



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

**Citation: *K. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 5**

**Date: January 04, 2016**

**File number: AD-15-1233**

**APPEAL DIVISION**

**Between:**

**K. S.**

**Appellant**

**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 August 12, 2015, (the Application). In its decision the General Division 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.

## **GROUND OF THE APPLICATION**

[3] Counsel for the Applicant submitted that the General Division decision contravened the provisions of section 58 of the *Department of Employment and Social Development Act*, (the DESD Act). Counsel charged that the General Division failed to observe a principle of natural justice in that it failed to afford the Applicant a reasonable opportunity to respond to the evidence and give her version of the matter. Counsel also alleged that the General Division erred in law in making its decision and based its decision on an erroneous finding of fact that it made without regard for the material before it as follows:

- The General Division erroneously discounted and misinterpreted material and salient evidence placed before it.
- The General Division failed to consider opinion evidence of qualified health professionals that K. S. is not gainfully employable and failed to give such opinion evidence the weight it deserved.
- The General Division erroneously concluded that K. S. limitations and disability are not long, continued and of an indefinite nature.
- The General Division erroneously discounted the effect of the limitations and disabling conditions on K. S. and her residual capacity to sustain regular work of a substantial nature.

## **ISSUE**

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

## APPLICABLE LAW

[5] 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.<sup>1</sup>

[6] 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 v. Canada (Attorney General)* 2015 FC 1300, 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.

[7] 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.<sup>2</sup> For its part, the Appeal Division also 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.

[8] In *Villani*<sup>3</sup> 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

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<sup>1</sup> **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.

<sup>2</sup> 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.”

<sup>3</sup> *Villani v. Canada (Attorney General)* 2001 FCA 248.

to determining whether or not the appeal would have a reasonable chance of success. The Oxford Dictionary<sup>4</sup> 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.”

[9] 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**

[10] Counsel for the Applicant has put forward five main areas in which, it is submitted, the General Division erred or otherwise breached the provisions of section 58 of the DESD Act. The Appeal Division examined the alleged breaches *seriatim* with a view to determining whether the Application ought to be granted.

### **Did the General Division fail to observe a principal of natural justice?**

[11] First it has been submitted that the General Division failed to observe a principle of natural justice in that the Applicant was not afforded a reasonable opportunity to respond to the evidence and 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.

[12] 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 had the opportunity to make submissions and to

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<sup>4</sup> The Compact Edition of the Oxford English Dictionary, Oxford University Press, 1971

question the Applicant for the purpose of presenting her evidence. In fact, the Applicant's then counsel made full written submissions on her behalf (GT-2; GT-4; GT-5 )

[13] Thirdly, the Applicant did give oral testimony at the hearing. 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, thereby affording the Applicant 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. Other than 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.

[14] Therefore, in light of the circumstances 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.

**Did the General Division err in law in making its decision?**

[15] Counsel for the Applicant has submitted that the General Division erred in law "by erroneously discounting and misinterpreting material and salient evidence placed before it." The material and salient evidence that the General Division is alleged to have discounted and misinterpreted consists of medical and psychological evidence of the aftermath of the accident upon the Applicant.

[16] While Counsel for the Applicant lists and quotes extensively from the various medical and psychological reports and assessments that were made in respect of the Applicant, (AD1-18 to AD1-25) Counsel has not shown how the General Division either discounted or misinterpreted that evidence. The Appeal Division failed to observe recitation of evidence alone is not sufficient to make out the allegation that the General Division either discounted it or misinterpreted it. For that reason the Appeal Division is unable to find that the General Division erred in law in the manner alleged by the Applicant. Accordingly, the Appeal Division finds that these submissions cannot form the basis for granting the Application.

**Did the General Division err by failing to give appropriate weight to the opinions regarding the Applicant's capacity to work?**

[17] That the General Division failed to give appropriate weight to the medical records and opinions of qualified health professionals that the Applicant is incapable regularly of pursuing any substantially gainful occupation is the charge of Counsel for the Applicant. The medical opinions that the General Division is alleged not to have given appropriate weight includes those of,

- 1) Dr. Ali Ghouse dated September 24, 2013;
- 2) The in-home assessment report of Bo Liu dated December 7, 2012
- 3) The situational Assessment Report of Maria Ross dated May 28, 2013
- 4) An independent medical evaluation by Dr. Ali Ghouse dated April 22, 2014; and
- 5) Psychological Report by Dr. Bettina DeRyck dated March 30, 2015

[18] Beyond citing the medical reports the Applicant and her Counsel have not shown in what way the General Division failed to give appropriate weight to them. Furthermore, with the exception of the functional abilities in-home assessment of Bo Liu, these reports post-date the MQP of December 31, 2012 and thus are of limited assistance to an assessment of the Applicant's situation on or before the MQP. In any event assessing evidence and assigning weight to evidence is within the purview of the General Division. The function of the Appeal Division is not to reweigh the evidence in order to reach a conclusion that better suits an applicant. *Tracey at para. 46*. The Appeal Division is not satisfied that this is a ground of appeal that has a reasonable chance of success.

**Did the General Division erroneously conclude that the Applicant's disability is not prolonged?**

[19] Under this head, Counsel for the Applicant set out the various treatments that the Applicant has undergone since her accident. Counsel noted and contrasted the Applicant's abilities both prior and after the accident, as well as the opinions of the medical personnel listed above. In addition, Counsel for the Applicant noted that the Applicant was successful in her application for an ODSP benefit as a disabled person. While not expressly articulated, the

Appeal Division infers that in the view of the Applicant a successful application for ODSF ought to carry over to the CPP. In this regard, the Appeal Division notes that, per *Atkinson v. Canada (Attorney General)* 2014 FCA 187 “the CPP’s definition of “disabled” is very restrictive” and per *Mazotta v. MNHW (May 10, 1990) CP 1925*, the CPP is not a substitute for other social programmes but has its own strict criteria.

[20] Furthermore, the two requirements of paragraph 42(2)(a) of the CPP are cumulative. Should an applicant fail to meet one or the other condition, his application for a disability pension under the CPP necessarily fails. *Klabouch v. Canada (Minister of Social Development)* 2008 FCA 33. As the General Division found that the Applicant’s disability was not severe, it committed no error of law when it concluded that it was not necessary to make a finding on whether her disability was prolonged. The Application cannot be granted on this ground.

**Did the General Division erroneously discount the effect of the limitations and disabling conditions on the Applicant’s residual capacity to pursue regularly any substantially gainful occupation?**

[21] Counsel for the Applicant has submitted that the Applicant’s medical conditions prevent her from engaging in work of any kind. Counsel repeated the Applicant's ailments and their effect on her and Counsel posits that, due to her health condition the Applicant’s prospects of employment are limited. In the view of the Appeal Division this amounts to no more than providing the applicant’s self-assessment of her situation.

[22] In the decision, the General Division Member assessed the Applicant's retained work capacity on or before the MQP. He examined the reports of her treating physicians. He assessed whether the Applicant had adhered to treatment recommendations. The General Division Member found the Applicant wanting in this regard. He found that she had not followed medical advice and did not pursue the treatment recommendations suggested by her family physician. Accordingly, the General Division concluded that the Applicant had failed to rebut the presumption that she retained capacity for work or retraining.

[23] Beyond expressing the belief that the Applicant qualifies for a CPP disability pension, Counsel has not shown how the General Division erred in its assessment of the Applicant’s

residual capacity to pursue regularly any substantially gainful occupation. Therefore, the Appeal Division finds that this is not a ground of appeal that would have a reasonable chance of success.

## **CONCLUSION**

[24] Through her Counsel the Applicant submitted that the General Division made a number of errors in its decision, including breaching natural justice by not affording her a proper opportunity to be heard. On the basis of the foregoing analysis and reasons the Appeal Division finds that the Applicant has not met her onus to satisfy it that the appeal would have a reasonable chance of success.

[25] The Application is refused.

*Hazelyn Ross*  
Member, Appeal Division