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

Citation: *R. S. v. Minister of Employment and Social Development,* 2016 SSTADIS 253

Tribunal File Number: AD-16-200

BETWEEN:

R. S.

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: July 6, 2016

Canada

DECISION AND REASONS

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

INTRODUCTION

[2] The Applicant seeks leave to appeal the decision of the General Division issued on September 30, 2016, (the Application). In its decision the General Division held that the Applicant was not eligible for a disability pension under *Canada Pension Plan, (CPP),* as she did not have a disability that was severe and prolonged as defined by the CPP.

GROUNDS OF THE APPLICATION

[3] Leave to appeal was sought on the basis that the General Division based its decision on erroneous findings of fact that it made without regard for the material before it. (AD1-3).

ISSUE

[4] The issue before the Appeal Division is whether the appeal would have a reasonable chance of success.

THE LAW

[5] Appeals to the Appeal Division are governed by Sections 56 to 59 of the *Department of Employment and Social Development (DESD) Act*. The grounds of appeal are set out at ss. 58 (1) and are:-

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;
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

[6] Subsections 56(1) and 58(3) of the DESD Act govern the granting of leave to appeal. Subsection 56(1) makes clear that leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division, providing that, "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(3) makes the grant or refusal of leave mandatory. To obtain leave to appeal, an applicant must satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal.[1]

[7] An applicant satisfies the Appeal Division that his appeal has a reasonable chance of success by raising an arguable case in his application for leave.[2] The Federal Court of Appeal has equated an arguable case to a reasonable chance of success. *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[8] *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

PRELIMINARY ISSUE

[9] A question arose as to whether or not the Application had been filed within the time limit provided for in subsection 57(1) of the DESD Act. The General Division issued its decision on September 30, 2015. The Tribunal record shows that a decision, cover letter was prepared on October 1, 2015. The Tribunal received the Application on January 22, 2016, which is more than ninety days after the date of the decision letter. In response to the Tribunal, the Applicant indicated that she received the decision on or about October 30, 2015 and mailed her Application on January 12, 2016. In fact, in the Application she states she received the decision on October 31, 2015. If true, the Application is not late-files.

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[1] (58(2) "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

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

[10] The Appeal Division is unable to locate in the Tribunal record the date on which the decision was mailed to the Applicant, therefore, it is not in a position to decide this matter as a late-filed application and accepts it as having been filed in time.

ANALYSIS

[11] The Applicant submitted that her medical condition is severe and prolonged because her health continues to deteriorate and is not expected to improve. She stated that a number of medical conditions prevent her from returning to work, namely post-surgery complications to her left leg that includes swelling, numbness and loss of sensation; anticipated surgery to her right leg; depression; her inability to take anti-inflammatories and constant pain. The Applicant argues that she is unable to carry out her activities of daily living unaided and is depressed as a result of her medical conditions and personal circumstances. She submitted that the General Division did not consider these facts when it made its decision.

[12] The operative date is December 31, 2015. This is the end of her minimum qualifying period, (MQP). The Applicant had the onus of establishing that she had become disabled within the meaning of the CPP, on or before this date.

[13] In response to the General Division's written questions and answers, the Applicant explained that she had not returned to her former employment. However, she was involved in volunteer activity in her community. She stressed that due to her mobility problems all of her volunteer work was done from her home; that meetings were held at her residence; and that she obtained rides when she had to attend meetings outside of her residence. She described her volunteer activities as retraining; however, she stated that no one was interested in offering her employment because of her health condition. (GT13-2)

[14] The General Division found that the Applicant's age, level of education and past work experience were all factors that were in her favour. As well, the General Division found that the while the Applicant may not be able to perform the strenuous tasks associated with her former employment as a special needs assistant with the Toronto District School Board she retained work capacity. This was the crux of the decision.

[15] With rare exception, Applicants for a CPP disability benefit are required to show that they have made efforts to mitigate their damages by finding alternate employment or by making efforts to retrain. *A.P. v. MHRSD* (December 15, 2009) CP 26308 (PAB). In *A.P.* the PAB expressed this necessity in the following terms:-

> [15] We are mindful of the importance of each and every word and of the Board's obligation to give them a generous interpretation. On the other hand, every effort must be made by an applicant for disability benefits to seek and maintain suitable employment that will accommodate the limitations which afflict him.

[16] In dismissing the Appeal, the PAB stated:-

> [17] We are also satisfied that there is an essential element missing in the Appellant's case, namely evidence of serious efforts made by him to help himself. This requirement extends to both the obligation to aggressively seek treatment and to the burden which accrues to all applicants of establishing to the satisfaction of the Board that reasonable and realistic efforts were made to find and maintain employment while taking account as mandated by *Villani* of the personal characteristics of the applicant, of all the circumstances including his health problems, in short of his employability. On both counts, we regret to say, the Appellant has failed.

[17] The Appeal Division agrees that it was incumbent upon the Applicant to demonstrate that her efforts in obtaining and maintaining alternate employment were unsuccessful by reason of her medical or mental health conditions. The General Division found that the Applicant's volunteer activity demonstrated that she had the capacity for alternate employment, however, beyond approaching her former employer for modified duties she had taken no steps to secure alternate employment. Thus, the Applicant had not met her onus to demonstrate that her efforts at alternate employment had been rendered futile by her health conditions.

[18] In coming to its decision the General Division had before it documentary evidence and the Applicant's responses to its questions (GT-13) in which she set out her various health conditions. This provided the evidentiary basis for the General Division's decision. In its analysis of the evidence, the General Division turned its mind to the Applicant's health conditions, and made particular reference to her left knee, leg and her depression. The discussion at paragraphs 37 to 39 of the decision addressed the Applicant's medical and mental

health conditions; their effect on her; and her ability to engage in any substantially gainful occupation.

[19] Accordingly, the Appeal Division finds that the General Division did not base its decision on an erroneous finding of fact without regard for the material before it. The Appeal Division also finds that the General Division did not err in its application of the law to the facts of the Applicant's case. The Appeal Division is not satisfied that the Application raises grounds of appeal that would have a reasonable chance of success.

CONCLUSION

[20] The Application is refused.

Hazelyn Ross
Member, Appeal Division