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

Citation: *H. P. v. Minister of Employment and Social Development*, 2016 SSTADIS 482

Tribunal File Number: AD-16-352

BETWEEN:

H. P.

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: December 12, 2016

REASONS AND DECISION

INTRODUCTION

[1] In its decision dated December 19, 2015, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Applicant did not qualify for a disability pension under the Canada Pension Plan, (CPP). On February 24, 2016 the Appeal Division of the Tribunal received the Applicant's request for leave to appeal (Application) from the decision of the General Division.

GROUNDS OF THE APPLICATION

[2] Counsel for the Applicant submitted that the General Division breached subsections 58 (l) (a) & (c) of the *Department of Employment and Social Development (DESD) Act*.

ISSUE

[3] The Member must decide if the appeal has a reasonable chance of success.

THE LAW

[4] 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."

[5] 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.[1] 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

[9] Counsel for the Applicant made a number of submissions in which he alleged that the General Division erred. He asserted that the General Division erred because "numerous reports indicated that the appellant was unable to work due to his condition." He submitted that the interest of fairness and natural justice require that the Applicant receive an impartial hearing to put forward evidence of her disability.

[10] The Appeal Division is not persuaded by Counsel's submission that the General Division breached a principle of natural justice. 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.

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

[11] It is clear from the Applicant's submissions that he disagrees with the General Division's decision. However, it is not clear to the Appeal Division how the General Division breached a principle of natural justice in coming to its decision. The Applicant has not shown how the General Division failed to provide her with an impartial hearing as her counsel submitted. It is clear from the Tribunal record that the Applicant knew the onus she had to meet and had the opportunity to present her case, which proceeded by videoconference and where she was assisted by both counsel and an interpreter fluent in the Punjabi language. It is clear that the Applicant and her counsel disagree with the decision of the General Division; however, the mere denial of an appeal does not automatically translate into a breach of natural justice make.

[12] Furthermore, while counsel for the Applicant submitted that the interests of natural justice demands that the Appeal Division hold a hearing and give the Applicant the opportunity to present evidence of her disability, the Appeal Division finds that she already had that opportunity at the General Division hearing. Hearing the evidence anew is not the role of the Appeal Division: *Tracey v. Canada (Attorney General).* Taking this into consideration, the Appeal Division finds that there is no basis for a finding that the General Division breached a principle of natural justice. Accordingly, the Appeal Division finds that the submission of Counsel for the Applicant does not disclose a ground of appeal that would have a reasonable chance of success.

Did the General Division disregard material that was before it?

[13] Counsel for the Applicant submitted that the General Division failed to consider the totality of the evidence and material before it when it determined that the Applicant was not entitled to a CPP disability benefit because the Applicant, "was suffering from a severe and prolonged disability within the meaning of the paragraph 42(2)(a) of the plan." In making this submission Counsel for the Applicant alluded to reports from various doctors who, he stated, had the opportunity of seeing the Applicant and who concluded that she was disabled on an ongoing basis.

[14] Counsel for the Applicant also set out the medical reasons why the Applicant stopped working. He argued that the General Division misapprehended the significance of the diagnoses made by the Applicant's family doctor in his report of December 11, 2012. He noted that the Applicant saw his family doctor "on a continual basis without any improvement in his (sic) condition." (AD1-7) He also asserted that the General Division failed to apprehend the significance of the medical reports of Dr. I. Ullah and Dr. Tullio, Dr. M. Joshi at GD3-57 and GD7-85, all of which, he stated led to the General Division making the erroneous finding of fact that the Applicant did not have a disability that was severe.

[15] The General Division summarised and set out the medical evidence at paragraphs 18-36 of its decision. Additionally, the General Division specifically discussed and weighed the medical evidence at paragraphs 46-48, inclusive. Having done so, it came to the conclusion that the medical evidence did not support a finding that the Applicant had a severe disability. The Appeal Division finds that, in reality, the submissions of Counsel for the Applicant do no more than invite the Appeal Division to reweigh the evidence and to come to a conclusion that favours the Applicant. This, the Appeal Division cannot do. Therefore, the Appeal Division finds that the submissions of the Applicant do not disclose a ground of appeal that would have a reasonable chance of success.

[16] Counsel for the Applicant also submitted that the General Division failed to make a real world analysis as required by *Villani v. Canada (A.G.),* 2001 FCA 248. He submitted that the Applicant's limited education; absence of proficiency in the English language; work and life experience do not permit her to either return to any "suitable occupation" or to retrain.

[17] The General Division noted that it was handicapped in its ability to assess the Applicant's ability to regularly pursue any substantially gainful employment by the fact that the Applicant did not provide certain evidence. [2] In *Giannaros v Canada (Minister of Social Development),* 2005 FCA 187, the Federal Court of Appeal (FCA) indicated that in certain

[2] [46] The Appellant also testified that she participated in an LMR program from 2007 to 2010. It would appear that the WSIB deemed her fit to pursue an office clerical position. None of the LMR and related WSIB documentation was in the hearing file. This documentation would have assisted the Tribunal in assessing the courses and upgrading taken by the Appellant, her efforts to upgrade her language and work skills, as well as her efforts to find alternative employment. It would have also assisted the Tribunal in determining why the WSIB considered her able to pursue an office clerical position. The failure to provide this documentation further diminished the strength of the Appellant's case.

circumstances the General Division may not be required to engage in a real world analysis. According to the FCA, this circumstance would arise where there is a finding that an applicant does not suffer from a severe and prolonged disability, which the General Division in fact did. The FCA said of *Giannaros*, "the Board was not persuaded that the applicant suffered from a severe and prolonged disability, as of December 31, 1995, there was, in my view, no necessity for it to apply the "real world" approach." Therefore, applying the dicta in *Giannaros* the Appeal Division finds that the General Division did not err in regard to the real world approach.

CONCLUSION

[18] In light of the above analysis, the Application is refused.

Hazelyn Ross
Member, Appeal Division