Citation: *K. S. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 71

Appeal No: AD-13-39

BETWEEN:

K. S.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: VALERIE HAZLETT PARKER

DATE OF DECISION: April 23, 2014

DECISION

[1] The Tribunal grants leave to appeal to the Appeal Division of the Social Security Tribunal.

INTRODUCTION

[2] On January 28, 2013 a Review Tribunal determined that a Canada Pension Plan disability pension was not payable. The Applicant filed an application for leave to appeal (the "Application") with the Appeal Division of the Social Security Tribunal (the Tribunal) on May 1, 2013.

ISSUE

[3] The Tribunal must decide whether the appeal has a reasonable chance of success.

THE LAW

[4] 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".

[5] 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.

[6] The decision of the Review Tribunal is considered a decision of the General Division.

[7] 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".

SUBMISSIONS

[8] The Applicant submitted in support of the Application that the Review Tribunal erred in law and in fact in making its decision, as follows:

a) It erred in finding that there was evidence of the Applicant's work capacity;

b) It erred in finding that the Applicant refused to follow recommended treatment;

c) It erred in finding that the Applicant had adopted a disabled lifestyle;

d) It erred in not considering the medical reports regarding the Applicant's mental health diagnoses and treatment;

e) It erred in concluding that a GAF score of 50 was not severe when there was no evidence regarding this;

[9] The Respondent made no submissions.

ANALYSIS

[10] Although a leave to appeal application is a first, and lower, hurdle to meet than the one that must be met on the hearing of the appeal on the merits, some arguable ground upon which the proposed appeal might succeed is needed in order for leave to be granted: *Kerth v. Canada (Minister of Development)*, [1999] FCJ No. 1252 (FC).

[11] Furthermore, the Federal Court of Appeal has found that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success:

Canada (Minister of Human Resources Development) v. Hogervorst, 2007 FCA 4, *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[12] The Applicant has raised a number of grounds of appeal. First, she argued that the Review Tribunal erred in concluding that she had capacity to work. This argument is made with nothing to substantiate it. This ground of appeal has no reasonable chance of success as it is without any ** substance.

[13] The Applicant also argued that the Review Tribunal erred in concluding that the Applicant did not follow treatment recommendations, and that she had adopted a disabled lifestyle. With these arguments, she essentially asks the Tribunal to reevaluate and reweigh the evidence that was put before the Review Tribunal. This is the province of the trier of fact. The Tribunal Member deciding whether to grant leave to appeal ought not to substitute its view of the persuasive value of the evidence for that of the Review Tribunal who made the findings of fact – Simpson v. Canada (Attorney General), 2012 FCA 82. I am not prepared to grant leave to appeal based on these arguments alone as it does not have a reasonable chance of success.

[14] The Applicant also argued that the Review Tribunal erred in law as it did not consider whether her condition was prolonged. As the CPP requires that a disability be both severe and prolonged, the Review Tribunal made no error by not deciding whether the condition was prolonged when it had decided that it was not severe. This is therefore not a ground of appeal that has a reasonable chance of success.

[15] In addition, the Applicant argued that the Review Tribunal erred by not considering the evidence before it regarding the Applicant's mental illnesses including depression and post-traumatic stress disorder. The Review Tribunal decision makes no reference to any such evidence, nor was it considered in the Review Tribunal's reasoning. This is an error that is a ground of appeal that has a reasonable chance of success.

[16] Finally the Applicant argued that the Review Tribunal erred in concluding that the Applicant's GAF score was not severe, when there was no evidence before it about what score is considered severe. Again, the Review Tribunal decision does not mention any

evidence to support this conclusion, and there was no indication that such evidence was before the Review Tribunal. This is a ground of appeal that has a reasonable chance of success.

CONCLUSION

[17] The Application granted for the reasons stated above.

[18] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Valerie Hazlett Parker
Member, Appeal Division