Citation: ***Minister of Employment and Social Development v. H. P.,*** **2015 SSTAD 1362**

Date: November 26, 2015

File number: AD-15-1035

APPEAL DIVISION

Between:

Minister of Employment and Social Development

Applicant

and

H. P.

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 24, 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. The Applicant seeks leave to appeal the decision, (the Application).

GROUNDS OF THE APPLICATION

[3] Counsel for the Applicant submitted that the 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 erred in law regarding the application of the proration provisions of the CPP. The Applicant argues that for these reasons the appeal has a reasonable chance of success and leave to appeal should be granted.

ISSUE

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

APPLICABLE LAW

Leave to Appeal

[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*

[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."

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 *Department of Employment and Social Development, (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 in two ways. First, the General Division erred "when it determined that the Respondent became disabled by her medical conditions within the meaning of subsection 42(2)(b) of the CPP as of November 2003." The Applicant took the position that the General Division ignored medical evidence that the Respondent was,

a) not taking medication to treat seizures, but rather to treat trigeminal neuralgia; and

b) that the Respondent was not diagnosed with a seizure condition until August 2007.

[8] The Applicant further submitted that the General Division's conclusions were based on an "erroneous finding of fact that was made without regard to all the medical evidence that was before it because it was not until October 2007, that Dr. Aghakhani made the diagnosis that in

[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.

August 2007, the Respondent had, what he highly suspected, was a seizure." (AD1-9) The Applicant argued that there was no medical evidence which shows that the Respondent had a seizure disorder prior to August 2007.

[9] The Applicant also took issue with how the General Division applied the CPP pro-ration provisions. In the Applicant's submission, the General Division misinterpreted and misapplied the provision, thereby committing an error of law. The Applicant contended that,

> Properly interpreted and applied, the proration provision would allow a proration of the Respondent's earnings, only if the Respondent were found to be disabled with in a four month period between January 2007 - April 2007. Without a finding of disability in the prorated year there is no "triggering event" that allows for proration under the proration provision.

Did the General Division commit an error of fact in respect of its findings about the Respondent's seizure condition?

[10] The General Division accepted that as far back as at least 2000 the Respondent suffered from seizures. This is reflected at paragraph 44 of the decision where the Member states:

> The Tribunal found that the Appellant's disability is long continued. She testified that her dizziness and seizures go back to at least 2000 when she started taking anti-seizure medication and this is corroborated in histories documented in several of the medical reports.

[11] The Applicant contends that this is a mistake of fact, as there was no medical evidence showing that the Respondent had a seizure disorder prior to August 2007.

[12] The Appeal Division notes that in his report dated October 16, 2012, the Respondent's family physician indicated that she had been diagnosed with a seizure disorder as far back as 2000. GT1-67 The Applicant states that the family physician was making an inference based on the fact that the Respondent had been taking antiepileptic medication since 2000. The Appeal Division finds that the Applicant has raised an arguable case in this regard. At the time this medical report was made the Respondent had been her family physician's patient for only one

year. The family physician clearly did not have first-hand knowledge of the particular prescription, and why it had been made.

Did the General Division misapply the CPP pro-ration provisions?

[13] With respect to the General Division's application of the CPP pro-ration provisions, the Appeal Division finds that the Applicant has also raised an arguable case.

[14] The General Division determined that the Respondent's minimum qualifying period (MQP) date was April 30, 2007 based on a proration of her earnings. The General Division also determined that the Respondent was disabled as of November 2003 and went on to find that she was eligible for a CPP disability pension.[4] The Applicant argues that this was an error of law because the Respondent must have been found to have become disabled within the four month period January 2007 - April 2007. In the Applicant's submission, "without a finding of disability in the prorated year there is no "triggering event" that allows for proration under the proration provision." AD1-12

[15] There is case law that supports the Applicant's position. 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.

CONCLUSION

[16] Counsel for the Applicant submitted that the General Division committed errors of fact and law in deciding that the Respondent was eligible for a CPP disability benefit. On the basis of the foregoing, the Appeal Division finds that the Applicant has raised an arguable case. The Appeal Division is satisfied that the appeal has a reasonable chance of success.

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[4] 45] The Tribunal finds that the Appellant had a severe and prolonged disability in November 2003, when she last worked at the Toy Library. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) CPP). The application was received in July 2012; therefore the Appellant is deemed disabled in April 1, 2011. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of August 2011.

[17] The Application is granted.

Hazelyn Ross
Member, Appeal Division