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

Citation: *S. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 342

Tribunal File Number: AD-16-251

BETWEEN:

S. 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

Leave to Appeal Decision by: Hazelyn Ross

Date of Decision: September 1, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] By a decision issued on December 21, 2015, the General Division of the Social Security Tribunal of Canada, (the Tribunal), determined that a disability pension under the *Canada Pension Plan* was not payable to the Applicant. On her behalf, on February 20, 2016, Counsel for the Applicant filed an application for leave to appeal, (the Application), with the Appeal Division of the Tribunal.

ISSUE

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

THE LAW

[3] 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."

[4] 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."

[5] 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.[1] In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 and in *Fancy v. Canada*

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

(Attorney General), 2010 FCA 63 an arguable case has been equated to a reasonable chance of success.

[6] 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.

[7] *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.

GROUNDS OF THE APPLICATION

[8] Counsel for the Applicant submitted that the General Division erred in law and in fact with respect to its findings concerning the Applicant's attempts to obtain and maintain alternate employment. He also submitted that the General Division reached erroneous conclusions concerning the Applicant's rotator cuff injury and surgical options.

ANALYSIS

Did the General Division err in law or base its decision on an erroneous finding of fact? The Applicant's medical conditions.

[9] Counsel for the Applicant submitted that the General Division decision was inconsistent in that paragraphs 61 and 51 contained contradictory statements about the surgery that the Applicant was required to undertake to remedy her rotator cuff. He submitted that at paragraph 61, the General Division noted that the surgery was not recommended, while at paragraph 51, it indicated that it was. He made the further submission that the Applicant ought not to be required to submit to surgery when the potential benefits of the surgery were uncertain.

[10] The Appeal Division finds that this submission amounts to no more than a disagreement with the conclusions reached by the General Division. In fact, at paragraph 51 the General

Division set out medical evidence in the form of a report from an orthopaedic surgeon who, on January 5, 2009 did not recommend surgery for the Applicant's rotator cuff. At paragraph 61, the General Division reports Dr. Nandy's findings. He stated that the Applicant had had shoulder problems and carpal tunnel syndrome since September 2006 and these had been exacerbated by her work at the bakery and the December 2008 motor vehicle accident.

[11] The Appeal Division finds that these paragraphs do not contain any conclusion or finding that the General Division made, therefore, no error on its part could arise in respect of them. Further, the submission by Counsel for the Applicant that she should not be forced to undergo dubious surgery is undermined by the fact that Dr. Jason Smith did, in fact, book her for surgery to repair a small tear in her rotator cuff. (para. 52)

[12] With respect to the Applicant's back issues, the General Division found that there was little evidence in the Tribunal file regarding her condition. It also found that there were no reports from specialists nor were there any record of consultations regarding the Applicant's back. The onus was on the Applicant to establish that she had a medical condition that was severe and prolonged and it was open to the General Division to assess and weigh the evidence on file. In light of its finding that there was little objective evidence to support the medical condition, the Appeal Division is not persuaded that the General Division erred in its assessment of the evidence concerning the Applicant's back condition.

[13] The Appeal Division refuses leave in respect of these submissions.

The Applicant's attempt to find alternate employment.

[14] Weighing evidence is within the purview of the General Division. In so far as there is some evidentiary basis for the General Division's finding, its decision will not have been reached in a perverse or capricious manner. The General Division found evidence that the Applicant retained work capacity by virtue of :-

1. Her attendance/participation in a two-year retraining programme. The General Division found that this training programme was equivalent to full-time employment because the Applicant was required to attend for six hours each day, five days a week.

2. The fact that she did not testify that her medical conditions prevented her from attending programme because of her medical condition; and

3. Because of the evidence that she had worked with her shoulder pain and had been retrained for light work.

[15] In addition, the General Division rejected the Applicant's explanation for why she had not completed the job search portion of the WSIB retraining programme. In the General Division's opinion it was not plausible that the WSIB, having spent two years retraining the Applicant, would refuse to allow her to complete this aspect of the training following a two-week absence.

[16] Accordingly, the Appeal Division is not persuaded that the General Division erred as submitted by Counsel for the Applicant. Thus, overall, the Appeal Division is not satisfied that the submissions of the Applicant give rise to grounds of appeal that would have a reasonable chance of success.

CONCLUSION

[17] The Application is refused.

Hazelyn Ross
Member, Appeal Division