



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *D. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 322

Tribunal File Number: AD-16-375

BETWEEN:

**D. S.**

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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LEAVE TO APPEAL DECISION BY: Hazelyn Ross

DATE OF DECISION: August 19, 2016

## **REASONS AND DECISION**

### **DECISION**

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

### **INTRODUCTION**

[2] This Application for leave arises from the dismissal on February 18, 2016 of the Applicant's appeal to the General Division of the Tribunal. The Applicant applied for a disability pension under the *Canada Pension Plan*, (CPP), in July 2013. The Respondent considered his application under the CPP late application provisions. It determined that the Applicant's minimum qualifying period, (MQP), or the date by which he had to be found disabled ended on December 31, 2007. The Respondent also found that, by the end of his MQP, the Applicant did not meet the criteria for "severe and prolonged" disability set out in paragraph 42(2)(a) of the CPP. It denied the initial application and maintained the denial on reconsideration. The Applicant appealed from the reconsideration decision to the General Division. As stated above the General Division dismissed his appeal. The Applicant seeks leave to appeal the General Division decision, (the Application).

### **REASONS FOR THE APPLICATION**

[3] Counsel for the Applicant has submitted that the General erred when it found at paragraph 39 of the decision that there was insufficient medical evidence to support a finding of severe and prolonged disability. (AD1-5)

### **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 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.” 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.”

[6] 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>1</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.

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

- 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.

[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.

## ANALYSIS

### **Does the Applicant’s reasons for appeal fall within the stated grounds of appeal?**

[9] Counsel for the Applicant submitted that the General Division erred by not considering the medical evidence “in the context of the evidence as a whole.” The Appeal Division finds

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

that this submission raises questions of whether the General Division based its decision on erroneous findings of fact. Thus paragraph 58(1)(c) of the DESD Act is engaged.

**Did the General Division base its decision on an erroneous finding of fact?**

[10] Counsel for the Applicant submitted that had the General Division properly assessed the evidence as a whole, it would have found that the medical evidence supported a finding that the Applicant had a severe and prolonged disability on or before the MQP. He argued that the Applicant was not to be blamed for the lack of pre-MQP medical reports about his mental health issues as his family physician did not refer him to a psychiatrist prior to the MQP.

[11] The Appeal Division finds that the submissions of Counsel for the Applicant are a tacit acknowledgment that the General Division did come to the correct conclusion. It is not that the General Division found that there was no medical evidence regarding the Applicant's mental health issue; rather it was that the General Division found that there was no such prior to the MQP. In the view of the General Division the post-MQP evidence did little to cast light on the Applicant's mental health condition on or before the MQP.

[12] In this regard, the Appeal Division finds the following medical reports to be instructive:

1. The CPP Medical report completed by Dr. Mughal, in which he gives a diagnosis of carpal tunnel syndrome in the Applicant's left wrist. (GD3-42) At the hearing and in this Application, the issue centred on the Applicant's mental health issues. No question was raised in respect of the injury to his left wrist, perhaps as the Applicant is the right-hand dominant.
2. Dr. Mughal's December 2013 report, in which he states that the Applicant had had "consultations with a plastic surgeon, Dr. Baum, and had participated in a Nerve Conduction Study on November 21, 2007. The study showed bilateral Carpal Tunnel Syndrome and normal motor function of left hand nerves".

[13] Dr. Mughal continued:-

3. "On July 4, 2007, he (the Applicant) was referred for physiotherapy to maximize his grip strength and improve the pain to his left hand. At about the same time he

was also referred by the William Osler Health Centre for physiotherapy to improve the range of motion of his left hand. He has not seen Dr. Baum since Jane 05.2007". (GD4-3)

[14] With respect to the Applicant's treatment for his mental health issue, Dr. Mughal commented, that:-

4. "Lately he saw Dr. Jagtaran Dhaliwal, a Psychiatrist, on Nov 05, 2013 for anxiety, depression and post-traumatic stress syndrome. He was treated with Cipralex 10mg in the evening and Seroquel 25 mg - 100 mg at night. He does not have a follow up appointment with Dr. Dhaliwal. At present Mr. D. S. is still having pain and discomfort in his left arm and hand secondary to the accident Mar 7, 2007. He has not been working. He is depressed and suffering from post-traumatic stress disorder. He is under the on-going care of a Psychiatrist and has been advised to continue seeing him. His prognosis is guarded at present".

[15] From Dr. Mughal's December 2013 report, it is clear that the Applicant did not consult with a psychiatrist until some six years after the end of his MQP. The AD concludes that this is indicative of how Dr. Mughal viewed the Applicant's mental health conditions prior to the MQP. In these circumstances, the Appeal Division finds that it was reasonable for the General Division to conclude that the medical evidence was insufficient to establish that, on or before his MQP of December 31, 2007, the Applicant suffered from a mental health condition that was severe and prolonged within the meaning of the CPP.

[16] Although it was not raised as the basis of the Application, the Appeal Division also finds that the General Division did not ignore the injury to the Applicant's left wrist. It found that the medical evidence did not establish that it was severe or prolonged as of the MQP: para. 40. The Appeal Division finds no error in the General Division's analysis of the Applicant's injury, the treatment he underwent and the prognosis for recovery.

[17] Similarly, the Appeal Division finds no error in the General Division's analysis of the Applicant's attempts to find alternate employment. Outside of the WSIB sponsored work programme with the Dollar Store, he made none. The Appeal Division is satisfied that the

Tribunal record does not contain objective medical evidence that could support a finding that his attempt to find alternate employment was rendered null by his medical or mental health conditions.

## **CONCLUSION**

[18] On the basis of the foregoing analysis, the Appeal Division is not satisfied that the submissions of Counsel for the Applicant disclose grounds that have a reasonable chance of success on appeal.

[19] The Application is refused.

Hazelyn Ross  
Member, Appeal Division