Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: ***S. P. v. Minister of Employment and Social Development,*** **2016 SSTADIS 3**

Date: January 04, 2016

File number: AD-15-1204

APPEAL DIVISION

Between:

S. P.

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] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada, (the Tribunal), issued September 30, 2015, (the Application). The decision denied the Applicant's appeal of a reconsideration decision that found that she did not meet the criteria for receipt of a *Canada Pension Plan,* (CPP), disability pension.

GROUNDS OF THE APPLICATION

[3] In the initial Application, Counsel for the Applicant submitted that the General Division hearing ought not to have proceeded by telephone. Counsel argued that an in-person hearing was required so as to allow the General Division Member to observe and to question the Applicant. Counsel also submitted that the form of hearing had prevented the Applicant from giving full details about her medical conditions. (AD1-2) Counsel did not refer to a specific section of the *Department of Employment and Social Development Act,* (the DESD Act),

[4] The Appeal Division interprets the submissions as a complaint that the General Division has breached a principle of natural justice.

[5] In an additional document filed to complete the Application, Counsel for the Applicant provided a second reason for the Application. Counsel submitted that the Applicant had been suffering from a psychiatric disorder since before her MQP; that her next appointment with a psychiatrist was scheduled for November 2, 2015 following which the Applicant would file an updated psychiatric report with the Tribunal.

ISSUE

[6] In this Application the issue is:

Does the appeal have a reasonable chance of success?

APPLICABLE LAW

[7] Leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.[1] In *Tracey v. Canada (Attorney General) 2015 FC 1300* the Federal Court observed that the current statutory regime sets out at subsection 58(2) the test that the Appeal Division must apply when determining an application for leave to appeal. "Leave to appeal is refused if the SST-AD is satisfied that the appeal has no reasonable chance of success." The question for the Appeal Division is, in the context of the present statutory regime, what constitutes a reasonable chance of success?

[8] Notwithstanding this poser, subsection 58(1) of the DESD Act provides the only grounds on which an appellant may bring an appeal, namely that the General Division has committed a breach of natural justice or has either failed to exercise or has exceeded its jurisdiction; or has committed either an error of law or an error of fact.[2]

[9] In previous decisions, the Appeal Division has held that to grant leave 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. In *Tracey,* the Federal Court did not address the question of how the Appeal Division is to be satisfied that an appeal has no reasonable chance of success, noting at paragraph 22 of its decision that this determination was within the expertise of the Appeal Division.

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

[2] **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.

[10] In *Bossé v. Canada (Attorney General)* 2015 FC 1142 the Federal Court appeared to accept "plain and obvious" as the appropriate test for determining whether an appeal has no reasonable chance of success.[3] For its part, the Appeal Division finds it helpful to enlist the plain and ordinary meaning of the term "reasonable chance" and to adopt the approach taken by the Federal Court of Appeal in *Villani v. Canada (Attorney General)* 2001 FCA 248.

[11] 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."

[12] 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. Thus, the Appeal Division finds that, in order to grant the Application, it must be satisfied that the appeal has a fairly good or average chance of being successful or that the Applicant has raised an arguable case. The Appeal Division does not have to be satisfied that success is certain.

ANALYSIS

[13] The Appeal Division examined submissions of Counsel for the Applicant with a view to determining whether the General Division breached the provisions of section 58(1)(a) of the DESD Act and whether it should grant the Application.

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[3] 44. …"because, upon reading the reasons of the Appeal Division Member for refusing leave to appeal, it is necessary to understand that this case , in fact, concerns a summary dismissal of the appeal. It was "plain and obvious" that the applicant's appeal had no reasonable chance of success."
[4] *Villani v. Canada (Attorney General)* 2001 FCA 248.
[5] The Compact Edition of the Oxford English Dictionary, Oxford University Press, 1971.

[14] Counsel for the Applicant has submitted that the Applicant was not afforded a reasonable opportunity to respond to the evidence and to give her version of the matter. For the following reasons, the Appeal Division is not persuaded of Counsel's position and is not satisfied that this is a ground of appeal that would have a reasonable chance of success.

[15] First, the hearing of the appeal was an in-person hearing, meaning that the Applicant was physically present at the hearing. Second, the Applicant was assisted by a representative, who was also present at the hearing and who had the opportunity to make submissions and to question the Applicant for the purpose of presenting her evidence. In fact, not only was the Applicant present in person full written submissions were filed on her behalf (GT-2; GT GT-4; GT-5)

[16] Thirdly, the Applicant gave oral testimony at the hearing. By giving oral testimony she would have been afforded the opportunity to respond to the evidence and to give her version of the matter. Fourthly, while the Respondent did not attend the hearing, its representatives made submissions on its behalf prior to the hearing all of which would have been disclosed to the Applicant well before the hearing date. Thus, the Applicant would have had ample opportunity both to become aware of the Respondent's position and to reply to it either by written submissions or to address it at the hearing. In the view of the Appeal Division, outside of raising the allegation, the Applicant has not demonstrated how the General Division prevented her from responding to evidence and to give her version of the matter.

[17] Furthermore, neither the Applicant nor her then representative raised any objection to the form of hearing either prior to or during the hearing itself. Nor was an in-person hearing requested. Therefore, it does not behove Counsel now to argue with the 20-20 vision of hindsight that another form of hearing would have been more appropriate. The Appeal Division is not persuaded that in light of the alleged importance of an in-person hearing to the Applicant that she or her representative would not have raised the matter sooner.

[18] In light of the above, the Appeal Division finds that there is valid reason to doubt and to reject the Applicant's claim that she was not afforded a reasonable opportunity to respond to the

evidence and to give her version of the matter. Consequently, the Appeal Division finds no breach of natural justice on the part of the General Division.

The Applicant's Mental Health Condition

[19] Counsel for the Applicant has intimated that the Applicant suffers from a mental health condition that would bring her within the meaning of a "severe" disability as set out by CPP, section 42. In this regard, it was proposed that the Applicant would send a copy of an updated psychiatrist report to the Tribunal after she visited her psychiatrist on November 2, 2015. In fact, Counsel for the Applicant did append a number of medical reports to the additional documents that were filed in response to the Tribunal's letter asking that the Applicant set out fully the reason for the Application. Included among these new medical reports is the note of Dr. Spatmanidis, dated November 27, 2015. (AD1A-7) In his note, Dr. Spatmanidis states that the Applicant "was seen for a psychiatric assessment and that she had been diagnosed with anxiety and depression superimposed on chronic pain disorder." Dr. Spatmanidis concludes by stating that the Applicant was "unfit to work in any capacity."

[20] Two things flow from Dr. Spatmanidis' note. First, as evidence that the Applicant has a mental health condition that predates the MQP and meets the severe criteria in the CPP, the note is silent as whether this was an on-going appointment, indeed, the use of the phrase "was seen for a psychiatric assessment" implies that this was a first visit, at least with Dr. Spatmanidis. The Applicant's family physician did not list a mental health condition in his report of 2011 and Dr, Spatmanidis did not state the basis on which he made the diagnoses of anxiety and depression, or how he came to the conclusion that the Applicant was "unfit for all work." All of which, in the view of the Appeal Division would render it difficult to assess the Applicant's mental health condition as of the MQP.

[21] Second, all of the medical reports were created in 2015. Thus, Dr. Spatmanidis' note, and indeed most of the medical reports filed with the Tribunal as part of the appeal, appears to be in the nature of "fresh evidence," more properly filed as part of an application under section 66 of the DESD Act.

[22] The Appeal Division, whether determining an Application for Leave or an Appeal, is guided by the provisions of the DESD Act. Under its provisions new evidence "is no longer a stand alone ground of appeal" (*Tracey*, para. 29). The Appeal Division is, therefore, unable to consider new evidence, that is, evidence that was not before the General Division when considering either an application for leave or an appeal. Thus, the Applicant is better advised to bring an application under section 66 of the DESD to rescind or amend the decision of the General Division. The Applicant should also be aware that such an application would have to be brought to the General Division as decisions are rescinded or amended by the division that made them.

CONCLUSION

[23] Through her Counsel the Applicant submitted that the General Division erred in its choice of the form of hearing, contending that she suffered prejudice, in that she was unable to fully present her appeal because the hearing was by means of a teleconference and not in-person. The Applicant also contended that on or before her MQP date of December 31, 2011, she was suffering from a mental health condition that met the CPP definition of severe disability. Having considered the submissions of Counsel for the Applicant, the Appeal Division finds that she has failed to raise an arguable case; therefore, the Appeal Division is not satisfied that the appeal would have a reasonable chance of success. The Application is refused.

Hazelyn Ross
Member, Appeal Division