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

Citation: *A. H. v. Minister of Employment and Social Development,* 2016 SSTADIS 296

Tribunal File Number: AD-16-290

BETWEEN:

A. 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

LEAVE TO APPEAL DECISION BY: Hazelyn Ross

DATE OF DECISION: August 04, 2016

DECISION AND REASONS

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

INTRODUCTION

[2] On November 10, 2015, the General Division of the Tribunal dismissed the Applicant's appeal of a reconsideration decision. The General Division found that the Applicant had not met her onus to establish that she had a severe and prolonged disability as defined by paragraph 42(2)(a) of the *Canada Pension Plan*, (CPP). The Applicant seeks leave to appeal from the General Division decision, (the Application).

GROUNDS OF THE APPLICATION

[3] On the behalf of the Applicant her counsel submitted the following as the basis of the Application:-

i. The General Division failed to observe a principle of natural justice by not considering all the reports on file and [the] written submissions and submission made during [the] hearing.
ii. The General Division also erred in law and made its decision "without considering the severe and prolonged disability issues in terms of paragraph 42 (2)(a) of the plan." The General Division erroneously came to conclusion that the Applicant's disability was not severe and did not examine whether it was prolonged.
iii. The General Division based its decision on erroneous finding of facts and failed to "consider the facts in [their] correct meaning". The General Division erroneously came to the conclusion that surgery can fix the problem when the Applicant explained that due to diabetes surgery is not an option.

ISSUES

[4] The Appeal Division must determine whether the appeal would have 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.[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] The grounds of appeal and the jurisdiction of the Appeal Division are set out at section 58 of the *Department of Employment and Social Development, (DESD), Act.* They are:-

> **58** – *Grounds of Appeal* – **(1)** The only grounds of appeal are that
>
> 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.

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[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)

[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] For the following reasons the Appeal Division refuses leave to appeal.

The General Division failed to observe a principle of natural justice

[11] Counsel for the Applicant submitted that by not considering all the medical reports on file and the written and oral submissions, the General Division breached natural justice. He cited the Applicant's numerous medical conditions and the reports that address them; and he argued that the General Division erred in concluding that the Applicant could return to gainful employment given her many medical problems.

[12] The principles of natural justice are concerned with ensuring that parties are able to present their cases fully; to know the case they have to meet; and to have their cases heard by an impartial decision-maker. In the administrative law context "natural justice" is particularly concerned with fairness which embodies all of the above concepts and also extends to procedural fairness.

[13] Counsel for the Applicant charges that the General Division did not consider all of the medical evidence. He did not identify which of the numerous medical reports, or what part of the Applicant's testimony or submissions the General Division ignored. In *Simpson v. Canada (Attorney General)*, 2012 FCA 82 (CanLII), the Federal Court of Appeal held that, "…a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence." It is only where the deficiencies in the reasons of the trier of fact, here the General Division, prevent meaningful appellate review that an error of law will arise: *Doucette v. Canada (Minister of Human Resources Development)*, 2004 FCA 292 (CanLII).

[14] The General Division decision contains an extensive summary of the medical evidence; the Applicant's oral testimony and the submissions. In its analysis the General Division

assessed whether the Applicant met the test for severe and prolonged disability by reference to medical reports and her oral testimony, providing clear reasons for its conclusions. Accordingly, the Appeal Division is not persuaded that the General Division failed to consider the whole of the evidence in coming to its conclusion. The Appeal Division finds that a breach of natural justice did not occur. This argument does not have a reasonable chance of success on appeal.

The General Division erred in law

[15] Counsel for the Applicant submitted that the General Division erred in law when it failed to make a finding on the prolonged nature of the Applicant's medical conditions. The Appeal Division rejects this submission. It is well settled law that, due to the conjunctive nature of the CPP definition of severe and prolonged disability; where the General Division finds that the test for the severe aspect of the CPP definition has been met there is no further need to consider whether the prolonged aspect of the test was met: *Klabouch v. Canada (Minister of Human Resources Development)*, 2004 FCA 377. The Appeal Division is satisfied that this argument does not have a reasonable chance of success on appeal.

The General Division based its decision on erroneous finding of facts

[16] Counsel for the Applicant also submitted that the General Division failed to "consider the facts in [their] correct meaning". Counsel's meaning is not clear; however, he did go on to elaborate that the General Division erroneously came to the conclusion that the Applicant could benefit from surgery when she explained that because she was diabetic surgery is not an option. Having had the opportunity to listen to a recording of the hearing, this is not the Appeal Division's appreciation of the Applicant's oral testimony.

[17] The Appeal Division understands from the recording that the Applicant initially testified that she had been very worried about undergoing shoulder surgery, (12:24). In response to the General Division's question, the Applicant testified that she was sceptical about surgery, (28:22). She also testified that she consulted two orthopaedic surgeons; the second in November 2015 and that he gave her three cortisone injections.

[18] Responding further to the General Division, the Applicant testified that the first orthopaedic surgeon recommended surgery and sent her for a second opinion when she asked. She agreed that

while she did tell the first orthopaedic she was diabetic, however he did not seem to her condition was a barrier to surgery. (31:56). She testified that she repeated her concerns to both the second surgeon (33:00) and to her family doctor. (28:22). The Applicant stated that she had been told that diabetics have complications from surgery and do not heal properly. (34:22). In response to the General Division's questions, the Applicant testified that while she discussed the advisability of surgery with her family doctor, Dr. Seegobin. (34:30) While he agreed there were risks; he did not tell her what the risks were. (35:26)

[19] It is the role of the General Division to assess the evidence and to assign weight to it. Counsel for the Applicant submitted that the General Division reached a conclusion that, in light of the Applicant's testimony, was perverse. On the basis of the foregoing, the Appeal Division finds that this argument has not been made out.

CONCLUSION

[20] Counsel for the Applicant submitted that the General Division committed errors of law; based its decision on erroneous findings of fact; and breached the principles of natural justice. On the basis of the foregoing the Appeal Division is not satisfied that counsel's submissions and arguments raise grounds of appeal that might have a reasonable chance of success.

[21] The Application is refused.

Hazelyn Ross
Member, Appeal Division