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

Citation: *L. H. v. Minister of Employment and Social Development*, 2016 SSTADIS 185

Tribunal File Number: AD-16-465

BETWEEN:

L. H.

Applicant

and

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Hazelyn Ross

DATE OF DECISION: May 24, 2016

DECISION

[1] The Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), refuses leave to appeal.

INTRODUCTION

[2] The Applicant applies for leave to appeal from the decision of the General Division of the Tribunal issued February 23, 2016, (the Application). The decision determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan,* (CPP).

GROUNDS OF THE APPEAL

[3] The Applicant cites error of law as the basis of the application. She also relies on paragraph 58(1)(c) of the *Department of Employment and Social Development,* (DESD), *Ac*t, as she states that it is her opinion that the reports from her family physician and specialists had not been taken seriously. (AD1A-4)

ISSUE

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

THE GOVERNING STATUTORY PROVISIONS

[5] Subsections 56(1) and 58(3) of the DESD Act govern the granting of leave to appeal. As provided by subsection 56(1) of the DESD Act, leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division. According to subsection 56(1) "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(3) provides that "the Appeal Division must either grant or refuse leave to appeal."

[6] In order to obtain leave to appeal, subsection 58(2) of the DESD Act requires an applicant to satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal. 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."

[7] An applicant satisfies the Appeal Division that his appeal would have a reasonable chance of success by raising an arguable case in his application for leave[1]. In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 and in *Fancy v. Canada (Attorney General)*, 2010 FCA 63 an arguable case has been equated to a reasonable chance of success.

[8] Subsection 58(1) of the DESD Act sets out the only three grounds of appeal, namely:-

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.

[9] *Tracey v. Canada (Attorney General)*, 2015 FC 1300 supports the view that in assessing an application for leave to appeal the Appeal Division must first determine whether any of the Applicant's reasons for appeal fall within any of the stated grounds of appeal

ANALYSIS

[10] The Applicant raised several issues as the basis for the Application. First, she states that she was of the view that she had not been well prepared for the hearing before the General Division as she had been in extreme pain and is unable to think clearly for much of the time. Being in extreme pain and being unable to think clearly are not grounds of appeal. The Applicant attended the hearing by video-conference and could have requested an adjournment of the hearing if she was in extreme pain, but did not do so. Thus, there is no basis on which the Appeal Division could grant leave on these bases.

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

[11] The Appeal Division also finds that the Applicant's submission that, in her view, the General Division did not give adequate weight to the medical reports of her family physician and specialists also does not give rise to a ground of appeal. The Appeal Division finds that these statements are no more than expressions of disagreement with the conclusions of the General Division. The Appeal Division cannot reweigh the evidence in order to come to a conclusion that is more favourable to the Applicant.

[12] The Applicant also submitted that the General Division decision contains an error of law. She stated that her opinion is based on the medical evidence. However, she has not shown where or how the error arose. She did state, as grounds of the appeal, that she did not look for work because no one would employ her with her medical issues; and further, that she would not seek employment knowing that she could not be an asset to an employer. (AD1A-4)

[13] This latter submission was made in direct response to the General Division finding that the Applicant had retained work capacity but had shown no effort at obtaining and maintaining employment; or that her attempt to do so had been unsuccessful by reason of her health condition.

[14] In *Lalonde v. Canada (Minister of Human Resources Development)* 2002 FCA 211, the Federal Court of Appeal reiterated that applicants for a CPP disability pension have the burden of proving their physical disability to the then Pension Appeals Board Tribunal, in accordance with the requirements of CPP, subsection 42(2), and the efforts they have made to find employment for themselves in the circumstances (*Adele Lutzer v. Minister of Human Resources Development*, 2002 FCA 190, paragraphs 7 *et seq*.).

[15] The Appeal Division has reviewed the Tribunal record as well as the General Division decision and the Appeal Division finds no error on the part of the General Division either in its statement of the law regarding the obligation to find alternative work or in its application of that law. Accordingly, the Appeal Division finds that leave to appeal cannot be granted in respect of the submission that the General Division committed an error of law.

CONCLUSION

[16] The Applicant submitted that the General Division gave inadequate consideration to the medical evidence and committed an error of law. She also submitted that she could not be expected to work given her health condition. On the basis of the foregoing, the Appeal Division finds that the reasons put forward by the Applicant for the Application do not give rise to grounds of appeal that would have a reasonable chance of success.

[17] The Application is refused.

Hazelyn Ross
Member, Appeal Division