Citation: ***Minister of Employment and Social Development v. L. T.*****, 2015 SSTAD 1347**

Date: November 20, 2015

File number: AD-15-1060

APPEAL DIVISION

Between:

Minister of Employment and Social Development

Applicant

and

L. T.

Respondent

Leave to Appeal

Decision by: Hazelyn Ross, Member, Appeal Division

DECISION

[1] Leave to appeal to the Appeal Division of the Social Security Tribunal of Canada is granted.

INTRODUCTION

[2] On June 30, 2015 the General Division of the Social Security Tribunal of Canada, (the Tribunal), issued a decision in which it found that the Respondent met the criteria for receipt of a *Canada Pension Plan* (CPP) disability pension based on a pro-ration date of May 31, 2009. The Applicant seeks leave to appeal the decision, (the Application).

GROUNDS OF THE APPLICATION

[3] Counsel for the Applicant submitted that the General Division erred when it determined that the Respondent became disabled by virtue of her medical conditions within the meaning of subsection 42(2) of the CPP. Counsel submitted that General Division based its decision on erroneous findings of fact that it made without regard for the material before it and, also that the General Division.

[4] Counsel for the Applicant also submitted that the General Division erred in law regarding the application of the proration provisions of the CPP. The Applicant argues that while the General Division properly determined the pro-rated minimum qualifying period date, (MQP), the General Division misinterpreted and misapplied the proration provision; including failing to find that the Respondent had become disabled during the prorated year as required by the CPP; while finding her disabled within the meaning of the CPP.

[5] The Applicant also submitted that the General Division erred in law when it applied the effective date of payment provision in the CPP by determining that the effective date of payment as being April 2010 when it should be April 2011.

ISSUE

[6] The Appeal Division must decide if the appeal has a reasonable chance of success.

APPLICABLE LAW

[7] 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. In *Canada (Attorney General) v. Carroll*[3] the Federal Court opined that, "an Applicant will raise an arguable case if she [or he] ... raises an issue not considered ... or can point to an error" in the decision.

[8] There are but three grounds on which an appellant may bring an appeal. They are set out in section 58 of the *Department of Employment and Social Development, (DESD*), *Act*, namely, breaches of natural justice; error of law; or error of fact.[4] However, to grant leave, 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, at least one of the grounds of the Application relates to a ground of appeal and that there is a reasonable chance that the appeal would succeed on this ground.

ANALYSIS

Did the General Division err in finding that the Respondent had qualified for a CPP disability pension?

[9] The Applicant made two main submissions in relation to this issue. First the Applicant submitted that the General Division erred in finding that the Respondent was entitled to a CPP

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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."

[3] *Canada (Attorney General) v. Carroll*, 2011FC1092 para 14.

[4] **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; The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or 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.

disability pension. In the Applicant's submission the Respondent could qualify for a disability pension only if the General Division were to have found that she became disabled during the pro-rated year, which the General Division did not do. The pro-rated date being May 31, 2009.

[10] Provision is made in subsection 44(2.1) of the CPP for the possibility of an MQP based on an applicant's pro-rated contributions where the applicant is a late-applicant, namely:

> **(2.1)** For the purposes of determining the minimum qualifying period of a contributor referred to in subparagraph (1)(b)(ii), the basic exemption for the year in which they would have been considered to have become disabled, and in which the unadjusted pensionable earnings are less than the relevant Year's Basic Exemption for that year, is an amount equal to that proportion of the amount of that Year's Basic Exemption that the number of months that would not have been excluded from the contributory period by reason of disability is of 12.

[11] Further, the Applicant submits that the General Division committed errors of fact in respect of its interpretation and application of the medical evidence. The Applicant submitted that the General Division either misapprehended or disregarded certain aspects of the medical evidence, including the fact that while the General Division found that the Respondent suffered from a severe and prolonged disability as of November 2008, there was no medical evidence that ante-dated September 2009.

[12] With respect to the first issue the Applicant raised, in *MSD v. Gorman (August 1, 2006). CP 22414 (PAB),* the Pension Appeals Board concluded that in order for a claimant to be eligible for disability benefits a claimant would have to be found to be disabled within the meaning of the CPP during the extended or prorated period. The General Division found that the Applicant was disabled as of November 2008. This finding does not accord with the PAB's statement in Gorman.

[13] With respect to the Applicant's submissions concerning the medical evidence, the Appeal Division finds that an arguable case was raised not only by the General Division's finding that the medical evidence supported a finding of severe disability but also by the timing of the medical evidence in relation to the date on which the General Division deemed the Respondent to have become disabled. It follows, therefore that the Applicant has also raised an arguable case with respect to the start date of payment of the disability pension.

CONCLUSION

[14] Counsel for the Applicant submitted that the General Division committed errors of fact and law in deeming the Respondent disabled as of November 2008 and in finding that she was entitled to a Canada Pension Plan disability pension. In order to succeed on an Application for leave to appeal an Applicant need only demonstrate that there is one ground of appeal that has a reasonable chance of success. The Appeal Division finds that the Applicant has raised an arguable case with respect to all of the grounds put forward. Further, the Appeal Division is satisfied that the appeal has a reasonable chance of success.

[15] The Application is granted.

Hazelyn Ross
Member, Appeal Division