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

Citation: *S. M. v. Minister of Employment and Social Development*, 2016 SSTADIS 18

Date: January 12, 2016

File number: AD-15-1126

APPEAL DIVISION

Between:

S. M.

Applicant

and

Minister of Employment and Social Development

(Formerly Minister of Human Resources and Skills Development)

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

DECISION

[1] Leave to Appeal to the Appeal Division of the Social Security Tribunal, (the Tribunal), is refused.

INTRODUCTION

[2] On March 12, 2014, the Tribunal received the Applicant's Notice of Appeal from a reconsideration decision dated December 2, 2013. On August 25, 2015 a Member of the Tribunal's General Division adjudicated the appeal and issued his decision. The Member found that the Applicant did not have a severe and prolonged disability on or before the end of his minimum qualifying period, (MQP) of December 31, 2008. Accordingly, the Applicant did not qualify for a Canada Pension Plan, (CPP), disability pension.

[3] The Appeal before the General Division was in respect of the Applicant's fourth application for a CPP disability pension, which was made on March 15, 2013. In regard to his third Application the Applicant's MQP, had been determined as December 31, 2007. The General Division established the Applicant's MQP as starting from the end of this prior MQP and ending on December 31, 2008. It is important to note that in regard to the Applicant's third application; on July 28, 2008 a Review Tribunal denied his appeal. On March 29, 2009, the Pension Appeals Board refused the Applicant Leave to Appeal the decision of the Review Tribunal. Accordingly, under the statutory regime that then applied, namely, subsection 84(1) of the CPP, the July 28, 2008 decision of the Review Tribunal was binding upon the Applicant. Thus, the General Division could examine the Applicant's physical and mental condition only for the period January 1, 2008 to December 31, 2008.

GROUNDS OF THE APPLICATION

[4] In his Notice of Appeal the Applicant set out the grounds of the Application thus:

> The worker does have a severe medical problem that prevents him from obtaining any gainful employment. The Appellant co-operated to the best of his ability with vocational and medical rehabilitation attempts and was unable to continue due to his medical impairments. The Appellant exhausted all forms of medical care offered by his physicians. The physical symptoms have been a very large barrier for him being unable to work. The Appellant is suffering from

> severe physical impairments that is (sic) preventing him to work in any gainful occupation.
>
> The General Division Tribunal decision was not reasonable in its decision, since the Appellant has remained unable to be gainfully or substantially employed within the MQP. His condition is prolonged and is severe as defined within the CPP.

[5] As the submissions did not appear to disclose a ground of appeal, by letter dated December 3, 2015, the Tribunal wrote to the Counsel for the Applicant to advise him that the Notice of Appeal was missing required information, namely, the reasons for the appeal. The Tribunal provided detailed advice as to how the missing information could be provided. Counsel was required to provide the missing information by January 4, 2016[1]. However, Counsel for the Applicant did not respond to the Tribunal.

ISSUE

[6] The Appeal Division must decide whether the Appeal would have a reasonable chance of success.

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[1] The Tribunal provided the following direction to Counsel for the Applicant:

- **Reasons for the appeal:**

  Explain in detail **<u>why</u>** the Applicant appealing the decision of the General Division. Only the following 3 reasons can be considered under the law:

  Reason #1: ***The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction.*** For example, an appellant submitted a Record of Employment, and the document was not included in the appeal file.

  Reason #2: ***The General Division made an error in law in its decision.*** For example: the Member of the General Division based its decision on the wrong section of the applicable law.

  Reason #3: ***The General Division made an important error regarding the facts contained in the appeal file.*** For example, the Member of the General Division indicated in the decision that there was no Record of Employment submitted by the appellant, when one had been submitted and was in the appeal file.

  Please identify which of the reason(s) apply to the case and provide as much detail as possible. It is not sufficient to simply indicate that there was an error or that natural justice was not respected. The Applicant must explain what the error was or how natural justice was not respected. You can refer to specific pages of documents on file or to paragraphs in the General Division decision.

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.[2] 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] 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.[3]

[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.

[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

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[2] 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."

[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.

reasonable chance of success.[4] 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*[5] 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[6] 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] For the following reasons the Appeal Division refuses the Application.

[14] The Appeal Division finds that the submissions made in the Application do not relate to a ground of appeal set out in the *Department of Employment and Social Development, (DESD), Act.* that would have a reasonable chance of success. They are no more than a statement of the Applicant's disagreement with the decision of the General Division and a restatement of his continued belief that he suffers from a disability that is severe and prolonged within the meaning

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

of the CPP and that he is entitled to a disability pension. The Applicant has not shown how the General Division either breached a principle of natural justice or exceeded or refused to exercise its jurisdiction. Neither has the Applicant shown how the General Division may have erred in law or based its decision on an error of fact that it made in a perverse or capricious manner or without regard for the material before it.

[15] The Appeal Division comes to this finding noting the steps that the Tribunal took to advise the Applicant of the deficiencies in his Notice of Appeal. The Tribunal specifically asked that the grounds of appeal be set out and allowed thirty days for the response.

[16] Notwithstanding the lack of response and the fact that the Applicant's submissions did not specify a ground of appeal, the Appeal Division examined the General Division decision with a view to determining whether any of the statutory grounds of appeal had been breached.

[17] The Appeal Division finds that there has been no breach of subsection 58(1) of the DESD Act. Specifically, the Appeal Division finds that there has been no breach of natural justice in regards to the hearing, which was conducted by teleconference. The Applicant was advised well in advance of the hearing date that the General Division Member intended to hold a teleconference and there is no indication that either the Applicant or his Counsel objected to this method of hearing. The Applicant was advised well in advance of the hearing and, thus, had ample time in which to make written submissions and to file materials he wished the General Division to consider. (GD0). The Applicant was also allowed ample time to voice his objection to the form of hearing if, indeed, he had any. The Appeal Division finds that no breach of natural justice is revealed.

[18] With respect to any possible error of law, the Appeal Division finds that the General Division identified and applied the correct law with respect to the Applicant's MQP and the test that he had to meet if he were to be found to have a disability that was severe and prolonged within the meaning of the CPP.

[19] The General Division decision turned on whether the Applicant followed recommended treatment; had retained work capacity; as well as his efforts at obtaining and maintaining alternative employment. While the Appeal Division might have preferred a more detailed

treatment of these issues, the Appeal Division does not find that the General Division failed, properly, to apply the law in regard to them.

[20] With respect to error of fact, although the submissions of the Applicant express the point of view that he is disabled within the meaning of the CPP this does not automatically translate to a decision that is based on an erroneous finding of fact. In the view of the Appeal Division the submissions indicate a disagreement with the weight that the General Division gave to the facts. However, weighing evidence is the purview of the General Division. It is not the role of the Appeal Division to reassess evidence of reweigh the factors considered by the General Division in order to reach a different conclusion regarding the Applicant's eligibility for a disability pension. (*Tracey* at para. 46)

CONCLUSION

[21] Counsel for the Applicant has indicated disagreement with the decision of the General Division, who he submits suffers from a severe and prolonged disability as defined by the CPP. For the reasons set out above the Appeal Division finds that the Applicant has not met his onus to satisfy it that the appeal would have a reasonable chance of success. Accordingly, leave to appeal cannot be granted.

[22] The Application is refused.

Hazelyn Ross
Member, Appeal Division