Citation: *D. M. v. Minister of Employment and Social Development,* 2014 SSTAD 350

Appeal No: AD-14-573

BETWEEN:

D. 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: December 2, 2014

DECISION

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

INTRODUCTION

[2] In June 2011 the Applicant applied for a *Canada Pension Plan* disability pension. This application was denied by the Respondent, and the Applicant appealed that decision to the General Division of this Tribunal. On September 18, 2014 a Member of the General Division wrote to the Applicant and advised that her claim for a *Canada Pension Plan* disability pension would be decided based on the written material in the file, and her written answers to questions posed in that letter. The Applicant was to reply to the written questions by October 20, 2014. The letter also set out that both parties would have a further 30 day response period to respond to any documents or submissions filed during the time to respond to the written questions.

[3] The General Division decision was issued by the Tribunal on October 27, 2014. It stated that the Applicant had not responded to the written questions.

[4] The Applicant disagreed with the General Division decision and requested leave to appeal. She argued that she did respond to the written questions in time and that the General Division made its decision without regard to the material before it as it did not consider these answers, or the additional medical information that she filed with the Tribunal prior to the end of the response period to answers and submissions. She provided copies of courier receipts to substantiate her claim that she filed her answers to the written questions in time.

[5] The Applicant also argued that the General Division decision erred in not considering her Multiple Sclerosis as a disabling condition.

[6] The Respondent did not respond to the application.

ISSUE AND ANALYSIS

[7] In order to be granted leave to appeal, the Applicant must present some arguable ground upon which the proposed appeal might succeed: *Kerth v. Canada (Minister of Development)*, [1999] FCJ No. 1252 (FC). The Federal Court of Appeal has also 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. v. Canada (Attorney General)*, 2010 FCA 63.

[8] Section 58 of the *Department of Employment and Social Development Act* sets out the only grounds of appeal that may be considered to grant leave to appeal a decision of the General Division. One of these grounds is that the General Division member made an error of fact without regard to the material before it (see Appendix for relevant legislative provisions). Therefore, I must determine whether at least one of the arguments presented by the Applicant that the General Division erred in fact may have a reasonable chance of success on appeal.

[9] The Applicant argued, first, that she responded to the written questions and produced copies of courier receipts which indicate that her documents were sent to the Tribunal before the deadline to do so had expired. She also sent a letter to the Tribunal dated October 5, 2014. These documents were not acknowledged as received by the Tribunal until October 29, 2014. They were not considered by the General Division when it made its decision. This was an error of fact made by the General Division without regard to the material before it. I am satisfied that this ground of appeal has a reasonable chance of success on appeal.

[10] The Applicant also argued that the General Division erred by not considering Multiple Sclerosis as a disabling condition, and referred to additional medical information regarding the deterioration of her health as a result of this condition. The General Division decision noted that that Applicant was diagnosed with Multiple Sclerosis in 1995. It does not appear, however, to have considered the recent medical information on this condition that the Applicant supplied to the Tribunal. This may also be an error of fact that has a reasonable chance of success on appeal.

CONCLUSION

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

[12] 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

APPENDIX

According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (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 DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success".