Citation: ***K. J. v. Minister of Employment and Social Development,*** **2015 SSTAD 1452**

Date: December 15, 2015

File number: AD-15-1232

APPEAL DIVISION

Between:

K. J.

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] The Applicant seeks leave to appeal the decision issued by the Tribunal's General Division on August 10, 2015, (the Application). The decision relates to the Applicant's appeal of a reconsideration decision. The General Division found that, on or before her minimum qualifying period date of December 31, 2007, (MQP), the Applicant did not suffer from a disability that met the definition of "severe and prolonged disability" contained in s. 42 of the *Canada Pension Plan*, (CPP).

GROUNDS OF THE APPLICATION

[3] Counsel for the Applicant submitted that the General Division erred by basing 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. i.e., that the General Division breached paragraph 58(1)(c) of the *Department of Employment and Social Development* (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

[1] Subsections 56(1) and 58(3) of the DESD Act 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."

satisfied that the appeal would have a reasonable chance of success[2]. The three grounds on which an appellant may bring an appeal to the Appeal Division are set out in section 58 of the DESD Act.[3]

[6] In *Tracey v. Canada (Attorney General)* 2015 FC 1300 the Federal Court addressed the question of the Appeal Division's jurisdiction on an application for leave. The Federal Court noted that this jurisdiction has now been codified by law, stating that,

> "in contrast with the former scheme which was grounded in common law through jurisprudence, the test to be applied by the SST-AD when determining leave to appeal is now set out in subsection 58(2) of the DESDA. Leave to appeal is refused if the SST-AD is satisfied that the appeal has no reasonable chance of success."

[7] In determining whether the Applicant's appeal has a reasonable chance of success, the Appeal Division finds it helpful to identify what is meant by "reasonable chance." In *Villani*[4] Isaacs, J. A. specifically approved the approach taken by the Pension Appeals Board, (PAB), in Barlow, wherein the PAB applied the dictionary definition of the words "regularly; pursuing; substantial; gainful; and occupation" to assist its determination of Ms. Barlow's eligibility for a CPP disability pension. The Appeal Division takes a similar approach to determining whether or not the appeal would have a reasonable chance of success. The Oxford Dictionary[5] defines "reasonable' variously as fair, sensible or fairly good or average. Ironically, the on-line version of the dictionary gives the following example of usage: "I am not satisfied that the appellant has any reasonable chance of success if allowed to proceed with the appeal."

[8] Thus, the Appeal Division finds that, in order to grant the Application, it must find that the Applicant's submissions relate to at least one of the enumerated grounds of appeal. The Appeal Division must also be satisfied that the ground or grounds of appeal raised has or have a reasonable i.e. a fairly good or average chance of being successful. The Appeal Division

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[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** – 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.
[4] *Villani v. Canada (Attorney General)* 2001 FCA 248.
[5] The Compact Edition of the Oxford English Dictionary, Oxford University Press, 1971

does not have to be satisfied that success is certain. For the reasons set out below the Appeal Division is not satisfied that this appeal would have a reasonable chance of success.

ANALYSIS

Omissions in Paragraph 10 of the Decision

[9] In the Application, the Applicant reiterated her belief that she is disabled within the meaning of the CPP. She stated that she suffers from a severe and prolonged disability that keeps her from working regularly at any job. Counsel for the Applicant made a number of submissions to support the Applicant's position. First, he submitted that at paragraph 10 of the decision the General Division Member erred by noting an inconsistency between the Applicant's written statements and her oral testimony. This paragraph reads as follows:

> [10] She indicated in the Questionnaire for Disability Benefits (Questionnaire) dated February 22, 2012, the impairments that prevent her from working were degenerative disc disease, facet joint disease, chronic back pain, headaches, and jaw pain. She testified the main reason she has been unable to work since February 8, 2006, is low back pain and cognitive difficulties

[10] The inconsistency that Counsel for the Applicant is referring to is the failure to list multiple head injuries" as one of the Applicant's disabling conditions. Counsel for the Applicant submitted that her testimony was consistent with the answers she provided on her Questionnaire.

[11] The Appeal Division is not persuaded that the General Division committed an error as claimed. While it is true that "multiple head injuries" is not included in the list of disabling conditions that the Applicant either claimed or testified to, the Appeal Division does not find this omission material. Box 18 of the CPP Questionnaire instructs Applicants to state the illnesses or impairments that prevent them from working. The Applicant stated that these illnesses or ailments were: "prominent bulging/herniated disc at L4-L5 with compressions of the adjacent thecal sac and traversing right L5 root. Degenerative disc disease and facet joint disease present throughout more prominent L4-L5" (GT1-154)

[12] Box 19 of the same Questionnaire instructs Applicants to describe how those illnesses or impairments prevent them from working. The Applicant listed "chronic back pain. My legs

go numb. My balance is off, multiple head injuries with severe headaches. I had a broken nose and I am going for surgery 3rd time on jaw. Dizziness when standing up." (GT1-154)

[13] If I read the Applicant's statement at Box 19 correctly, she has indicated that her balance is off, that she suffered head injuries in the accident and that these injuries have given rise to severe headaches that prevent her from working. The General Division Member refers to headaches in paragraph 10. Therefore, I am not persuaded that the omission of a specific reference to "multiple head injuries" is an omission material enough to render the General Division decision in breach of paragraph 58(1) (c) of the DESD.

[14] Furthermore, in the view of the Appeal Division paragraph 10 of the decision does no more than recite the conditions that the Applicant either stated or testified were the conditions that prevented her from working. The Appeal Division finds that there is no inconsistency between the statements in paragraph 10 of the decision and Boxes 18 and 19 of the Applicant's Questionnaire. Even if there are, the Appeal Division finds that they are not material to the decision, because the decision does not rest solely on the absence or presence of certain conditions. Accordingly, the Appeal Division is not satisfied that this is a ground of appeal that has a reasonable chance of success. The Application cannot be granted on this basis.

Errors arising from Statements in Paragraph 44 of the Decision

[15] Counsel for the Applicant also charged that the statement in paragraph 44 of the decision that the Applicant had not participated in cognitive behavioural therapy was an erroneous statement of fact. The paragraph reads:

> [44] The Tribunal determined the conservative nature of the Appellant's treatment subsequent to surgeries shortly after injured (sic) in the automobile accident, the absence of treatment such as cognitive behavioural therapy, or pain management program, the absence of any specialist seen for headaches or mental illness, the absence of any significant treatment for back pain, right leg pain, and headaches, the minimal pathology shown on investigative reports, and the Appellant's failure to look for work or participate in any upgrading or retraining program, led to the conclusion the Appellant did not have a severe disability prior to the end of her MQP of December 31, 2007.

[16] Citing the report of Dr. Zohar Waisman, (GT1-45), Counsel for the Applicant argued that the material before the General Division indicated that the Applicant received substantial treatment for her cognitive issues.

[17] Dr. Waisman conducted a psychiatric assessment of the Applicant. His report is dated October 12, 2012. Dr. Waisman found that that the Applicant had moderate impairment in respect of her activities of daily living, social functioning and concentration. Dr. Waisman found marked impairment in respect of adaptation. He assessed her global impairment as marked. While noting that the Applicant would benefit from participation in a pain management programme, there was no evidence in the report that Dr. Waisman had provided the Applicant with any type of treatment. In the view of the Appeal Division this undermines the Applicant's reliance on Dr. Waisman's report as substantiating the submission that the General Division incorrectly found that the Applicant did not have cognitive behavioural therapy.

[18] Counsel for the Applicant also relied on the various reports of Patricia Morand to support the Applicant's position. Mrs. Morand is an occupational therapist. She performed a number of functional abilities assessments of the Applicant. GT1-74 to GT1-105. The Appeal Division is not satisfied that a functional abilities assessment constitutes cognitive behavioural therapy.

[19] There was also evidence that the Applicant attended Occupational Therapy sessions at the Advanced Rehabilitation Centre for the purpose of a work conditioning/work hardening programme. (AD1-80) According to a letter from ARC the Applicant's programme focused on

> "improving cardiovascular endurance strengthening lower extremity and core musculature and increasing overall strength. Ms. K. J. demonstrated the knowledge to perform her exercises independently and was encouraged to attend for three times per week for the duration of her programme"

[20] Despite the Applicant's participation in functional abilities assessments and occupational therapy sessions, the Appeal Division is not persuaded that the General Division erred when it concluded that she had not participated in cognitive behavioural therapy sessions. Accordingly, the Appeal Division is not satisfied that this is aground of Appeal that would have a reasonable chance of success.

The Applicant's back pain

[21] Counsel for the Applicant also submitted that the General Division erred in concluding the Applicant's back pain was not caused by the motor vehicle accident. Counsel submitted that,

> "At the hearing the Appellant testified that she began to experience back pain as she was completing the work hardening programme. The Hearing File confirms that the Appellant began to complain of back pain in and around September 2008. The Hearing file also confirms that the Appellant began the work hardening program in and around July 2008."

[22] The Applicant's MQP ended on December 31, 2007.

[23] Counsel for the Applicant draws a straight line connection between the Applicant's involvement in the motor vehicle accident and her back pain. However, by her own testimony, the Applicant did not suffer from back pain on or before the MQP. Her back pain began eight months after her MQP had ended. Similarly, the Applicant's questionnaire and medical report, in which back pain is noted, were not completed until almost four years after the MQP. Any treatment for back pain that the Applicant received did not commence until almost a year and a half after the expiry of the MQP. (GTl – 80 et seq.) Accordingly, the Appeal Division finds that the General Division did no err in its conclusion regarding the Applicant's back pain.

[24] Counsel for the Applicant also addressed the statement in paragraph 44 that "there is minimal pathology shown or investigative reports." Counsel submitted that a CT scan report dated October 7, 2010 indicating the following:

> Degenerative disc disease and facet joint disease present throughout. More prominent at L4-LS.
> There is a prominent bulging/herniated disc at L4-L5 with compression of the adjacent thecal sac and traversing right LS root. The thecal sac, traversing and exiting roots at L3-L4 and LS-51 appear normal. (GTl-79)

[25] The Appeal Division finds that it was not that the General Division disputed these findings; rather it was that the Member found that the findings came too far after the expiry of the Applicant's MQP to establish that the Applicant had a disability that was severe and prolonged on or before the MQP. (paras. 39 & 40). The General Division finds that the General Division did not err in this respect.

CONCLUSION

[26] Counsel for the Applicant has submitted, as the ground of the appeal, that the General Division decision is based on erroneous findings of fact that the General Division made perversely or capriciously or without regard for the material before it. On the basis of the analysis set out above the Appeal Division finds that the General Division did not err as alleged. As a result, the Applicant has failed to satisfy the General Division that the appeal would have a reasonable chance of success.

[27] The Application is refused.

Hazelyn Ross
Member, Appeal Division