



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *M. W. v. Minister of Employment and Social Development*, 2016 SSTADIS 279

Tribunal File Number: AD-16-447

BETWEEN:

**M. W.**

Applicant

and

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

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Hazelyn Ross

DATE OF DECISION: July 25, 2016

## **REASONS AND DECISION**

### **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, (the Application), the February 8, 2016 decision of the General Division of the Tribunal, which determined that a disability pension under the *Canada Pension Plan* was not payable to him.

### **GROUND OF THE APPLICATION**

[3] The Applicant's representative submitted that the General Division erred in law in a number of ways. Specifically, that it failed to consider that the Applicant was self-employed; failed to consider the totality of the evidence; and misapprehended the nature of his employment with the Town Council. (AD1)

### **ISSUE**

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

### **THE LAW**

[5] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act*, (DESD Act), govern the grant of leave to appeal. Subsection 56(1) provides that "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Thus, leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.

[6] Subsection 58(3) provides that "the Appeal Division must either grant or refuse leave to appeal." In order to obtain leave to appeal, an applicant must satisfy the Appeal Division that

their appeal would have a reasonable chance of success; otherwise it must refuse leave to appeal.<sup>1</sup>

[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.<sup>2</sup> 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

### **The General Division failed to consider that the Applicant was self-employed**

[10] On the behalf of the Applicant his representative submitted that the General Division erred in law by failing to take into consideration the fact that the Applicant was self-employed and worked in a decision-making capacity only. This submission was made in response to the General Division's discussion of the Applicant's activities on his farm and his retained work capacity.

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<sup>1</sup> 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."

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

[11] At paragraphs 7, 10 and 11 of the decision, the General Division set out the Applicant's testimony about his work activity on his farm. At paragraphs 28 and 29 of the decision, the General Division examined the Applicant's evidence about his activities and concluded that the activities demonstrated that he retained work capacity. The General Division found that the Applicant had not shown that his efforts at obtaining and maintaining employment had been unsuccessful by reason of his medical condition. This is a usual requirement demanded of applicants for a CPP disability pension: *Inclima v. Canada (Attorney General)* 2003 F.C.A. 117. Indeed, the General Division found that the Applicant had not sought alternative employment.

[12] In coming to its conclusion, the General Division took into consideration the Applicant's testimony describing how he worked, including the fact that he supervised the work of the farm, paced himself when engaged in maintenance and farming activities, and took care not to aggravate his back and knee pain. The Appeal Division finds that this testimony undermines the submissions that the General Division did not take into consideration that the Applicant was self-employed and also that he worked in a decision-making capacity only. Accordingly, the Appeal Division is not satisfied that this submission raises grounds of appeal that would have a reasonable chance of success.

### **The Town Council position is not a substantially gainful occupation**

[13] The Appeal Division is not persuaded that the General Division erred in law as a result of its view of the Applicant's role with the Town Council. The Applicant's representative submitted that the General Division considered this work a "substantially gainful occupation." However, this was not the finding of the General Division; rather the General Division factored in that work and remuneration in its consideration of the totality of the Applicant's activities as part of its assessment of his retained work capacity.

[14] At paragraph 36, the General Division assessed the remunerative capacity of all of the Applicant's efforts and concluded that the only activity for which there was clear evidence of remuneration was the Town Council position. Nonetheless, the General Division found that the Applicant was engaged in potentially remunerative activity on his farm; all of which, taken together, was not indicative of a severe disability. The Appeal Division is unable to find that the

General Division erred in law as submitted by the Applicant's representative. Leave to appeal cannot be granted on this ground.

**The General Division failed to consider the totality of the evidence**

[15] The Applicant's representative questioned the weight the General Division gave to aspects of the Applicant's evidence, namely, the evidence that the Applicant requires assistance to perform some of his activities of daily living. He also submitted that the General Division failed to consider that the Applicant's condition is worsening and that he would require a benevolent employer if he were to find alternate employment.

[16] The Appeal Division finds that with these submissions the Applicant and his representative are essentially asking it to reweigh the evidence. Weighing evidence is within the purview of the General Division. *Tracey is clear that* on an application for leave to appeal it is not the job of the Appeal Division to reweigh evidence. Accordingly, leave to appeal cannot be granted with respect to these submissions.

**CONCLUSION**

[17] The Applicant's representative submitted that the General Division made several errors of law in its decision. Based on the discussion above, the Appeal Division is not satisfied that these submissions give rise to grounds of appeal that would have a reasonable chance of success.

[18] The Application is refused.

Hazelyn Ross  
Member, Appeal Division