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

Citation: ***K. H. v. Minister of Employment and Social Development*****, 2016 SSTADIS 23**

Date: January 13, 2016

File number: AD-15-35

APPEAL DIVISION

Between:

K. H.

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 applied for a *Canada Pension Plan* disability pension on August 4, 2010. The Respondent considered her application under the late application provisions of the CPP. It denied her application on the basis that at the end of her minimum qualifying period, (MQP), of December 1997, the Applicant did not have a disability that was severe and prolonged. On reconsideration, the Respondent upheld the initial denial. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals, (OCRT), which transferred her file to the Tribunal.

[3] On October 22, 2014 the General Division of the Tribunal heard the appeal. The General Division found that the Applicant's medical condition at the time of her MQP did not preclude her from some type of work. Accordingly, he dismissed her appeal. The Applicant sought to appeal the General Division decision. She filed an Application for leave to appeal with the Appeal Division of the Tribunal. A Member of the Appeal Division granted the application for leave to appeal on the basis that the Applicant had presented a reasonable ground on which her proposed appeal might succeed, namely, that the General Division may have disregarded medical reports that concluded that the Applicant could not work.

[4] The Respondent applied to the Federal Court for a judicial review of the decision granting leave to appeal.

DECISION OF THE FEDERAL COURT

[5] The Federal Court found that in granting the application for leave to appeal, the Appeal Division had failed reasonably to apply the test for leave under section 58 of the Department of Employment and Social Development Act. The Federal Court also found that the decision granting leave to Appeal was not reasonable in that it lacked justification.

[6] The Federal Court allowed the application for judicial review, set aside the decision of the Appeal Division and directed that the matter be returned to the Appeal Division for reconsideration and determination by a different Member in accordance with the reasons of the Court.

[7] In making is determination the Federal Court observed that the Appeal Division Member had ,

> [44] … failed to articulate in any way what evidence she relied upon in deciding that the Respondent had a reasonable chance of success on appeal, based on the evidence and reasons before the SST-GD, as of the relevant date of December 31, 1997.

[8] Further, the Federal Court found that the Appeal Division decision was not well- founded, noting that:

> [45] In finding that evidence "penned prior to the MQP" may have been ignored, the Tribunal Member neglects to recognize the record contains no medical evidence describing the Respondent's condition in 1997 and except for one report in 2001, there is no other medical evidence in the record describing her condition until 2010.
>
> [45] The Member does not appear to have considered that while the leave application says Dr. Surapaneni noted "Ms. K. H. appeared to have symptoms of post-traumatic stress disorder", but neglected to indicate the report also says this disorder "came on" after she had a motor vehicle accident on February 25, 2011.
>
> [45] It is also unclear as to whether the Member recognized that Dr. Surti's 1992 note suggests the opposite of what is alleged by the Respondent (Applicant). Dr. Surti's note stated that the Respondent is "not disabled" and "not psychotic".

[9] Finally, the Federal Court found that the Appeal Division's decision was insufficient in that the Member had failed to "reasonably provide any reason(s) to support granting leave on the basis that the SST-GD may have based its decision on an erroneous finding of fact made in a perverse or capricious manner."

ISSUE

[10] I must decide if the appeal has a reasonable chance of success?"

APPLICABLE LAW

[11] 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?

[12] 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]

[13] 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.

[14] 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. However, in

---

[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** Grounds of Appeal – (1) The only grounds of appeal are that

a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

c) 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.

Canada *(Minister of Human Resources Development) v. Hogervorst*, *2007 FCA 41*, the Federal Court of Appeal equated a reasonable chance of success to an arguable case.

ANALYSIS

[15] Given the reasons and directions of the Federal Court, the Appeal Division analysed the application for leave with a view to determining whether the Applicant had raised an arguable case. For the reasons set out below, the Appeal Division finds that she has not.

[16] The Applicant sought leave to appeal the decision of the General Division on the ground that it 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. In this regard, Counsel for the Applicant submitted that the General Division had based its decision on a selective assessment of the medical reports that were before it. Counsel for the Applicant submitted that several of the Applicant's treating physicians had found her disabled well before the end of the MQP. Counsel identified these medical reports as:

1) The December 1992 report of Dr. Surti;
2) Medical report of Dr. Martina Power and Dr. Surapaneni consequent upon the Applicant's hospitalization in February 1996; and
3) The 2010 report of the Applicant's family doctor, Dr. King

[17] The difficulty with the medical reports upon which the Applicant relies is that either the reports do not state what it is alleged they state or they were dated well outside of the MQP and, therefore, were not relevant to deciding if the Applicant had a severe and prolonged disability as of the MQP. Furthermore, before the Federal Court, Counsel for the Applicant acknowledged that in December 1992, Dr. Surti had not found the Applicant to be disabled by reason of a mental health condition.

[18] Similarly, with respect to the submission that following her hospitalisation in 1996 Dr. Surapaneni found the Applicant was incapable of handling her life, the Appeal Division finds that this submission is undermined by the fact that Dr. Surapaneni appears to have treated the Applicant for the first time in 2012. Dr. Surapaneni's letter to the Applicant's family doctor of January 06, 2012 starts, "thank you very much for referring this 47-year-old Caucasian lady for Psychiatric Assessment" (GT1-114). In the view of the Appeal Division this is a strong

indication that Dr. Surapaneni was seeing the Applicant for the very first time in January 2012. As well, Dr. King appeared to have referred the Applicant to Dr, Power only in April 2000, which also undermines the submission that Dr. Powers treated the Applicant in 1996. (GT1-62).

[19] Dr. King's own medical report was created in 2010, in which he found that the Applicant could not work, which rendered it of little relevance to the determination of the Applicant's mental and medical disability as of December 31, 1997.

[20] Given the above circumstances, the Appeal Division is not persuaded that 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. Accordingly, the Appeal Division is not satisfied that the appeal would have a reasonable chance of success.

CONCLUSION

[21] The Applicant applied for leave to appeal the decision of the General Division on the basis that the General Division decision falls foul of subsection 58(1)(c) of the DESD Act. On the basis of the foregoing, 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.

[22] The Application is refused.

Hazelyn Ross
Member, Appeal Division