Citation: ***J. W. v. Minister of Employment and Social Development,*** **2015 SSTAD 1409**

Date: December 9, 2015

File number: AD-15-1111

APPEAL DIVISION

Between:

J. W.

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 refused.

INTRODUCTION

[2] On October 13, 2015, the Tribunal received a Notice of Appeal from the Applicant. The Applicant was seeking leave to appeal the decision of the General Division of the Tribunal dated August 19, 2015. This decision denied his appeal of a reconsideration decision that found he was not eligible for a *Canada Pension Plan* (CPP) disability pension.

GROUNDS OF THE APPLICATION

[3] The Applicant submitted that the General Division decision is wrong. He did not specify whether the error was an error of law; of fact; or a breach of natural justice or a refusal or improper exercise of jurisdiction. He charged that the General Division was swayed by the fact that he continued to work after the accident. The crux of the Applicant's complaint is contained in the following statement, "I feel that the board's decision to deny my disability claim is solely based on my continuance of employment for a few years after my accident." (AD1-Request of Leave to Appeal) In the view of the Appeal Division the Applicant is alleging breaches of paragraphs 58(1)(b) and (c) of the *Department of Employment and Social Development Act*, (DESD), Act.[1]

ISSUE

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

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[1] **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.

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.[2] To grant leave, the Appeal Division must be satisfied that the appeal would have a reasonable chance of success[3]. 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*[4] 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.

[6] 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 erred in finding that he is not disabled within the meaning of the CPP. He submitted that his injuries continue to worsen and that he sees his doctors and takes medications to deal with the aftermath of the injuries to his feet. The Appeal Division accepts that the Applicant's health condition may be worsening, however, this is not the criteria by which the General Division had to assess his eligibility for a CPP disability pension. With this in mind, the Applicant has to establish that in relation to the General Division decision, there is at least one ground of appeal that has a reasonable chance of success.

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[2] 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."
[3] 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."
[4] *Canada (Attorney General) v. Carroll*, 2011FC1092 para 14.

[8] The General Division Member had to find that the Applicant had a severe and prolonged disability on or before the end of his minimum qualifying period (MQP) date of December 31, 2006. Alternatively, the General Division had to find that the Applicant became disabled on or before September 2007, the possible prorated MQP date.

[9] The Member found that evidence did not support either finding. Further, the Member found that the Applicant had retained work capacity relative to his MQP and prorated MQP.

[10] The Applicant contends that this finding is an error. The Appeal Division is not persuaded by the Applicant's submission.

[11] It was not disputed that the Applicant suffered a workplace injury in 2001. Neither is it disputed that the Applicant continued to work until June 2007. In the context of an MQP date of December 31, 2006 and a possible pro-rated MQP of September 2007, the General Division was legally required to assess the Applicant's ability to pursue regularly any substantially gainful employment up to these dates. It is not simply a question of the General Division placing too much emphasis on the fact that the Applicant continued to work for several years after the accident. It is a duty that the General Division had to carry out. The case law is clear, where an Applicant demonstrates that he or she has retained work capacity then the Applicant must show that their health condition prevented them from pursuing regularly any substantially gainful employment. The Applicant's health condition may have worsened; however, the General Division was under a duty to assess the facts as they impacted the Applicant's ability to pursue regularly any substantially gainful employment on or before the MQP as opposed to on the date of the hearing. The MQP predated the hearing by some 8 or 9 years.

[12] Therefore, the Appeal Division finds that the General Division did not err in law or base 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. The Appeal Division is not satisfied that the Applicant's submissions disclose a ground of appeal that would have a reasonable chance of success.

CONCLUSION

[13] The Application is refused.

Hazelyn Ross
Member, Appeal Division