Citation: *Minister of Employment and Social Development v. M. V.*, 2014 SSTAD 348

Appeal No: AD-14-542

BETWEEN:

Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)

Applicant

and

M. V.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: VALERIE HAZLETT PARKER

DATE OF DECISION: December 1, 2014

DECISION

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

INTRODUCTION

[2] The Respondent began working in England, before moving to Canada and working in this country. He has held a number of different jobs, many of which required very heavy labour. The Respondent last worked as a heavy duty mechanic on very large machinery until he injured his knee in 2011. He applied for a Canada Pension Plan disability pension, claiming that he was disabled by this knee injury and ongoing pain. The Applicant denied this claim. In July 2014 a Member of the General Division of this Tribunal allowed the Respondent's appeal from the Applicant's decision and found that he was disabled under the *Canada Pension Plan* (CPP).

[3] The Applicant disagreed with this conclusion and has sought leave to appeal. It argued that the General Division decision contained errors of fact that were made in a perverse or capricious manner or without regard to the material it, and errors of mixed fact and law. These are permissible grounds of appeal under the *Department of Employment and Social Development Act* (relevant provisions attached as the Appendix to this decision).

[4] The Respondent made no submissions regarding this application.

ISSUES AND ANALYSIS

[5] In order to be granted leave to appeal, the Applicant must establish 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 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. Therefore, I must determine whether the General Division decision contains an error of fact made in a perverse or capricious manner or without regard to the material before it, or an error of mixed fact and law that may have a reasonable chance of success on appeal.

[6] First, the Applicant argued that the General Division decision erred when it concluded that any attempts at working would cause the Respondent's knee to deteriorate more quickly, as there was no evidence presented at the hearing to support this. The decision does not contain any reference to any evidence to substantiate this conclusion. Therefore this may be an error of fact made without regard to the material before the General Division. It is a ground of appeal that may have a reasonable chance of success on appeal.

[7] The Applicant asserted, also, that the General Division made an error of fact when it concluded that the Respondent's medical condition was severe as this was not supported by the medical evidence of the family doctor and the orthopedic surgeon. The General Division decision considered the medical evidence and the Respondent's testimony that he could not work, all of which was summarized in the decision. It did not, however, give reasons for rejecting the medical evidence in reaching its decision. In *R.v. Sheppard* (2002 SCC 26) the Supreme Court of Canada concluded that a decision maker must give reasons for decisions made on disputed and contradicted evidence and upon which the outcome of the case is largely dependent. As the General Division decision did not do this, it may have made an error of fact without regard to the material before it. This ground of appeal may have a reasonable chance of success on appeal.

[8] In addition, the Applicant submitted that the General Division erred in finding that the Respondent's condition was severe under the CPP because of his level of pain and swelling and the worsening of his condition. It argued that even if chronic pain was established, the Respondent could not be found to be disabled unless he also presented evidence regarding his attempts to work in spite of his pain, and his other limitations. These arguments are based on an assumption that the Respondent had some residual capacity to work, which the General Division did not find that he had. Therefore, this argument may only disclose an error made by the General Division if the Applicant also succeeds in establishing that the Respondent had some capacity to work.

[9] Finally, the Applicant argued that the General Division misread the handwritten report by the Respondent's family doctor, stating that he wrote that the Respondent was "restricted" when the word should have been "motivated". It argued that this error of fact

influenced the outcome of the hearing, and was therefore an error made without regard to the material before the General Division. Upon review, the writing in this document is not clear. On the material before me at this time I am not satisfied that this is a ground of appeal that has a reasonable chance of success on appeal. By coming to this conclusion, however, I do not wish to prevent either party from making further submissions on this issue at the hearing of the appeal.

CONCLUSION

[10] The Application for leave to appeal is granted because the Applicant has presented grounds of appeal that may have a reasonable chance of success on appeal.

[11] 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 DHRSD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success".