



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. B. v. Minister of Employment and Social Development*, 2016 SSTADIS 368

Tribunal File Number: AD-16-317

BETWEEN:

C. B.

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 16, 2016

REASONS AND DECISION

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

INTRODUCTION

[2] The Applicant requests leave to appeal from the decision of the General Division issued January 22, 2016, (the Application). In its decision, the General Division dismissed her appeal of a reconsideration decision that denied her payment of a disability pension under the *Canada Pension Plan*, (CPP).

GROUND OF THE APPLICATION

[3] The Applicant did not set out the exact ground or grounds of appeal on which she based her Application. However, from her submission, the Appeal Division was able to induce that she was alleging that the General Division decision was based on an erroneous finding of fact that it made without regard for the material before it.

[4] The Applicant made the following submission:-

58 A Nobody did anything wrong here and this is not a blame game just a hard disease of Fibro to understand and the Accident May 2010 sure made symptoms much worse and sadly the severe neck pain leaves my hands with numbness, tingling, that causes me to drop things, and still cannot use a keyboard my fingers will not go where I want them to. As I shared with Ms. C. during my teleconference on Dec 02/205 on several occasions using my visa or deb[i]t card to key in numbers my right hand will not open all the way and have to use my right knuckle to key in numbers, this is not mentioned in her decision. We have to think outside the box on medical conditions that we cannot see physically and on an x-ray. I may look fine on the outside but there is great struggles with pain just to live day to day is a severe challenge.

Sub 18 must have been a misunderstanding in communication talking I shower myself with a safe lift chair, make my bed, cook simple healthy meals for me. My friend vacuums floors and cleans for me. Lifts heavy items and drives me. Also in conversation I stated now I am looking for an apartment in an elevator building the stairs r [are] getting to[o] difficult for me to climb that was also not mentioned in decision. The only truth I own is the story that I wrote in my appeal life before fibro and after. The 8 letters of professionals and family stating the

difficulty I have with trying to use a pen to sign my name. (AD1-2) (typed as written)

ISSUE

[5] The issue to be decided is whether the appeal has a reasonable chance of success.

THE LAW

[6] 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.

[7] 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 In *Canada (Attorney General) v. O’Keefe*, 2016 FC 503, the Federal Court examined the jurisdiction of the Appeal Division to grant leave to appeal, stating that:-

[36] Leave to appeal a decision of the SST-GD may be granted only where a claimant satisfies the SST-AD that their appeal has a “reasonable chance of success” on one of the three grounds of appeal identified in subsection 58(1) of the *DESDA*: (a) a breach of natural justice; (b) an error of law; or (c) an erroneous finding of fact made in a perverse and capricious manner or without regard for the material before it. No other grounds of appeal may be considered (*Belo-Alves*, above, at paras 71-73).

[8] 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 *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

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] 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.

[10] *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 disregarded evidence

[11] The Applicant submitted that the General Division disregarded two important pieces of information that go to the severity of her disability, namely, her testimony that:-

- (a) on several occasions she had difficulty using her right hand to make payments with her visa or debit card; and
- (b) that because climbing stairs had become increasingly difficult; she was now looking for an apartment in a building with an elevator.

[12] The question is whether these omissions constitute errors and, if so, to what extent they would affect the decision. In this regard, it is important to keep in mind the date by which the Applicant had to be found to be disabled. The General Division determined that her minimum qualifying period (MQP) ended as of December 31, 2013. Therefore, for the omissions to be material to the decision, the situations they describe must have occurred prior to December 31, 2013.

[13] The Appeal Division finds that the evidence concerning the Applicant's difficulty using her right hand was captured under the umbrella of her "loss of fine motor skills." (paragraphs 28(b) and 32)

[14] A decision-maker is presumed to have considered all of the evidence before it. Each and every piece of evidence need not be mentioned in the written decision: *Simpson v. Canada*

(Attorney General), 2012 FCA 82. Therefore, even if the General Division did not specifically mention that on several occasions the Applicant had difficulty using her right hand to make payments with her visa or debit card and had to use her left knuckle to assist her to key in the numbers, this omission does not constitute an error that would render the decision unsafe. Furthermore, there is no clear evidence that this development occurred prior to the end of the Applicant's MQP, as the Applicant appears to indicate that it is a fairly recent development. Leave to appeal cannot be granted in regard to this submission.

[15] With respect to the Applicant's second submission, the Appeal Division finds that it also does not give rise to a ground of appeal that would have a reasonable chance of success. She stated that the General Division did not mention that, because of her difficulty climbing stairs; she was looking for an apartment in a building with an elevator. While the Appeal Division finds this information is not included in the decision, it is also clear that the Applicant's search for a new apartment is a current search. It did not take place prior to December 31, 2013, the operative date. Therefore, the Appeal Division finds that the omission does not constitute an error. Leave to appeal cannot be granted in this regard.

CONCLUSION

[16] The Applicant submitted that the General Division based its decision on erroneous finding of fact that it made without regard for the material before it. For the reasons set out above the Appeal Division is not satisfied that her arguments raise grounds of appeal that would have a reasonable chance of success.

[17] The Application is refused.

Hazelyn Ross
Member, Appeal Division