

Citation: *K. O. v. Minister of Employment and Social Development*, 2014 SSTAD 384

Appeal No: AD-14-511

BETWEEN:

K. O.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: VALERIE HAZLETT PARKER

DATE OF DECISION: December 18, 2014

DECISION

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

INTRODUCTION

[2] The Respondent applied for a *Canada Pension Plan* (CPP) disability pension, and claimed that he was disabled by low back pain. His application was denied by the Applicant initially and at reconsideration. The Respondent appealed to the General Division of the Social Security Tribunal. After an in person hearing, the General Division rendered a decision which granted the Respondent this disability pension.

[3] The Applicant seeks leave to appeal from that decision, and argued that the General Division erred in law as it did not calculate the Respondent's Minimum Qualifying Period correctly under the CPP, that it made various errors of fact in a perverse manner or without regard to the material before it, that it applied the wrong legal test to find the Respondent disabled, and that it provided inadequate reasons for its decision.

[4] The Respondent contended that if the General Division made any errors in law or in fact they were immaterial and would not have changed the decision made, that no errors of fact were made but only that the General Division preferred some of the evidence and that the reasons for the decision were full and sufficient. He also argued that the decision made by the General Division was correct.

ISSUE AND ANALYSIS

[5] 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.

[6] 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 (see the Appendix to this decision).

[7] The Applicant argued, first, that the General Division erred in law as it considered the wrong Minimum Qualifying Period (MQP) in determining whether the Respondent was disabled. The Applicant provided the General Division with a second updated Record of Earnings, which included earnings by the Respondent in 2013 and resulted in a different MQP for him. It appears that due to an administrative error this was not before the General Division member at the hearing. Therefore, this information was not considered. The Respondent argued that if this error was made, it was immaterial to the outcome of the matter as the General Division found the Respondent to be disabled long before the MQP. I find that the General Division made an error in law by considering the wrong MQP in this case. One cannot know for certain whether, if the information contained in the Record of Earnings had been before the General Division, its conclusion would not have changed. This is a ground of appeal that has a reasonable chance of success on appeal.

[8] The Applicant argued, in the alternative, that the General Division breached the principles of natural justice by not providing it with an opportunity to be heard if the second updated Record of Earnings was not considered. I need not make a decision on this argument as I have concluded that not considering this evidence was an error of law as it resulted in an incorrect MQP.

[9] In addition, the General Division considered income earned by the Respondent after the claimed disability date and concluded that it was not “gainful occupation”. This is the incorrect legal test. Similarly, the Applicant argued that the General Division erred when it concluded that the Respondent could not work full time. The CPP requires that a claimant be unable to perform a “substantially gainful occupation” in order to be found disabled. This could be full time, part time or seasonal work. These errors are grounds of appeal that have a reasonable chance of success on appeal.

[10] The Applicant also argued that the General Division made a number of factual errors regarding the evidence presented at the hearing. The Respondent disagreed, and argued that

no error was made, but that the General Division preferred some of the evidence that was presented. In *Simpson v. Canada (Attorney General)*, 2012 FCA 82 the Federal Court of Appeal concluded that 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. Many of the examples provided by the Applicant as alleged errors of fact were not, but only a preference of some evidence over other evidence. This is not a ground of appeal that has a reasonable chance of success.

[11] However, in *R. v. Sheppard* 2002 SCC 26 the Supreme Court of Canada stated clearly that a decision maker is obliged to provide reasons for findings of fact made upon disputed and contradicted evidence, and upon which the outcome of the case is largely dependent. In this case, there was contradictory medical evidence. The General Division relied on some of this evidence in making the decision. It did not, however, explain why it preferred this evidence in the face of contradictory evidence. This is an error. Therefore, this ground of appeal has a reasonable chance of success on appeal.

[12] Finally, the Applicant disagreed with the conclusion reached by the General Division. This is not a ground of appeal that has a reasonable chance of success as it does not point to any error of law, error of fact or breach of natural justice by the General Division.

CONCLUSION

[13] Leave to appeal is granted as the Applicant has raised grounds of appeal that have a reasonable chance of success on appeal.

[14] 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: *Department of Employment and Social Development Act*

58(1) The only grounds of appeal are that

- (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.

(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.