Citation: *L. C. v. Minister of Employment and Social Development,* 2014 SSTAD 340

Appeal No: AD-14-530

BETWEEN:

L. C.

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 17, 2014

DECISION

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

INTRODUCTION

[2] On August 20, 2014, the General Division of the Social Security Tribunal (the "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 Tribunal on October 10, 2014.

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". 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.

[5] 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".

SUBMISSIONS

[6] The Applicant submitted that the General Division erred in how it weighed the evidence, including:

a) It placed undue weight on the Applicant's attempts at upgrading and returning to work;

b) It did not place sufficient weight on the Applicant's age, career history, and exaggerated her transferrable skills;

c) It downplayed the diagnosis of neuropathic pain;

d) It also downplayed the Applicant's failed efforts to get better;

e) It over-emphasized the retraining provided by WSIB; and

f) It rejected the family physician's opinion;

[7] The Applicant submitted, further, that the General Division did not acknowledge some of the evidence, particularly:

a) The Applicant's attempt to return to work caused excruciating pain and was undertaken out of financial desperation, and contrary to every medical precaution;

b) The Applicant had difficulty attending and participating in retraining classes, and participated in them as best she could;

[8] In addition, the Applicant submitted that the General Division erred in concluding that the Applicant did not have chronic pain syndrome;

[9] Finally, the Applicant submitted that the General Division also erred in suggesting that the Applicant no longer needed anti-depressant medication because she was "fine", not because it was not helping her.

[10] The Respondent made no submissions.

ANALYSIS

[11] 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).

[12] 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.

[13] The Applicant in this case made numerous arguments regarding how the General Division weighed the evidence that was presented at the hearing. She complained that too much weight was given to some medical reports, and insufficient weight was given to other evidence. With this argument, she essentially asks the Appeal Division of the Tribunal to reevaluate and reweigh the evidence that was put before the General Division to reach a different conclusion. Assigning weight to evidence is the province of the trier of fact (in this case 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 Review Tribunal who made the findings of fact (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). In addition, the Applicant did not allege that the General Division decision made findings of fact that were perverse, capricious or made without regard to the evidence before it. Therefore, these arguments are not grounds of appeal that may have a reasonable chance of success on appeal.

[14] The Applicant also submitted that the General Division failed to acknowledge her evidence that her attempt at re-employment caused excruciating pain, and her difficulties in

attending at the retraining program. In the *Simpson* decision, the Federal Court of Appeal also stated that the decision need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all of the evidence. The decision summarized the oral and documentary evidence that was before it. Therefore, not specifically mentioning some evidence in the decision is not a ground of appeal that has a reasonable chance of success.

[15] The Applicant submitted, in addition, that the General Division erred in concluding that she did not have chronic pain syndrome. While this may be so, it is not relevant to the outcome of the hearing. The legal issue at a *Canada Pension Plan* disability pension hearing is not what the diagnosis of the debilitating medical condition is, but whether the physical or mental disability prevents a claimant regularly from pursuing any substantially gainful occupation (*Klabouch v. Canada (Social Development)* 2008 FCA 33). Therefore, this argument does not have a reasonable chance of success on appeal.

[16] The Applicant also submitted that the General Division decision made errors in its findings of fact. She argued that the decision suggested that the Applicant stopped taking anti-depressant medication because she was better. The decision stated that the Applicant stopped taking this medication and declined other therapy for depression because she wanted to "fight" this condition on her own. Therefore, this argument does not have a reasonable chance of success on appeal.

CONCLUSION

[17] The Application is refused because the Applicant has not put forward a ground of appeal that may have a reasonable chance of success on appeal.

Valerie Hazlett Parker
Member, Appeal Division