decision in the context of the alleged errors of law. Having done so, the Tribunal is not satisfied that, in the circumstances of the Applicant's case, any of the submissions regarding error of law give rise to a ground of appeal that would have a reasonable chance of success. The Tribunal reaches its conclusion for the following reasons:

[12] It is clear that the General Division decision is based on the Applicant's failure to follow prescribed medical treatment, both for her physical conditions and her mental health issues. The Tribunal found that whether the prescribed treatment related to the Applicant's fibromyalgia condition; or her depression and anxiety, the Applicant failed to follow prescribed medical treatment. Further, the General Division found that the Applicant did not have a reasonable explanation for the failure.

[13] The case law is clear on the point. In *Bulger v. MHRD* (May 18, 2000) CP 9164, the PAB stated clearly that:

> To be entitled to a disability pension, an applicant is obligated to abide by and submit to treatment recommendations and, if this is not done, the applicant must establish the reasonableness of his/her non-compliance.

[14] The Federal Court of Appeal has upheld this principle stating, in *Lalonde v. Canada (Minister of Human Resources Development),* 2002 FCA 211 that, "the real world context also means that the PAB must consider whether the claimant's refusal to undergo physiotherapy treatment is unreasonable, and what impact that refusal might have on the claimant's disability status should the refusal be considered unreasonable." The Federal Court of Appeal would later uphold the position that claimants for a CPP disability pension have a personal responsibility to cooperate in their health care.[4] After recounting the salient details of the PAB decision denying the appeal, in part, on the basis that the appellant had consistently received medical advice to increase her physical exercise and activities but had unreasonably failed to do so,[5] the Federal Court of Appeal unanimously concluded,

> [4] We are of the view that the Pension Appeals Board was justified in reaching the conclusions it did having regard to the evidence before it.

[15] In the Applicant's case, the General Division determined that she received recommendations for pain management that included psychological counselling, which she did not take because she was reluctant to seek psychological treatment. The General Division did not find the Applicant's explanation reasonable. Neither did the Applicant participate in recommended cognitive behavioural treatment. Moreover, the Applicant apparently, was less than straightforward in her testimony when asked whether she had taken the offered cognitive behavioural treatment. (GDEC paras. 52- 53)

[16] Similarly, the General Division found that the Applicant did not have a reasonable explanation for her failure to participate in the recommended treatment plan that included strategies aimed at addressing her depression and anxiety. As well, the General Division found

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[4] *Kambo v. Canada (Human Resources Development),* 2005 F.C.A. 353 (CAN LII).

[5] *Kambo*, supra, para. 3.

"The Pension Appeals Board dismissed the appellant's appeal holding that although the appellant had been diagnosed with fibromyalgia, she had adopted an almost completely sedentary lifestyle. The Pension Appeals Board noted that the appellant had consistently received medical advice to increase her physical exercise and activities but had unreasonably failed to do so. Further the Pension Appeals Board noted that the appellant had never once looked for work of any kind since the onset of her illness, despite the fact that there was medical evidence that she was capable of doing "light duty work". The Pension Appeals Board did not accept the appellant's evidence that she was unable to do any work and there was no evidence that the failure to look for work or seek training was the result of her fibromyalgia."

that in light of a specific direction that the Applicant be directed to a publicly funded programme, the Applicant's explanation that she did not participate in physiotherapy because she lacked medical insurance was not reasonable. The General Division found that, in fact, the Applicant had not participated in any of the treatments recommended by Dr. Kolbe.

[17] In *Lalonde,* the appellant had refused physiotherapy. This refusal was held to be fatal to the appeal. Here the Applicant has failed to participate in several recommended treatments and has been found not to have provided reasonable explanations for not doing so. In light of the finding in *Lalonde,* and also in light of the fact that the General Division based its decision on the Applicant's failure to follow recommended treatments, the Tribunal finds that no error arises in the General Division's determination that the Applicant had not met her onus to establish that, on or before the MQP, she suffered from a disability that was severe and prolonged, within the meaning of the CPP. The Tribunal finds that in light of the facts and case law, this was a decision that was open to the General Division to make.

[18] Accordingly, the Tribunal finds that submissions in regard to error of law either cannot be supported or are rendered moot by the General Division finding that the Applicant failed to cooperate in her health care.

[19] With regard to the submission that the General Division committed an error of fact in relation to the opinion of Dr. Langlois, the Tribunal finds that it did. Counsel for the Applicant submitted that the General Division misconstrued Dr. Langlois' opinion with regard to how symptoms of degenerative disc disease are to be interpreted. The offending statement is the General Division conclusion that "Implicit in that comment is the fact that the degenerative disc disease itself is not severe." In the Tribunal's view when Dr. Langlois opines that " ... the common mistake is to assume that mild or moderate defects are necessarily related to mild or moderate symptoms ... ", he was actually saying that the presence of mild or moderate disc disease can be the source of a severe chronic pain syndrome. Thus, in the Tribunal's view, it was an error for the General Division to draw the inference that the Applicant's degenerative disc disease was not severe.

[20] Notwithstanding its finding that the General Division erred in its interpretation of Dr. Langlois' opinion, the Tribunal is not persuaded that the error is so material as to render the

whole of the decision unsafe. There was other evidence before the General Division on which it could have come to the same conclusion, namely the medical reports of Dr. Hinton and Dr. Kolbe. These are referenced at paragraphs 37-40 of the decision. Accordingly, leave will not be granted on this basis.

CONCLUSION

[21] In deciding this Application the Tribunal was required to determine whether any of the Applicant's reasons for leave to appeal fall within any of the grounds of appeal and then to assess the possibility of success on appeal. While the Tribunal finds that the Applicant's reasons for appeal fall within paragraphs 58(1)(b) and 58(1) (c) of the DESD Act, for the reasons set out above the Tribunal is not satisfied that, if leave is granted, the appeal would have a reasonable chance of success.

[22] The Application is refused.

Hazelyn Ross
Member, Appeal Division