

Citation: *B. C. v. Minister of Employment and Social Development*, 2015 SSTAD 66

Appeal No: AD-15-9

BETWEEN:

B. C.

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, and claimed that she was disabled as a result of having diabetes mellitus, hyperlipidemia, undifferentiated connective tissue disorder, and osteoporosis. She also listed a number of physical complaints in her application for this pension. The Respondent denied her application initially and after reconsideration. She appealed to the Office of the Commissioner of Review Tribunals. The matter was transferred to the Social Security Tribunal on April 1, 2013 pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division of this Tribunal held a hearing on October 27, 2014, and dismissed her claim.

[3] The Applicant seeks leave to appeal to the Appeal Division of the Tribunal. She contended that 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.

[4] The Respondent did not respond to the Application.

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). I must therefore be satisfied that the Applicant has presented a ground of appeal that has a reasonable chance of success in order to grant leave to appeal.

[7] The Applicant submitted that the General Division erred as it did not consider that her attempt to work after the Minimum Qualifying Period was a failed work attempt, and it did not demonstrate that she had capacity to work. She also argued that work for three hours each day, three days each week was not “regular” under the *Canada Pension Plan*. The Applicant correctly stated that a claimant who attempts to return to work but fails could be found disabled under the *Canada Pension Plan*. She is also correct that regularity of work is a consideration in determining whether a claimant is disabled. With the arguments presented, however, the Applicant essentially asks this tribunal to reevaluate and reweigh the evidence that was put 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] The Applicant also contended that the General Division erred as it did not consider the evidence and argument advanced at the hearing that her work after the Minimum Qualifying Period was not substantially gainful. In order to be found disabled, a claimant must not be capable of performing any substantially gainful occupation. This is different than not being capable of performing any conceivable occupation. This argument, although referenced in the decision, was not considered by the General Division in reaching its conclusion. Therefore the General Division made the decision without regard to the material before it, and this ground of appeal has a reasonable chance of success on appeal.

CONCLUSION

[9] The Application granted because the Applicant has put forward a ground of appeal that has a reasonable chance of success on appeal.

[10] 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.