

Citation: *A. P. v. Minister of Employment and Social Development*, 2015 SSTAD 1370

Date: November 30, 2015

File number: AD-15-1071

APPEAL DIVISION

Between:

A. P.

Applicant

and

Minister of Employment and Social Development

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, (the Tribunal), is granted.

INTRODUCTION

[2] On September 2, 2015, the General Division of the Tribunal issued a decision in which it held that the Applicant had not met her onus to establish that she had a severe and prolonged disability within the meaning of the *Canada Pension Plan* (CPP).

[3] The Applicant seeks leave to appeal the decision, (the Application).

GROUND OF THE APPLICATION

[4] Counsel for the Applicant submitted that the General Division decision contains numerous errors of law and fact. Specifically, Counsel submitted that the General Division Member erred in three main ways, namely by failing to correctly apply the relevant law; misapprehending the true facts concerning the Applicant's medical condition and not rendering her decision on the totality of the Applicant's medical conditions. Counsel for the Applicant also submitted that the General Division failed to address the Applicant's credibility. In the submission of Counsel for the Applicant, but for these errors, the General Division would have found that the Applicant met the criteria for a severe and prolonged disability.

ISSUE

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

APPLICABLE 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 success². 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.

[7] There are only three grounds on which an appellant may bring an appeal. These grounds are set out in section 58 of the *Department of Employment and Social Development Act*, (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

[8] The Applicant submitted that the General Division was under a duty to assess the Applicant’s subjective level of pain and that by omitting to do so the General Division Member committed an error of law.

[9] Further, the Applicant submitted that the General Division Member misinterpreted and misquoted her evidence and also took the medical evidence out of context. Counsel for the Applicant also alleged that the General Division committed other errors of law or of mixed fact and law, including misapplying the law with respect to training and failing to address the issue of credibility.

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.

[10] Without commenting on the merits of the appeal, the Appeal Division is of the view that these are questions that could only be addressed through a hearing. Thus, the Appeal Division finds that the Applicant has raised an arguable case.

CONCLUSION

[1] The Application is granted.

Hazelyn Ross
Member, Appeal Division