Citation: ***M. S. v. Minister of Employment and Social Development,*** **2015 SSTAD 1189**

Date: October 2, 2015

File number: AD-15-939

APPEAL DIVISION

Between:

M. S.

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 October 2, 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 21, 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, 2010. He submitted that on or before this date he was suffering from a severe and prolonged disability that prevented him from pursuing regularly any 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 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 granting 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 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] Preliminary to a decision to grant the Application 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

[8] The Applicant made only one submission to support his appeal. He framed his submissions in the following terms, "severe and prolonged disability before MQP. Tried to return to work. Discontinue same due to medical."

[9] The Appeal Division finds that the Applicant's submissions do not relate to a ground of appeal that would have a reasonable chance of success. They repeat his belief in his eligibility but the Applicant has not shown how the General Division either breached a principle of natural justice or erred in law or 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.

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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.

[10] Furthermore, based on the Applicant's testimony that he returned to work in October 2012, the General Division found that he did not qualify for a CPP disability pension. The member recorded his testimony in the following paragraphs of the decision:

> [15] From 2008 until 2011, he was paid biweekly payments by the Workplace Safety and Insurance Board (WSIB). His pain improved somewhat in 2012. In October 2012, he began working for Appolito in X. When he started he did long distance hauls from Ontario to the United States. After a one year, he started doing short-haul deliveries across Ontario. He transports fresh and frozen food.
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> [16] When asked, he confirmed that he continues to work for that Appolito. He works five days a week. He testified that in 2014, he earned $60,000. He earned more in 2013 because he was driving to the United States.

[11] Thus on May 14, 2015 when the General Division held the hearing, the Applicant had returned to a substantially gainful occupation for some 2 years and 7 months. It is a tenet of the legislation that persons cannot simultaneously contribute to the CPP and derive a disability benefit. Nor can a person obtain short-term or partial benefits. The Applicant argues that he was disabled prior to the MQP. The General Division did not find that he was as he met only one aspect of the test for disability. It is undisputed that the Applicant has been engaged in a substantially gainful occupation for some time, which is clear evidence of work capacity. Absent error on the part of the General Division, which the Appeal Division does not find, the Appeal Division finds that the Applicant's submissions do not give rise to a ground of appeal that would have a reasonable chance of success.

CONCLUSION

[12] The Application is refused.

Hazelyn Ross
Member, Appeal Division