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

Citation: *D. F. v. Minister of Employment and Social Development,* 2016 SSTADIS 390

Tribunal File Number: AD-16-316

BETWEEN:

D. F.

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: October 4, 2016

Canada

REASONS AND DECISION

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

INTRODUCTION

[2] The Applicant seeks leave to appeal from the decision of the General Division dated November 19, 2015, (the Application). The General Division determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan,* (CPP).

GROUNDS OF THE APPLICATION

[3] The Applicant submitted that the General Division breached paragraphs 58(1)(a) and (c) of the *Department of Employment and Social Development,* (DESD Act). Specifically, that the General Division failed to:-

(1) acknowledge her inability to work in any capacity;

(2) appreciate in its appreciation of pertinent questions as to her pain; pain management and inability to function; and

(3) acknowledge that her disability was severe and prolonged with no expectation of relief.

[4] In addition, the Applicant contended that due to her age and arthritis condition retraining is not an option and that she would not be a dependable employee. The Applicant also submitted that pain management continued to be an issue for her.

ISSUE

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

THE LAW

[6] 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.

[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]

[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] 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.

[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 failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction.

[11] Outside of making this allegation, the Applicant did not provide any basis for it. It is not sufficient to state that the General Division failed to observe a principle of natural justice without some basis on which the allegation is made. Therefore, the Appeal Division finds that the submission does not disclose a ground of appeal that would have a reasonable chance of success.

[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] [1] 2 *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

The General Division based its decision on erroneous findings of fact made perversely or capriciously or without regard for the material before it.

[12] The Applicant submitted that the General Division based its decision on erroneous findings of fact with respect to her health conditions and with respect to her attempts to return to modified work. She states, that the General Division did not acknowledge her inability to work or appreciate the extent of her pain and her inability to function. The Appeal Division finds that the submission is not supported. In its decision the General Division summarised the Applicant's health conditions and their effects on her performance of the daily activities of her life. It also acknowledged that the Applicant did suffer some serious health conditions, however, it found that despite her health conditions she did not meet the CPP threshold for severe and prolonged disability.

[13] The pertinent paragraphs of the decision are:-

> [51] The Tribunal accepts that working housekeeping, or other physically demanding work, is no longer possible for the Appellant, given her chronic bilateral shoulder and arm pain. The Tribunal accepts the oral testimony that carpal tunnel syndrome symptoms have subsided since she is no longer working, as has her dermatitis. Her conditions of bilateral shoulder, arm and groin pain, in addition to restless leg syndrome are treated with oxycodone and clonazepam respectively, and these medications have been used to treat these conditions for many years.
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> [52] The Tribunal considered her conditions of depression and anxiety. The Appellant testified that she has used medical marijuana to treat her symptoms of anxiety for approximately 15 years. Despite Dr. Ives' diagnosis of chronic depression and anxiety, there does not seem to be any other treatment of these conditions. She does not take any anti-depression medications, nor does she attend any counselling. There were no documents pertaining to the Appellant's depression in 2006 which caused her to miss work for six months. As such, the Tribunal was not convinced that her depression and anxiety are severe conditions, as defined by CPP.

[14] Accordingly, the Appeal Division finds that this submission does not disclose a ground of appeal that would have a reasonable chance of success.

[15] With respect to the Applicant's submission that the General Division did not appreciate that she could not return to the workforce, the Appeal Division finds that the General Division did note her attempts to return to modified work. However, at the same time the General

Division noted that the Applicant bore the onus to retrain in order to find alternate employment when it is obvious that one's prior employment is no longer appropriate: *Lombardo v MHRD*, (July 23, 2001), CP 12731(PAB).

[16] The Applicant submits that she is too old and too sick to retrain. However, that is not the test. Applicants for a CPP disability pension who are found to have retained work capacity are required to make "good faith" efforts to find alternate employment and to show that their efforts were rendered unsuccessful because of their health conditions: *Inclima v. (Canada) Attorney General* 2003 FCA 117. The Appeal Division finds that these submissions implicitly ask it to reweigh the evidence, which is not the task of the Appeal Division. Thus, the Appeal Division finds that this submission, too, does not disclose a ground of appeal that would have a reasonable chance of success..

CONCLUSION

[17] The Application is refused.

Hazelyn Ross
Member, Appeal Division