Citation: ***P. H. v. Canada Employment Insurance Commission*****, 2015 SSTAD 1219**

Date: October 15, 2015

File number: AD-15-64

APPEAL DIVISION

Between:

P. H.

Applicant

and

Canada Employment Insurance Commission

Respondent

Decision by: Shu-Tai Cheng, Member, Appeal Division

REASONS AND DECISION

INTRODUCTION

[1] The Applicant applies to the Appeal Division (AD) of the Social Security Tribunal (Tribunal) for leave to appeal the decision of the General Division (GD) of the Tribunal, dated January 15, 2015. The GD dismissed her appeal of a decision of the Respondent (Commission) refusing an extension of time for the Applicant to seek reconsideration of a Commission decision.

[2] The Applicant had applied for employment insurance (EI) benefits on February 1, 2013. She received separation monies (severance pay and vacation pay) and she was informed by the Commission, in September 2013, that these earnings were retroactively allocated and had resulted in an overpayment. The Applicant filed a reconsideration request on May 2, 2014, well beyond the 30-day limit. The Respondent denied the request for an extension of time in which to request a reconsideration decision.

[3] The Applicant filed a late Notice of Appeal with the GD of the Tribunal and, on September 22, 2014, the GD allowed an extension of time to appeal.

[4] The appeal before the GD was heard by way of telephone on January 14, 2015. The GD concluded that the Applicant failed to demonstrate a continued intention to request a reconsideration decision and did not have a reasonable explanation for the delay. It also found that the Commission exercised its discretion judiciously. The GD dismissed the Applicant's appeal.

[5] The Applicant filed an application for leave to appeal (Application) with the AD of the Tribunal on February 13, 2015, within the time limit prescribed for appealing to the AD.

ISSUE

[6] The Tribunal must decide if the appeal has a reasonable chance of success.

SUBMISSIONS

[7] The Applicant submitted in support of the Application that the GD based its decision on erroneous findings of fact. In particular, she asserted that the following findings were in error:

a) Her multiple medical conditions were not fully considered;

b) Her last day of work was incorrectly stated as January 1, 2013, instead of February 1, 2013;

c) It is incorrect to suggest that she did not follow medical protocol and take psychotherapeutic drugs to address the situational depression; and

d) There was a perverse assumption made that because she was able to perform some functions, at a minimal level, she should have been able to do more.

[8] In addition, the Applicant submitted that she had an additional medical condition and that she did take medication for depression but it was ineffective. She points to paragraph [48] of the GD decision as the "critical error" and states that it misses the point that she had severely impaired abilities.

LAW AND ANALYSIS

[9] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development* (DESD) *Act*, "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal".

[10] 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".

[11] Subsection 58(1) of the DESD Act states that the only grounds of appeal are the following:

> (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.

[12] The Tribunal must be satisfied that the reasons for appeal fall within any of the grounds of appeal and that at least one of the reasons has a reasonable chance of success, before leave can be granted.

[13] The Applicant's submissions, as set out in paragraphs [7] and [8] above, do not specifically refer to subsection 58(1)(c) of the DESD Act, but they do assert that the GD based its decision on erroneous findings of fact.

[14] Not every erroneous finding of fact will fall within the terms of subsection 58(1)(c) of the DESD Act. For example, an erroneous finding of fact upon which the GD does not base its decision would not be caught, nor would one that is not made in a perverse or capricious manner or without regard for the material before the Tribunal. An example of a finding of fact upon which the GD did not base its decision, in this matter, is the last day of work; even if it is wrongly stated in the GD decision, it is not a finding of fact upon which the GD based its decision.

[15] The GD considered the Applicant's evidence and submissions at pages 3 to 10 of its decision. The Applicant attended the GD hearing, gave evidence and made submissions.

[16] The GD weighed the conflicting evidence in relation to the impact of the Applicant's medical condition on her capacity to request a reconsideration decision and found that her medical condition did not limit her capacity. The GD also found that there was no evidence to

prove that her condition would have cognitively impaired her reasoning, judgment and decision making. It made these findings after considering the Applicant's evidence and submissions and the Respondent's evidence and submissions. The Applicant's disagreement with these findings is not enough to make them reviewable errors. Erroneous findings of fact must be made in a perverse or capricious manner or without regard to the material before it, in order to be reviewable.

[17] Once leave to appeal has been granted, the role of the AD is to determine if a reviewable error set out in subsection 58(1) of the DESD Act has been made by the GD and, if so, to provide a remedy for that error. In the absence of such a reviewable error, the law does not permit the AD to intervene. It is not the role of the AD to re-hear the case *de novo*. It is in that context that the AD must determine, at the leave to appeal stage, whether the appeal has a reasonable chance of success.

[18] I have read and carefully considered the GD's decision and the record. There is no suggestion by the Applicant that the GD failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction in coming to its decision. The Applicant has not identified any errors in law. The asserted erroneous findings of fact were not made in a perverse or capricious manner or without regard for the material before it, in coming to the GD decision.

[19] While an Applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some reasons which fall into the enumerated grounds of appeal. I have reviewed the asserted erroneous findings of fact, and I am satisfied that the appeal has no reasonable chance of success.

CONCLUSION

[20] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division