

Citation: *M. M. v. Minister of Employment and Social Development*, 2015 SSTAD 1371

Date: November 30, 2015

File number: AD-15-1074

APPEAL DIVISION

Between:

M. M.

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 is refused.

INTRODUCTION

[2] On June 30, 2015, the General Division of the Social Security Tribunal of Canada, (the Tribunal), issued a decision that denied the Applicant's appeal of a reconsideration decision that held that he did not meet the criteria for receipt of a *Canada Pension Plan* (CPP) disability pension. The Applicant seeks leave to appeal the decision, (the Application).

GROUND OF THE APPLICATION

[3] The Applicant submitted that the General Division misinterpreted the evidence concerning his ability to work. He submitted that he could not engage in full-time employment and that this inability was supported by all of his doctors. The Applicant stated that he was relying on subsections 58(1)(a) and 58(1)(c) of the *Department of Employment and Social Development Act*, (the DESD Act) as grounds of the appeal. He charged that the General Division focussed excessively on motor vehicle accident reports without properly balancing his reports, thereby committing a breach of natural justice. The Applicant also submitted that the General Division made an erroneous finding of fact when it determined that he never tried to work more than on a part-time basis.

ISSUE

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

APPLICABLE 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 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.

[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, namely, breaches of natural justice; error of law; or error of fact.³ 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

[7] The Applicant submitted that the General Division breached subsection 58(1)(c) of the DESD Act when the Member concluded that he had never tried to work on anything but a part-time basis. He pointed out that he had tried to increase the number of hours he taught the guitar, but that he was unable to work more. The Appeal Division infers that the Applicant is not stating that the company with which he was associated was not providing him more hours, simply that he was physically unable to work longer hours.

[8] On examining the General Division decision, the Appeal Division is not persuaded that the General Division based its decision on an erroneous finding of fact concerning the Applicant's ability to work more than on a part-time basis. Paragraphs 48 and 49 of the decision, provide the rationale for the General Division's conclusion, namely:

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; 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.

[48] In the Tribunal's estimation the crucial factor to determine is whether the Appellant's chronic pain at the time of the MQP precluded him from working more than the six to eight hours he currently works teaching guitar. The Appellant bears the onus to show that it is more likely than not that it does. If that onus is met, the Tribunal accepts that such work, earning \$240.00 a week, is not a substantially gainful occupation.

[49] However, there is simply no evidence in the record that the Appellant has attempted a part-time sedentary position that is substantially gainful and failed in that attempt owing to his health condition. The Tribunal finds that the Appellant has failed to discharge his onus of showing that his condition is such that he was incapable regularly of any substantially gainful occupation at the time of the MQP or thereafter.

[9] What emerges from a reading of these paragraphs is that the General Division was prepared to find that the Applicant met the definition of severe disability if he could establish that he had attempted and failed, by reason of his medical conditions, to acquire employment that was greater than the time he currently spent giving guitar lessons.

[10] The General Division found that the evidentiary record did not support such a finding. The key finding being the statement that "there is simply no evidence in the record that the Appellant has attempted a part-time sedentary position that is substantially gainful and failed in that attempt owing to his health condition." The Applicant has submitted that he tried to increase the number of hours he taught the guitar, however, there appears to be no objective evidence to support his assertion in the Tribunal Record. Accordingly, the Appeal Division is unable to find that the General Division relied on erroneous findings of fact to come to its decision about the Applicant's ability to do more than part-time work and, thus, retained work capacity.

CONCLUSION

[11] The Appeal Division is not satisfied that the appeal would have a reasonable chance of success. The Application is refused.

Hazelyn Ross
Member, Appeal Division