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

Citation: ***M. F. v. Minister of Employment and Social Development*, 2016 SSTADIS 45**

Date: January 22, 2016

File number: AD-15-1249

APPEAL DIVISION

Between:

M. F.

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 August 14, 2015, (the Application). The General Division decision dismissed 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] The Applicant relies on subsection 58(1)(b) of the *Department of Employment and Social Development Act,* (the DESD Act). She submitted that in determining her appeal, the General Division made an error or law. The Applicant put forward the position that she "is truly disabled". She refers to a number of circumstances that she submits establish her that her disability is severe and prolonged.

ISSUE

[4] The Appeal Division must decide if 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] 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

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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."

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?

[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.

[7] 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 Applicant has raised an arguable case and that she has satisfied it that her appeal has reasonable chance of being successful. The Appeal Division does not have to be satisfied that success is certain.

[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.[2]

ANALYSIS

[9] The Applicant has submitted that her appeal has a reasonable chance of success because in 2013, three magnetic resonance imaging, (MRI), examinations showed that she had bulging discs, however, she was advised not to undergo surgery. Her other medical conditions include diabetes; frequent falls, bleeding in her right eye, and blurred vision. The Applicant stated that

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[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.

not only was she able to obtain a disabled parking permit, which she held out as evidence that she is disabled, she is scheduled to undergo eye surgery in August of this year. The Applicant is enrolled in a diabetes clinic. In addition, she argued that she was prevented from working because she lacked a Food Service Certificate.

[10] With the exception of the scheduled eye surgery, none of this information is new. This was information that had been before the General Division when it made its decision. It is clear that the General Division was aware of and considered the points that have been raised by the Applicant raised in her application for leave.

[11] With respect to the error of law that the Applicant states the General Division committed, the Appeal Division finds that there is no support for this submission. The Appeal Division quoted the correct test, that "the Applicant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2015," which is the end of her minimum qualifying period (MQP). (Decision at para. 25).

[12] Furthermore, the General Division cited and applied the correct legal tests with regards to the factors that are relevant to a determination of whether a disability is severe and prolonged. The General Division noted that per *Villani v. Canada (Attorney General),*2001 F.C.A. 248,"the severe criterion must be assessed in the real world context". This means that the General Division had to make the determination keeping in mind factors "such as age, level of education, language proficiency, and past work and life experience."

[13] Also the General Division assessed the evidence with a view to determining the Applicant's retained work capacity as of the MQP. It found that the Applicant did not stop working because of medical reasons. Further, when she was advised to stop working, the advice came well after the MQP, as did much of her supporting medical documentation. The Appeal Division finds that no error of law is disclosed by the General Division's assessment of the evidence.

[14] It is clear that the Applicant disagrees with the findings and conclusions that the General Division made. In the absence of a finding of error, which the Appeal Division does not find, the Appeal Division cannot grant leave simply because the Applicant disagrees with the General Division decision. It is not a function of the Appeal Division to reweigh the evidence and to render a decision more in keeping with an Applicant's wishes.

CONCLUSION

[15] The Applicant submitted that the General Division erred in law with respect to its decision that dismissed her appeal of a reconsideration decision. Having considered her submissions, the General Division decision as well as the material that was before the General Division, the Appeal Division find that the Applicant has not met her onus to satisfy it that the appeal would have a reasonable chance of success.

[16] The Application is refused.

Hazelyn Ross
Member, Appeal Division