Social Security Tribunal

CANADA

Tribunal de la sécurité sociale

**Citation: *M. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 119**

**Date: March 21, 2016**

**File number: AD-15-1305**

**APPEAL DIVISION**

**BETWEEN:**

**M. S.**

**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] The Application for Leave to Appeal is refused.

## BACKGROUND

[2] The Respondent's application for a *Canada Pension Plan*, (CPP), disability pension was received on July 19, 2012. The application was denied both initially and upon reconsideration and the Applicant appealed the reconsideration decision. On September 4, 2015 a member of the General Division of the Social Security Tribunal, (the Tribunal), heard the appeal.

[3] The General Division dismissed the appeal holding that the Applicant had not met her onus to establish that on or before the end of her minimum qualifying period, (MQP), of December 2004 she was incapable regularly of pursuing any substantially gainful occupation.

[4] The Applicant seeks leave to appeal the General Division decision, (the Application).

## GROUNDS OF THE APPLICATION

[5] The Applicant alleged that the General Division breached the three provisions of subsection 58(1) of the Department of Employment and Social Development Act, (the DESD Act).

## THE LAW

### What must the Applicant establish on an Application for Leave to Appeal?

[6] Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success". On an Application for Leave to Appeal the hurdle that an Applicant must meet is a first and lower one than that which must be met on the hearing of the appeal on the merits. To grant leave the Appeal Division must be satisfied that the appeal would have a reasonable chance of

success. A reasonable chance of success has been equated with an arguable case[1]; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[7] Subsection 58(1) of the DESD Act states that the only grounds of appeal are the following:

(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.

In order to grant the Application, the Tribunal must determine whether any of the Applicant's reasons for appeal fall within any of the grounds of appeal set out above.

## ISSUE

[8] The issue before the Appeal Division is:-

Does the Appeal have a reasonable chance of success?

## ANALYSIS

### Did the General Division breach Natural Justice?

[9] The first ground of appeal provided for by subsection 58(1) of the DESD Act is that the "General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction." The Applicant submits that by finding that she was not disabled within the meaning of the CPP the General Division breached this ground of appeal.

[10] Her submissions, posed in question form, essentially repeat the evidence that was provided at the hearing and questions the conclusions to which the General Division came. The Applicant is essentially asking the Appeal Division to reweigh the evidence presented at the General Division hearing, which is not part of its function.

[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

[11] However, the Applicant did allege that the General Division Member asked irrelevant questions. She cited as an example that one of her witnesses was asked whether she had been a good boss. Whether the question was asked, is not in the view of the Appeal Division a sufficient basis on which to ground an appeal. However, the Applicant also levelled several, more specific charges of bias against the General Division Member. She alleged that the Member was "intimidating, hostile towards the witnesses and dismissive of the sworn testimonies." The Applicant also alleged that the Member ignored facts that were favourable to her; and, under the guise of time constraints, did not allow at least one witness to testify as well as completely ignored the evidence of her pharmacist. The Applicant also charged that the General Division Member had prejudged the matter.

[12] In light of the serious charges made by the Applicant, the Appeal Division asked her to provide it with further details. The content of the letter is set out below:-

> "At page two (2) of your application for leave to appeal, you refer to a report, which you describe as a "replica of former documentation as provided through CPP correspondence and duplication as outlined in the record to deny you benefits."
>
> - Please indicate the report that you are referring to.
>
> Also, in your application for leave you state that you "provided proof" that your conditions were as severe and prolonged as the CPP legislation dictates.
>
> - Please identify this proof.
>
> You have raised a number of allegations of bias against the General Division Member, Ms. Shamatutu.
>
> - Please indicate by reference to the recording of the hearing where the Member was either "intimidating, hostile towards the witnesses and dismissive of the sworn testimonies; or
> - completely ignored facts that would have decided a decision in your favour; or
> - prevented witnesses from testifying; or
> - Ignored the testimony of your pharmacist."
>
> In addition, please indicate by reference to the recording of the hearing, the basis of your claim that the General Division Member had come to a decision prior to the hearing.
>
> The Tribunal must receive your response by **February 29, 2016**.

[13] The Tribunal's letter is dated January 25, 2016. It was copied to the Respondent. Earlier, the Tribunal had provided the Applicant with a copy of the audio recording of the hearing. At her request, the Tribunal sent her the audio recording on December 18, 2015. As of the date the General Division issued its decision the Applicant had not responded to the Tribunal or communicated with the Tribunal in any way.

[14] As set out by the Federal Court of Appeal in *Joshi v. Canadian Imperial Bank of Commerce,* 2015 FCA 92 "bias is a term with a precise legal definition. Allegations of bias are of a very serious nature and should not be made without proof (Federal Court Decision, at para. 112). Such allegations are particularly egregious when made against judges, as they attack one of the pillars of the judicial system, namely the principle that judges are impartial as between the parties who appear before them (*Abi-Mansour v. Canada (Aboriginal Affairs),* 2014 FCA 272 at para. 12, [2014] F.C.J. No. 1145 (QL))."

[15] The test by which bias is established was also set out in *Abi-Mansour,* namely, would a reasonable person, viewing the matter objectively, and with knowledge of all the relevant facts, be persuaded that the trier of fact intended to favour one party over the other?

[16] In *Abi-Mansour* the Federal Court of Appeal stated that allegations of judicial bias cannot be allowed to go unchallenged as they attack the principle of judicial impartiality. The same applies in the Tribunal context. Despite being given ample opportunity to do so, the Applicant has not provided any evidence to support the allegations of bias she made.

[17] The Applicant was represented at the hearing by a paralegal. Four witnesses attended and gave testimony at the hearing. As well, the Applicant's daughter and son-in-law wrote letters of support that the General Division considered in its decision, which decision contains a compendious reporting of the medical documentation. Further, the Member analysed the evidence fully citing the appropriate law. From this, the Appeal Division concluded that the Applicant was given full opportunity to present her case. In light of these circumstances and also in light of the Applicant's failure to respond to the letter of January 25, 2016, the Appeal Division finds that the Applicant's allegations of bias have not been substantiated. Accordingly, leave to appeal cannot be granted on the ground that the General Division failed to observe a principle of natural justice.

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

[18] The Appeal Division had asked the Applicant to provide it with more precise detail concerning the errors of law and fact she alleged the General Division had made. (letter of January 25, 2016) As recorded earlier the Applicant did not respond to the Tribunal. In the circumstances, the Appeal Division finds that the Applicant's statements that the General Division erred in law in making its decision through written, implied and stated comments and that it misinterpreted the proof the Applicant had provided of her medical conditions is no more than expressions of her disagreement with the General Division decision.

[19] In *Tracey v. Canada (Attorney General),* 2015 FC 1300, the Federal Court made it clear that it is not the role of the Appeal Division on a leave to appeal decision to reassess the evidence or to reweigh the factors considered by the General Division in order to reach a different conclusion regarding the applicant's admissibility to a disability pension. The Appeal Division finds that this is what the Applicant is asking it to do. Accordingly, it declines to grant leave on this basis.

**CONCLUSION**

[20] The Applicant sought leave to appeal from the decision of the General Division on the basis that it had failed to observe a principle of natural justice; erred in law; and had based its decision on erroneous findings of fact that it made perversely or capriciously or without regard for the material before it. The Appeal Division finds that the General Division did not err as alleged. Accordingly, the Appeal Division refuses leave to appeal because it is not satisfied that the appeal would have a reasonable chance of success.

[21] The Application for Leave to Appeal is refused.

*Hazelyn Ross*
Member, Appeal Division