Citation: ***G. N. v. Minister of Employment and Social Development,*** **2015 SSTAD 1411**

Date: December 9, 2015

File number: AD-15-1183

APPEAL DIVISION

Between:

G. N.

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), is refused.

INTRODUCTION

[2] On July 28, 2015 a Member of the General Division of Canada, (the Tribunal issued a decision in which the Member found that the Applicant did not meet the definition of "severe and prolonged disability" contained in s. 42 of the *Canada Pension Plan,* (CPP). The decision denied payment of a CPP disability pension. The Applicant seeks leave to appeal the decision, (the Application).

GROUNDS OF THE APPLICATION

[3] The Applicant submitted that the General Division breached subsections 58(1) (a) & (c) of the *Department of Employment and Social Development Act, (the DESD Act).*

ISSUE

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

THE 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 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.

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[1] DESD Act, sections 56 to 59. 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."

[6] There are only three grounds on which an appellant may bring an appeal to the Appeal Division. These grounds are set out in section 58 of the *Department of Employment and Social Development, (DESD*), *Act*. They are that the General Division ,

> (1) committed a breach of natural justice or refused to or improperly exercised its jurisdiction;
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> (2) erred in law; or
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> (3) based its decision on an error of fact made in a perverse or capricious manner or without regard for the material before it.[3]

ANALYSIS

[7] In order to grant leave to appeal the Tribunal must be satisfied that the appeal would have a reasonable chance of success. This means that the Tribunal 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. The Appeal Division must then determine whether there is a reasonable chance that the appeal would succeed on this ground. For the reasons set out below the Appeal Division is not satisfied that this appeal would have a reasonable chance of success.

The Alleged Errors

[8] Counsel for the Applicant submitted that in making its decision the General Division did not take the totality of the evidence and material before it into consideration. He argued that the Applicant had consulted various doctors and specialists all of who had the opportunity of seeing him and gave as their professional opinion a finding that he is disabled. In particular, Counsel for the Applicant cited Dr. Hameed; Dr. Panjwani and Dr. Sehmi who he stated all reached the conclusion that the Applicant suffers from a severe and prolonged disability within the meaning of paragraph 42(2)(a) of the CPP.

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[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.

[9] In relation to the submissions of Counsel for the Applicant, the Appeal Division must address the following questions:

> 1. Did the General Division commit an error or errors of law in respect of its application of the law to the Applicant's case?
> 2. Did the General Division 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?

Is the General Division decision based on an erroneous finding of fact?

[10] The General Division is alleged to have failed to consider all of the evidence and material that was before it. Having examined the Tribunal Record and the General Division decision, the Appeal Division finds that the allegation is not supported. The Applicant's medical evidence is identified as GD4. Paragraphs 11 to 23 of the decision contain extensive summaries of the medical evidence. This includes references to the reports of the very doctors and specialists on which the Applicant relies. The General Division discussed the impact of the medical evidence on its assessment of whether the Applicant had a severe and prolonged disability at paragraphs 29 and 30 of the decision.

[11] The General Division Member gave two main reasons for finding that the medical evidence did not support a finding of severe and prolonged disability. First, that there were no medical reports contemporaneous to the Applicant's MQP which suggest he is precluded from all work. Second, that there was valid reason to give little weight to the medical reports of Dr. Panjwani and Dr. Hameed. The General Division Member found that Dr. Panjwani appeared not to have been aware that the Applicant had worked for three years after his MQP. In the opinion of the General Division Member this undermined Dr. Panjwani's positon that the Applicant was disabled from all work.

[12] Secondly, the both Dr. Panjwani and Dr. Hameed gave their opinions some tern years after the end of the Applicant's MQP. In fact, the General Division Member found that while Dr. Hameed stated that the Applicant's condition had remained the same since 1992, it was only in 2011 that she started treating the Applicant. In the view of the General Division, Dr. Hameed was not well placed to comment on the Applicant's medical condition as it existed on or before the MQP.

[13] As well, the General Division Member found that the Applicant's testimony that he had worked for three years after the MQP, which was supported by objective evidence, undermined his claim that he had been incapable of pursuing regularly any substantially gainful occupation since 1998. In light of the above the Appeal Division finds that the General Division did consider all of the medical evidence and material that was before it. Therefore, the Appeal Division is not satisfied that this is a ground of appeal that would have a reasonable chance of success. Leave to appeal cannot be granted on this basis.

Does the General Division decision contain errors of law?

[14] The Appeal Division finds that the General Division did not err in law, whether or not that error appears on the face of the record. The General Division Member was called upon to assess whether, in light of all the circumstances, the Applicant met the definition for severe and prolonged disability. The Member established the date by which the Applicant was required to establish his severe and prolonged disability i.e. the MQP. In addition, the Member cited the correct legal tests in respect to the Applicant's onus. In holding that the evidence overwhelmingly did not support a finding of severe and prolonged disability, the General Division Member explored the medical and other evidence in the context of the Applicant's MQP and his retained work capacity. The Appeal Division finds no error in this regard.

[15] Furthermore, in light of the fact that the Applicant had engaged in a substantially gainful occupation (worked in security) for three years after the expiry of his MQP the Appeal Division finds no error in the General Division conclusion that the Applicant had retained work capacity and had not shown that his medical condition prevented him from pursuing regularly any substantially gainful employment.

[16] Accordingly, while the Applicant's submissions relate to a ground of appeal, he has failed to satisfy the Appeal Division that his appeal would have a reasonable chance of success.

CONCLUSION

[17] The Application is refused.

Hazelyn Ross
Member, Appeal Division