Citation: ***B. G. v. Minister of Employment and Social Development,*** **2015 SSTAD 1365**

Date: November 27, 2015

File number: AD-15-1070

APPEAL DIVISION

Between:

B. G.

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] In a decision issued July 2, 2015, a Member of the General Division of the Social Security Tribunal of Canada, (the Tribunal), denied the Applicant's appeal of a reconsideration decision that found she did not meet the criteria for payment of a *Canada Pension Plan* (CPP) disability pension.

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

GROUNDS OF THE APPLICATION

[4] Counsel for the Applicant listed the grounds of the appeal as subsections 58(1)(a)(b)and (c) of the *Department of Employment and Social Development Act*, (the DESD Act). Counsel submitted that:

1. The Review Tribunal erred in not taking into consideration the totality of the evidence and material before it in deciding that the appellant was not entitled to a disability pension.
2. The General Division erred in its consideration of the Application as numerous medical reports indicated that the Applicant was unable to work due to her medical conditions.

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 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.

[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, 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.

[8] For the reasons set out below the Appeal Division is not satisfied that this appeal would have a reasonable chance of success.

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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*, 2011 FC1092 para 14.

[4] **58(1) Grounds of Appeal** –

> 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.

ANALYSIS

[9] Counsel for the Applicant has contended that there was a wealth of medical information before the General Division that supported a finding that the Applicant suffered from a severe and prolonged disability prior to her minimum qualifying period (MQP) date of December 31, 2010. Thus, in Counsel's view, the General Division decision is based either on error of law or error of fact. He cited three medical reports that in his submission clearly state that the Applicant is disabled. These reports were:

1. The report of the Applicant's family physician dated August 3, 2011. Counsel for the Applicant noted that Dr. G.S. Grewal provided a prognosis of "guarded"; and stated that the Applicant remains totally and permanently disabled to do any gainful employment all her life. The General Division noted this prognosis at paragraph 11 of the decision. As well Counsel stated that throughout his clinical notes Dr. G.S. Grewal states that the Applicant is nervous and anxious, establishing that there was a psychological issue near to the Applicant's minimum qualifying date.

2. Dr. Koponen's report dated April 3, 2012, in which he stated that the Applicant has right and left hand numbness and diagnoses the presence of bilateral Carpal Tunnel Syndrome which requires wrist splints.

3. Dr. Dhaliwal's report in which he diagnosed the Applicant with stress caused by the anxiety and depressive symptoms and states that the Applicant is unable to deal with these conditions and, therefore, she cannot go back to work.

[10] Counsel for the Applicant also submitted that the Applicant has a very low General Assessment of Functioning rating and that Dr. Dhaliwal continues to state that in his opinion with regard to the Applicant's ability to work and return to work.

[11] However, the reports on which Counsel for the Applicant relies were not the only medical reports that were before the General Division. At paragraphs eleven through thirty-four of the decision, the General Division Member set out the details of the various medical reports, including the diagnoses that were made and the treatments suggested as well as any comment on the Applicant's progress. Notwithstanding the comment of the Applicant's family physician, the

Member concluded that having carefully considered the medical evidence and the Appellant's testimony, he was not persuaded that the Applicant's disability met the CPP definition of severe and prolonged on or before the MQQ.

[12] The Appeal Division finds no error in this finding. The Applicant's MQP ended on December 31, 2010. The medical reports that predate the MQP do not clearly support a finding of severe disability. The Medical Report that the family physician completed was dated seven months after the MQP, and his clinical notes for 2010 do not clearly support such a finding.

[13] With regard to the submission that the General Division either ignored medical reports or drew perverse or capricious findings from the medical evidence, the Appeal Division finds that these submissions are not supported by the Tribunal record and the decision. In the decision, the General Division Member addressed each of the conditions that the Applicant submitted rendered her disabled, as he was required to do by the case law. These included Anxiety/Depression; Menopause; Hypothyroidism; Hypertension; Left side chest pain on exertion; Bilateral Shoulder Pain/left 3rd and 4th finger pain; and numbness/pain in back/legs/entire body. With the exception of the Applicant's complaint of right shoulder pain after working on February 16, 2006, the General Division Member found that he had not been presented with contemporaneous evidence, medical reports or test results at the time of the MQP, which would support a finding that the Applicant suffered disabling pain in her back, legs and throughout her body on or before the MQP.

[14] As well, the General Division Member was not satisfied that the evidence supported a conclusion that the Applicant's hypertension, menopausal symptoms and angina rendered her incapable regularly of pursuing any substantially gainful employment.

[15] The General Division Member made similar findings in regard to the Applicant's other medical conditions. In particular, with regard to the submission that the Applicant had a long-standing mental health condition, the General Division Member found that her treatment history, her ability to maintain employment together with the lateness of the diagnosis undermined a finding that the Applicant suffered from a severe mental health condition on or before her MQP. In this regard, paragraph 83 of the decision is instructive.

> [83] The Tribunal is not satisfied that the Appellant suffered from a significantly disabling anxiety and depression on or before the MQP which rendered her incapable regularly of performing any substantially gainful occupation. Although Dr. Grewal states in his March 19, 2012 report that the Appellant had longstanding anxiety

> and depression since August 1992, the Tribunal notes she was able to work with these conditions until September 2007 (see Appellant's Questionnaire).

[16] As well, the General Division Member commented on the timing of the Applicant's consultation with a psychiatrist, noting:

> [84] Significantly, the Appellant only saw Dr. Dhaliwal, psychiatrist, for the first time in 2012. Although he stated she presented with pain for 10 years with depression developing over time, he did not see the Appellant at or around the MQP and was unable to provide a contemporaneous opinion as to the disabling nature of her psychological conditions(s).
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> [85] The Tribunal has considered the list of medications provided by the Appellant. She does not appear to have been prescribed medication for anxiety and depression at or around the MQP. During the April 20, 2006 thyroid consultation, Dr. Dharmalingam reported she was not on any medication. According to his April 29, 2010 report, she was on Levothyroxine. In his February 28, 2011 report (issued just after the MQP), Dr. Qureshi reported that the Appellant was on Atenolol, Atacand, Synthroid and aspirin.
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> [86] The Tribunal has also considered Dr. Grewal's clinical notes and is not satisfied they support the existence of significantly disabling depressive or anxiolytic symptomatology on or around the MQP, which rendered the Appellant severely disabled as defined in the CPP. Although he noted she was anxious in a 2006 clinical note entry and also reported she was nervous and anxious in a January 20, 2010 entry, he did not report ongoing symptomatology between the date of these entries and the MQP or ongoing prescription of medication for these conditions.
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> [87] On balance, given the absence of active treatment, medication and psychiatric referral and consultation on or before the MQP, the Tribunal is not satisfied the Appellant's mental disability was severe as defined in the CPP on or before the MQP.

[17] The Appeal Division finds no error in respect of the above findings. The above paragraphs demonstrate that the General Division gave careful consideration to all of the evidence regarding the Applicant's mental health conditions.

[18] Further, the Member of the General Division found that there was valid reason to doubt the Applicant's credibility. The Appeal Division finds that the General Division did not err in this regard. In the view of the Appeal Division the Applicant's apparent prevarication about her her ability to communicate in English and to drive could reasonably lead to the conclusion to which the General Division arrived, namely that there was valid reason to doubt the Applicant's candour and truthfulness as a witness and, therefore, the reliability of her evidence. Especially, where that evidence contradicted statements that were made by one of the Applicant's treating physicians.

> [116] Her evidence that she can drive up to 2-3 times weekly, also raises questions concerning the nature, degree and severity of her problems with concentration, wrist and shoulder pain. Although the Tribunal appreciates the Appellant's evidence that her driving trips are of short duration and infrequent and that she requires a passenger in the car, nevertheless, the Tribunal notes the Appellant has capacity to drive, which requires her to be able to use her hands, wrists, arms and shoulders, and which further requires direct concentration on her part, passenger notwithstanding. The Tribunal further notes that the Appellant's explanation that she drove two weeks ago to visit a family member is at variance with the contents of Dr. Dhaliwal's February 14, 2015 report, in which he stated the Appellant avoids going out because of anxiety and is unable to socialize.

[19] Lastly, but not least, the General Division Member found that the Applicant's past attempts at alternative employment did not rule out that she could not retrain or pursue alternative work. The Member found that these efforts had also involved repetitive work. This was not in and of itself an indication that she could not engage in other types of work.

[20] Counsel for the Applicant cited the factors set out in *Villani v. Canada (A.G.)*, 2001 FCA 248 indicating that the General Division was under a duty to apply them. This is trite law. However, Counsel for the Applicant did go on to submit that the Applicant's age, education, difficulty in the English language, past work and life experience warranted a finding that she was disabled within the meaning of the CPP.

[21] The General Division Member addressed the Applicant's ability to pursue regularly any substantially gainful employment or to retrain in the context of her personal factors that included "her age at the MQP (54), education (Grade 10 in India) and knowledge of some English."

However, he concluded that on the evidence that was before him, namely, that she had engaged in alternative work and had studied English at school, he was not satisfied that these were not a bar to the Applicant pursuing "lighter work within her physical restrictions."

CONCLUSION

[22] The test for granting of leave is "reasonable chance of success". The Appeal Division must be satisfied that there is a reasonable chance that the appeal would succeed. The Applicant has submitted that the General Division breached all three grounds of subsection 58(1) of the DESD Act. The Appeal Division finds that the Applicant has not met her onus to satisfy it, on a balance of probabilities that any of the grounds of appeal exist. On the basis of the foregoing analysis, the Appeal Division is not satisfied that there has likely been a breach of natural justice; or that the General Division either erred in law; or based its decision on a finding of fact that it reached either perversely or capriciously or without regard for the material before it.

[23] The Application is refused.

Hazelyn Ross
Member, Appeal Division