

Citation: *S. T. v. Minister of Employment and Social Development*, 2015 SSTAD 65

Appeal No: AD-14-623

BETWEEN:

S. T.

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: January 15, 2015

DECISION

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

INTRODUCTION

[2] The Applicant applied for a *Canada Pension Plan* disability pension. She claimed that she was disabled as a result of physical limitations and mental illness that resulted from a motor vehicle accident. She had limited English skills and at the time of the hearing was enrolled in English as a Second Language classes. The Respondent denied her claim initially and at reconsideration. She appealed and on October 20, 2014 the General Division of the Social Security Tribunal dismissed her appeal.

[3] The Applicant sought leave to appeal from this decision to the Appeal Division of the Tribunal. She argued that she could not be employed in sedentary work because of her lack of English skills, that she required psychiatric treatment and that her attendance at English classes should not be equated with a job search. She also argued that it was a combination of her physical and mental disabilities that rendered her disabled under the *Canada Pension Plan* (CPP), and finally that there was no medical evidence that established that she was capable of performing substantially gainful employment.

[4] The Respondent did not respond to the application for leave to appeal.

THE LAW

[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). Therefore, I must determine whether the Applicant has put forward a ground of appeal that has a reasonable chance of success on appeal.

ANALYSIS

[7] The Applicant presented a number of arguments as grounds of appeal. First, she contended that she was not able to speak, read or write in English to the extent necessary to be engaged in sedentary employment. The Applicant also contended that her efforts to attend English classes could not be equated with a job search and therefore preclude a finding that she was disabled. The General Division decision summarized the evidence that was presented in writing and orally at the hearing, and concluded that the Applicant had the ability to learn English and improve her skills. This was considered with the other evidence to reach the conclusion that the Applicant was not disabled under the CPP. The Applicant has now asked this Tribunal to reweigh the evidence that was before the General Division to reach a different conclusion. This is the province of the trier of fact, which was the General Division in this case. 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 – *Simpson v. Canada (Attorney General)*, 2012 FCA 82. Therefore, I find that these arguments are not grounds of appeal that have a reasonable chance of success.

[8] In addition, the Applicant argued that there was no medical evidence presented that established that she could perform substantially gainful employment. However, it is for the Applicant to produce evidence to support her claim that she could not perform any substantially gainful occupation, not for any other party to demonstrate that she could do so. This argument is therefore not a ground of appeal that has a reasonable chance of success on appeal.

[9] In the leave to appeal application, the Appellant also asserted that she would provide further medical information to support her claim. Her counsel later advised that no such information would be provided. Therefore, this does not establish any ground of appeal.

[10] Finally, the Applicant submitted that she had mental health issues that required regular psychiatric treatment. This, combined with her physical limitations, rendered her disabled under the CPP. The General Division decision considered the Applicant's physical limitations and concluded that they were not severe. It also considered her mental illness and concluded that it was not severe. The decision did not, however, consider these conditions together. In *Bungay v. Canada (Attorney General)*, 2011 FCA 47 the Federal Court of Appeal concluded that the tribunal must examine all of a claimant's disabilities together to determine whether she is disabled under the CPP. The General Division decision did not do this; instead it examined each of her disabling conditions individually. This is an error that is a ground of appeal that has a reasonable chance of success on appeal.

CONCLUSION

[11] The Application is granted as the Applicant has put forward a ground of appeal that has 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

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.