

Citation: *J. M. v. Minister of Employment and Social Development*, 2015 SSTAD 7

Appeal No: AD-14-620

BETWEEN:

**J. M.**

Appellant

and

**Minister of Employment and Social Development  
(formerly Minister of Human Resources and Skills Development)**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION  
Appeal Division – Leave to Appeal Decision**

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SOCIAL SECURITY TRIBUNAL MEMBER: Valerie Hazlett Parker

DATE OF DECISION: January 5, 2015

## **DECISION**

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

## **INTRODUCTION**

[2] The Appellant claimed that she was disabled under the *Canada Pension Plan* due to anxiety and depression, chronic pain after breaking both of her ankles at separate times, fibromyalgia, neck, knee and back pain, leg swelling and other medical conditions. Her claim was dismissed by the Respondent initially and on reconsideration. She appealed to the General Division of this Tribunal. On October 10, 2014 her appeal was dismissed.

[3] The Appellant seeks leave to appeal to the Appeal Division of the Tribunal. The Appellant argued that the General Division erred in law by not properly applying legal principles set out in decisions of the Federal Court of Appeal and the Pension Appeals Board, that the General Division did not consider the impact of the Appellant's fatigue or her reliability on her capacity to work, and that it erred by equating the ability to do sedentary work with the ability to sit.

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

## **ISSUE AND LAW**

[5] The *Department of Employment and Social Development Act* (DESD Act) provides that to be granted leave to appeal, the Appellant must present at least one ground of appeal that has a reasonable chance of success. It also sets out very narrow grounds of appeal that can be considered (see the Appendix to this decision). Therefore, I must decide whether the Appellant has presented a ground of appeal that has a reasonable chance of success.

## **ANALYSIS**

[6] The Appellant has presented a number of arguments as grounds of appeal. First, she argued that she met the legal test of having a severe and prolonged disability under the *Canada Pension Plan* (CPP). This is the issue that was decided by the General Division.

Mere repetition of her position on this issue is not a ground of appeal under the DESD Act. Therefore, this argument does not have a reasonable chance of success on appeal.

[7] The Appellant next contended that the General Division failed to consider relevant evidence, misapprehended evidence and substituted its opinion for that of experts. She provided no details regarding how these errors were to have occurred. With only these bald allegations, I am unable to determine whether any of these errors may have occurred, resulting in a ground of appeal set out in section 58 of the DESD Act. Hence, this argument also does not have a reasonable chance of success on appeal.

[8] Next, the *E.J.B. v. Canada* decision (2011 FCA 47) concluded that in determining whether a claimant is disabled under the CPP, one must examine their background characteristics including age, language ability, work and life experience, and their medical condition in totality, not simply the main disabling condition(s). The Appellant argued that the General Division did not apply this reasoning as it did not consider the impact of her fatigue on her other conditions and her capacity to work. The General Division decision summarized the Appellant's testimony at the hearing, including her complaint that she would not be able to work reliably due to her pain and fatigue. The decision did not, however, assess the impact of the Appellant's fatigue on her other medical conditions. Hence, I am persuaded that this may be an error of law or of mixed law and fact that has a reasonable chance of success on appeal.

[9] The Appellant also argued that the General Division erred in law as it did not consider whether she would be able to work on a reliable basis given her fatigue and cognitive issues (see *D'Errico v. Attorney General* 2014 FCA 95). As set out above, I am satisfied that the General Division did not consider the impact of the Appellant's fatigue on her capacity to work. Therefore this ground of appeal also has a reasonable chance of success on appeal.

[10] The Appellant submitted, additionally, that the General Division erred in law by not applying the legal reasoning set out in the *Taylor v. Minister of Human Resources Development* decision (Pension Appeals Board CP 4436) by placing too much weight on the Appellant's receipt of regular Employment Insurance benefits prior to leaving her last job as

an indication of her ability to work. This decision was rendered by the Pension Appeals Board, so is not binding on this Tribunal. It is therefore not an error not to rely on its conclusion or to apply it to the facts of this case.

[11] In addition, with this argument, the Appellant has essentially asked the Appeal Division of this Tribunal to reassess and reweigh the evidence that was before the General Division to reach a different conclusion. This is not the function of the Appeal Division as it is for the trier of fact to do this (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). Therefore, I find that this argument is not a ground of appeal that has a reasonable chance of success.

[12] Finally, the Appellant contended that the General Division erred when it equated the Appellant's ability to sit with an ability to work in a sedentary job. The General Division decision considered the Appellant's various medical conditions, her age, education and work experience. I am not persuaded that it concluded that the Appellant had capacity to work in a sedentary job only because she had no sitting restrictions. This ground of appeal does not have a reasonable chance of success.

## **CONCLUSION**

[13] The Application is granted as the Appellant has presented at least one ground of appeal that has 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.