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

Citation: ***Minister of Employment and Social Development v. F. A.*****, 2016 SSTADIS 57**

Date: January 25, 2016

File number: AD-15-1242

APPEAL DIVISION

Between:

Minister of Employment and Social Development

Appellant

and

F. A.

Respondent

And

File number: AD-16-121

APPEAL DIVISION

F. A

Appellant

and

Minister of Employment and Social Development

Respondent

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 granted and the appeal is allowed.

INTRODUCTION

[2] The Applicant appeals from a decision of the General Division of the Tribunal of Canada, (the Tribunal), issued on August 27, 2015. In its decision, the General Division found that the Respondent had a severe and prolonged disability and was, therefore, entitled to a *Canada Pension Plan* (CPP) disability pension.

PRELIMINARY MATTERS – JOINDER

[3] The Minister of Employment and Social Development applied to the Appeal Division of the Tribunal for leave to appeal the decision of the General Division, (the Application). Subsequently, the Applicant filed an application for leave to appeal the decision of the General Division. The Tribunal now had two applications for leave to appeal in respect of the same General Division decision. Following a pre-hearing conference with the parties, the Appeal Division determined that the two applications would be heard jointly. In the view of the Appeal Division joinder was appropriate because the parties in both applications were the same; the subject matter of the applications was identical; and so, too, were the remedies the parties were requesting.

[4] For ease of reference, the Appeal Division decision is written in relation to the application of the Minister of Employment and Social Development.

[5] GROUNDS OF THE APPLICATION

[6] The Applicants submit that the General Division erred by basing 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. The error of fact being that the General Division identified the wrong date on which the application for a disability pension was made. Consequently, the General Division also erred when it found February 2011 to be the deemed date of disability and June 2011 as the date on which payment of the disability pension was to commence.

THE ISSUE

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

THE APPLICABLE LAW (Leave to Appeal)

[8] 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?

[9] 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]

[10] 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.

[11] 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.

[12] 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. 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."

[13] 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.

The Alleged Errors

[14] At paragraph 36 of the decision, the General Division concluded that "the Appellant had a severe and prolonged disability in 2008 after her third motor vehicle accident, which together with the second accident in 2007 caused her significant low back and neck pain." The General Division went on to find that payment of the disability pension would commence effective June 2011.

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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.

[15] The Applicant submitted that in addition to being an error of fact, the General Division decision is wrong in law. The Applicant argued that given that the Respondent's application was received in March 2012, then pursuant to paragraph 42(2) (b) of the CPP, the correct deemed date of disability is December 2010. Payment of the disability pension would commence four months later, namely, in April 2011.

[16] The Tribunal record confirms March 27, 2012 as the date on which it received the Respondent's application for a disability pension. The General Division decision cites the later date of May 2012. (para. 38)

The Legislative Provisions that govern payment of a Disability Pension

[17] CPP 42(2)(b) provides for when an applicant can be deemed disabled:

> (2) *When a person deemed disabled* - a person is deemed to have become or to have ceased to be disabled at the time that is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person - including a contributor referred to in subparagraph 44(1)(b)(ii) - be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.

[18] The statutory provision governing payment of the disability pension is CPP, section 69, which section provides,

> 69. *Commencement of pension* - subject to section 62, where payment of a disability pension is approved, the pension is payable for each month commencing with the fourth month following the month in which the applicant became disabled, except that where the applicant was, at any time during the five year period next before the month in which the applicant became disabled as a result of which the payment is approved, in receipt of a disability pension payable under this Act or under a provincial pension plan,
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> (a) the pension is payable for each month commencing with the month next following the month in which the applicant became disabled as a result of which the payment is approved; and
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> (b) the reference to "fifteen months" in paragraph 42(2)(b) shall be read as a reference to "twelve months".

[19] In light of the fact that the Respondent's application in respect of which the General Division rendered its decision was made on March 27, 2012, the General Division there is no question that the General Division did err as alleged. Paragraph 42(2)(b) of the CPP makes clear that the deemed date of disability is to be established by reference to the date the application for the benefit is made, in this case March 27, 2012. In *Minister of Social Development v. Galay (June 3, 2004), CP 21768 (PAB)* the PAB interpreted the words "the time of the making of any application" to mean at the time the Respondent received the application.) This is a point that was made in the earlier PAB decisions of *Bueno v MHRD (April 23, 1997), CP 03253* and *Sarrazin v. MHRD (June 27, 1997), CP 5300.* Thus, the General Division erred when it established the deemed date of disability by reference to May 2012.

[20] Accordingly, the Appeal Division is satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[21] The Application is granted.

THE APPEAL

[22] Counsel for the Applicant asked the Appeal Division to grant the Application, allow the appeal and to exercise its power under s. 59 of the DESD Act to give the decision that the General Division should have given.

[23] Given the circumstances of the case and the finding that the Applicant has raised an arguable case; and also in light of the Tribunal's mandate to conduct proceedings as informally and quickly as possible as the circumstances and the considerations of fairness and natural justice permit, the Appeal Division is of the view that this is an appropriate case in which to grant leave, allow the appeal and exercise the jurisdiction granted to it by s. 59 of the DESD Act to make the decision the General Division should have made.

DECISION

[24] The Appeal is allowed.

[25] The Appeal Division finds that, pursuant to paragraph 42(2)(b) of the CPP, the Respondent is deemed to have become disabled as of December 2010, which is fifteen (15) months before the date the application was received. Pursuant to section 69 of the CPP, payment of the disability pension commences effective April 2011, which is four months after the date the Respondent is deemed to have become disabled.

Hazelyn Ross
Member, Appeal Division