



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. Z. v. Minister of Employment and Social Development*, 2016 SSTADIS 304

Tribunal File Number: AD-16-211

BETWEEN:

A. Z.

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: August 9, 2016

DECISION

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

INTRODUCTION

[2] The Applicant had been in receipt of a retirement pension under the Canada Pension Plan, (CPP). He applied for and was denied a disability benefit on the basis that he was out of time to request a cancellation of his retirement pension. The Respondent maintained the denial on reconsideration. (GD3-4). The Applicant appealed from the reconsideration decision to the General Division of the Tribunal. On December 29, 2015, the General Division dismissed the appeal for the same reasons cited by the Respondent. The Applicant seeks leave to appeal the General Division decision, (the Application).

GROUND OF THE APPLICATION

[3] The Applicant submitted that the General Division breached paragraphs 58(1)(a)(b) and (c) of the *Department of Employment and Social Development, (DESD), Act*. He argued that because of his mental health condition since his work-related injury and hospitalisation of October 2013, the General Division ought to have applied subsection 60(8) of the CPP to his case. (AD1-2)

ISSUE

[4] Does the appeal have a reasonable chance of success?

THE GOVERNING STATUTORY PROVISIONS

THE LAW

[5] Subsections 56(1) and 58(3) of the 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 the Appeal Division must refuse leave to appeal.¹

[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.² 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.

[10] The CPP provides for applications in the circumstances where an applicant was incapable of forming the intent to apply for a benefit. Known as the incapacity provisions, they are set out at section 60 of the CPP.

60. Application for benefit – (1) No benefit is payable to any person under this Act unless an application therefor has been made by him or on his behalf and payment of the benefit has been approved under this Act.

(8) Incapacity – Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an intention to make an application on the person’s own behalf on the day on which the application was actually

¹ 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.”

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

made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

[11] The Applicant relies on subsection 60(8) as the basis of his application.

ANALYSIS

The General Division breached natural justice.

[12] The Applicant submitted that the hearing was unfair because of the manner in which questions were put to him; that he was prevented from explaining the cause of why he was unable to work; and that relevant facts were blurred.

[13] Having had the opportunity to listen to the recording of the hearing this is not the Appeal Division is not persuaded that the General Division breached natural justice. The Applicant was self-represented and was the only party present at the hearing. It, therefore, fell to the General Division to ask questions. Prior to asking its questions, the General Division gave the Applicant the opportunity to present its case, which he did.

[14] It is clear that the General Division Member had specific issues in mind when she questioned the Applicant, however, the Appeal Division finds that the Member's questions were intended to clarify areas of ambiguity, and therefore allowable. At all times, the General Division was respectful of the Applicant. Accordingly, the Appeal Division finds that the General Division's questions did not give rise to a breach of natural justice. Leave to appeal will not be granted in this respect.

The General Division applied the wrong legal test

[15] The Applicant submitted that the General Division applied the wrong legal test for incapacity. The Federal Court of Appeal, (FCA), examined the legal test in section 60 of the CPP in *Canada (Attorney General) v. Danielson*, 2008 CA 7. The FCA described section 60 as "precise and focused in that, "it does not require consideration of the capacity to make, prepare, process or complete an application for disability benefits, but only the capacity, quite simply, of 'forming or expressing an intention to make an application'".

[16] In *Morrison v. The Minister of Human Resources Development*, CP 04182 (March 7, 1997), the FCA stated that it was necessary to look both at the medical evidence as well as the applicant's activities in order to decide whether or not the applicant met the section 60 test. Thus, the General Division was required to look at the relevant activities of the Applicant between the claimed date of commencement of disability and the date of his application which cast light on his capacity during that period of forming and expressing the intent to make an application for CPP disability benefits.

[17] The General Division did just that. The Member asked questions to clarify when the Applicant stopped working; the reasons why he stopped working; his period of hospitalisation; and his activities upon release from hospital. The facts that emerged from the General Division's questions were:-

1. The Applicant began to receive a retirement pension in April 2012. (GD3-11)
2. He had been employed with Nortel Networks until April 28, 2013. He had also had his own renovation company that he wound up at the end of December 2011. In his questionnaire for Disability benefits, the Applicant stated that he stopped work on December 31, 2011, when his renovation business closed due to his mental illness. The General Division Member sought to clarify this area. In response to the General Division, the Applicant testified that his business closed because of the economic downturn in the Alberta economy and not because of his mental health issues.
3. After his employment ended with Nortel, the Applicant found employment with an oil company. While employed with this company he was injured at work. The reasons for his injury and subsequent hospitalisation are unclear. In October 2013, he left work one day and woke up in hospital several days later. The CPP Medical questionnaire indicates that the Applicant began to receive treatment for Major depressive disorder; alcohol dependence; and hypertension in October 2013.
4. Hospital personnel completed and submitted his disability application.

[18] The Appeal Division finds that the General Division did what *Morrison* required it to do. The General Division looked at the Applicant's activities between his hospitalisation and the date of his application for CPP disability benefits in order to determine whether, during this

period, he lacked the capacity to form and express the intent to make the application. Moreover, the General Division looked at the Applicant's activities connected to both his former employment with Nortel and his renovation company. Accordingly, the Appeal Division finds that the General Division applied the correct legal test for incapacity.

[19] The Appeal Division also finds that the General Division correctly identified and applied the provisions in subsection 61.1 (1.1) and paragraph 42(2)(b) of the CPP. These provisions together require the Applicant to have been deemed disabled before his retirement pension commenced but no earlier than 15 months prior to such commencement.

[20] The General Division found that any period of incapacity would have occurred while the Applicant was hospitalised in October 2013. This is 18 months after his retirement pension had commenced and after the end of his minimum qualifying period, (MQP). Even if he could have been brought under the section 60 exception, the interaction of subsection 61.1 (1.1) and paragraph 42(2)(b) precluded the cancellation of the Applicant's retirement pension in favour of a disability pension. Thus, no error of law that could give rise to a ground of appeal arises.

The General Division ignored relevant materials

[21] The Applicant submitted that the General Division made findings of fact without regard for the material before it. These materials included the Occupational Therapy and Functional Assessment reports. He argued that the General Division did not subject the medical reports to an adequate examination and erred in holding that there was a lack of medical evidence to support a finding of incapacity.

[22] In light of its finding that any incapacity would have arisen in 2013, which is outside of the end of the Applicant's minimum qualifying period, and also in light of the fact that these reports were generated in relation to the Applicant's October 2013 hospitalisation, no question arises of disregard for the documents. Thus, a ground of appeal that would have a reasonable chance of success is also not revealed.

CONCLUSION

[23] The Applicant submitted that the General Division breached the three grounds of appeal in subsection 58(1) of the DESD Act. For the reasons set out above the Appeal Division is not satisfied that his arguments raise grounds of appeal that would have a reasonable chance of success.

[24] The Application is refused.

Hazelyn Ross
Member, Appeal Division