Citation: *J. M. v. Minister of Employment and Social Development,* 2014 SSTAD 345

Appeal No: AD-14-476

BETWEEN:

J. M.

Applicant

and

Minister of Employment and Social Development
(Formerly 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: November 26, 2014

DECISION

[1] Leave to appeal to the Appeal Division of the Social Security Tribunal is granted.

INTRODUCTION

[2] The Applicant stated that she stopped working in 1987 because she was disabled by fibromyalgia. In 2007 she suffered a stroke and four aneurysms, two of which continue to be monitored by her doctors. When she had the stroke her fibromyalgia symptoms were relieved, although she now suffers from other limitations as a result of the stroke and associated conditions.

[3] The Applicant applied for a *Canada Pension Plan* (CPP) disability pension in 2011. The General Division of this Tribunal dismissed her claim that she was disabled in or before 1989 and thereafter. She disagreed with this result, and now seeks leave to appeal to the Appeal Division of the Tribunal, citing errors in fact and in law made in the General Division decision.

[4] The Appellant argued that the General Division erred in its interpretation of the CPP by adopting a strict abstract approach instead of a broad and liberal approach which should be applied to interpret benefits conferring legislation, that she was barred by her disability from any occupation, that it was unreasonable to expect her to produce medical records to support her claim back to 1989, that the General Division should have placed different weight on the evidence before it and that it should have accepted the oral evidence of her disability.

[5] The Respondent countered each of the arguments and urged me to conclude that the General Division did not make any error in its decision such that leave to appeal should be granted.

[6] I sent written questions to the Applicant, which she answered. I then asked both parties to provide written submissions. Both parties filed written submissions which I have considered in coming to my decision herein.

ISSUE AND ANALYSIS

[7] I must determine whether the Applicant should be granted leave to appeal the General Division decision. In order to be granted leave to appeal, she must have set out a ground of appeal that may have a reasonable chance of success on appeal (*Kerth v. Canada (Minister of Development)*, [1999] FCJ No. 1252 (FC)). The grounds of appeal that I can consider are set out in the *Department of Employment and Social Development Act* (DESD Act) which is attached as Appendix to this decision.

[8] This first ground of appeal in the DESD Act that I considered was whether 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. The Respondent noted that some minor errors were made in the decision, including the Applicant's age in 1989 and the year she tried to work from a home-based business. I accept the Respondent's submission that these errors were not made in a perverse or capricious manner or without regard to the material before the General Division. They did not affect the hearing outcome. Therefore, this disclosed no ground of appeal that may have a reasonable chance of success.

[9] The Applicant argued that the General Division erred by not giving sufficient weight to the oral testimony of her daughter and husband, including evidence regarding the work she did in 1997. The Applicant also disagreed with the weight that the General Division gave to the evidence in her written observations made prior to 2000. With these arguments, she essentially asks this tribunal to reevaluate and reweigh the evidence that was presented at the hearing. This is the province of the trier of fact which in this case was the General Division. The tribunal deciding whether to grant leave to appeal ought not to substitute its view of the persuasive value of the evidence for that of the tribunal who made the findings of fact – *Simpson v. Canada (Attorney General)*, 2012 FCA 82. Therefore, I find that these arguments are not grounds of appeal that may have a reasonable chance of success on appeal.

[10] The Applicant also argued that she made a number of efforts to find medical evidence from 1989, but could not do so as records have not been maintained for that length of time. The Applicant bears the legal burden of proof, and so must provide evidence to

substantiate her claim. If she does not do so, her claim fails. Therefore, the General Division conclusion that there was no medical evidence at the time of the Minimum Qualifying Period is not an error. This ground of appeal does not have a reasonable chance of success on appeal.

[11] In submissions, the Applicant's husband also repeated his evidence regarding the impact that her disabilities have had on him, their children, and others. While this is significant to them, the repetition of this evidence is not a ground of appeal that may have a reasonable chance of success on appeal under the DESD Act.

[12] The second ground of appeal that I considered was whether the General Division decision contained an error in law. The Applicant argued that the General Division erred in law as it adopted a strict interpretation of the CPP provisions regarding the severity requirement to be disabled, and did not give the legislation a broad and liberal interpretation which is required of benefits conferring legislation (*Rizzo v. Rizzo Shoes*, [1998] 1 S.C.R. 27). I agree that the *Rizzo* decision stands for the principle that benefits conferring legislation should be given a broad and liberal interpretation. However, it is not clear from the argument presented by the Applicant how the General Division was to have misapplied the *Rizzo* principle in this case. In *Pantic v. Canada (Attorney General)*, 2011 FC 591, the Federal Court concluded that a ground of appeal cannot be said to have a reasonable chance of success if it is not clear. Therefore, this ground of appeal does not have a reasonable chance of success on appeal.

[13] In contrast, the decision of the Federal Court of Appeal in *Villani v. Canada (Attorney General)*, 2001 FCA 248 clearly sets out factors to that are to be taken into account in determining whether a claimant is disabled under the CPP. These include the claimant's age, education, language skills, and work and life experience. In this case, the General Division did not examine the factors set out in *Villani*. The decision stated that "… the factors in *Villani* are not applicable". The Respondent suggested that it would have been better to phrase this as "… the factors in *Villani* are not helpful". The Respondent's suggestion of alternate wording does not change the wording in the decision. The General Division made an error in law by not examining these factors, and by stating that they were

not applicable. This ground of appeal therefore may have a reasonable chance of success on appeal.

[14] I had also asked the parties to address in submissions the application of the *S.S.E. v. Minister of Social Development* (June 20, 2007), CP24980 (PAB) decision. The submissions filed by the parties did not assist me to determine whether an error in law had been made by the General Division in its application of the principles from this decision to the matter before it. Hence, there may also be an error of law with regard to this. This ground of appeal may also have a reasonable chance of success on appeal.

CONCLUSION

[15] The Application is granted because the Applicant has put forward grounds of appeal that may have a reasonable chance of success on appeal.

[16] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case. The parties now have 45 days to file written submissions on the issues in the appeal, including but not limited to the form of hearing for the appeal.

Valerie Hazlett Parker
Member, Appeal Division

Appendix

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”.

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.

Subsection 58(2) of the DHRSD Act provides that “leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success”.