Citation: *H. W. v. Minister of Employment and Social Development,* 2015 SSTAD 104

Appeal No: AD-15-12

BETWEEN:

H. W.

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 28, 2015

DECISION

[1] An extension of time for filing the leave to appeal application is granted.

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

INTRODUCTION

[3] The Applicant applied for a *Canada Pension Plan* disability pension, and claimed that she was disabled by chronic pain that had been described as fibromyalgia, chronic pain syndrome and other conditions. The Respondent initially denied her application initially and after reconsideration. She appealed to the Office of the Commissioner of Review Tribunals. The matter was then transferred to the General Division of the Social Security Tribunal pursuant to the *Jobs, Growth and Long-term Prosperity Act.*

[4] The General Division held a teleconference hearing. On September 30, 2014 it dismissed the Applicant's claim. This decision was mailed to the Applicant on October 3, 2014. The Appellant filed an Application Requesting Leave to Appeal to the Appeal Division with the Tribunal on January 12, 2015. This appeared to be late.

[5] The Applicant argued that as she did not receive the General Division decision until October 23, 2014 her Application was not filed with the late. In the alternative, she submitted that she met the legal requirements for an extension of time for filing of her Application requested this.

[6] Regarding her request for leave to appeal, the Applicant presented a number of arguments as grounds of appeal. She submitted that the General Division failed to observe a principle of natural justice or otherwise refused to exercise its jurisdiction, that the medical evidence presented from the medical doctors and alternative health practitioners established that she was disabled, that the records received from her former employer supported her claim, and that she was still awaiting further medical appointments with Women's College Hospital. In addition, the Applicant corrected factual errors made in the General Division decision and referred to disability decisions to bolster her case. Finally, the Applicant alleged that the General Division gave "no allowance" to alternate health care providers.

[7] The Respondent made no submissions.

ANALYSIS

[8] For the Applicant to be granted leave to appeal, I must be persuaded to grant an extension of time to file the Application with the Tribunal if the Application is late, and that the Applicant has presented a ground of appeal that has a reasonable chance of success on appeal.

Filing of the Application

[9] The *Department of Employment and Social Development Act* (DESD Act) governs the operation of this Tribunal. Section 57 of this Act provides that an application for leave to appeal to the Appeal Division from a decision of the General Division must be made within 90 days of when the General Division decision was communicated to the Applicant. Section 19 of the Social *Security Tribunal Regulations* provides that such a decision is deemed to be communicated to a party, if sent by ordinary mail, ten days after the day on which it was mailed to her.

[10] In this case, the General Division decision was mailed to the Applicant on October 3, 2014. Therefore, it is deemed to have been communicated to her on October 13, 2014. Ninety days following October 13, 2014 is January 11, 2015, which was a Sunday. As the Application was filed with the Tribunal on the next business day, being January 12, 2015 it was not filed late.

[11] In addition, the Applicant argued that she received the decision on October 23, 2014. If the time for the filing of the Application is calculated from that date, it was not filed with the Tribunal late.

[12] Therefore, I am satisfied that the Application was filed within the time permitted to do so.

Leave to Appeal

[13] 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.

[14] Section 58 of the DESD Act sets out the only grounds of appeal that may be considered to grant leave to appeal a decision of the General Division (this is set out in the Appendix to this decision).

[15] The Applicant presented a number of arguments as grounds of appeal. To begin, she corrected factual errors made in the decision. She argued that she did not say that she had no faith in traditional medical doctors, but that she turned to alternate health therapies because she was having difficulty getting well and was "desperate". She also wrote in the Application that she did not "trade" 7 hour shifts for 3.5 hour shifts, but these were scheduled for her to accommodate her disability. She also denied that she was vague in answering questions about exercising, and referred to her testimony and that of her sister to clarify what was said at the hearing regarding her physical condition, and the efforts made by her employer to accommodate her.

[16] In order for these arguments to be grounds of appeal that can be considered under the DESD Act, they must point to the conclusion that the General Division based its decision on factual errors made in a perverse or capricious manner, or without regard to the material before it. The General Division decision summarized the evidence that was presented at the hearing, and made findings of fact. It is not for the Tribunal, when deciding whether to grant leave to appeal from this decision, to reevaluate and reweigh the evidence to reach a different conclusion (see *Simpson v. Canada (Attorney General)*, 2012 FCA 82). The factual errors referred to above were not made in a perverse or capricious manner. The decision of the General Division was not made without consideration of this evidence. Therefore, these arguments do not establish grounds of appeal that may have a reasonable chance of success on appeal.

[17] The Applicant also pointed out that Dr. Pop and Dr. Harth penned reports that supported that the Applicant was disabled under the Canada Pension Plan. These reports

were considered by the General Division. The General Division did not place weight these medical reports and set out the reasons for so concluding. For the same reason, I am not persuaded that this argument has a reasonable chance of success on appeal.

[18] The Appellant also contended that the General Division acknowledged that Dr. Harth concluded that she was work disabled, and insisted that there were medical records that demonstrated that she sought traditional medical treatment between 1993 and 2009. The General Division decision referred to reports penned by Dr. Harth, Dr. Pop and a report he obtained from Dr. Boyd. This information was considered by the General Division in reaching the decision. The repetition of this evidence is not a ground of appeal that has a reasonable chance of success on appeal.

[19] The Applicant argued further that she is still awaiting further medical investigations at Women's College Hospital. This argument does not point to any error made by the General Division or any breach of the principles of natural justice. It is not a ground of appeal that has a reasonable chance of success on appeal.

[20] The Applicant also referred, in the Application, to two decisions of the Pension Appeals Board to support her claim. The *Moore v. Minister of Human Resources Development* decision (September 2001, CP15717) stands for the proposition that an Applicant need only establish that she suffers from a severe and prolonged disability on a balance of probabilities, not beyond a reasonable doubt. This is a correct statement of the law. There is no indication that the General Division applied the incorrect burden of proof in this case. Hence, the presentation of this decision is not a ground of appeal that has a reasonable chance of success on appeal.

[21] The Applicant also referred to the *Curnew v. Human Resources Development* decision (April 2001, CP12886). This case also involved a *Canada Pension Plan* disability pension claimant who suffered from chronic pain. The Pension Appeals Board concluded that pain is a progressive disability, and it cannot be said that it first occurred only when a medical practitioner actually put a name on it. Further, in *Klabouche v. Canada (MSD)* 2008 FCA 33 the Federal Court of Appeal stated clearly that it is not the diagnosis of a condition, but its effect on a claimant's ability to work that determines the severity of the disability. In

this case, the General Division placed weight on the fact that no traditional medical practitioner had reached a definite diagnosis for the Applicant's condition. Its decision was influenced by this fact. Therefore, this submission points to errors of fact and of mixed fact and law by the General Division. This is a ground of appeal that has a reasonable chance of success on appeal.

[22] The Applicant also argued that the General Division failed to observe a principle of natural justice. She contended that the General Division gave "no allowance" to alternate health providers. Natural justice is concerned with ensuring that claimants are able to present their case fully, answer the arguments of the other party, and have the decision made by an impartial and unbiased decision maker. Some statements made in the General Division decision may demonstrate the decision maker was biased. For example, the General Division decision stated that the reports of the alternate healthcare providers are not objective medical evidence of her disability. It discounted all such reports on the basis that the practitioner was not qualified to provide a medical opinion with no indication that it investigated the qualifications of the practitioners. It also stated that reports of Dr. Pop and Dr. Harth were not given weight, at least in part, because the Applicant consulted with them to try to build her case. These statements in the General Division decision, when read in the context of the entire decision, suggest that the General Division may have been biased. If so, this would be a breach of the principles of natural justice. This is a ground of appeal that has a reasonable chance of success on appeal.

CONCLUSION

[23] The Application is granted for the reasons set out above.

[24] 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

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.