Citation: *M. T. v. Minister of Employment and Social Development,* 2015 SSTAD 314

Appeal No: AD-15-82

BETWEEN:

M. 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: March 6, 2015

DECISION

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

INTRODUCTION

[2] The Applicant applied for a *Canada Pension Plan* disability pension. She claimed that she was disabled as a result of physical and mental disabilities from a motor vehicle accident. The Respondent denied her claim initially and after reconsideration. She appealed to the Office of the Commissioner of Review Tribunals. On April 1, 2013 the matter was transferred to the General Division of the Social Security Tribunal pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division held a hearing and on January 21, 2015 dismissed the Applicant's disability pension claim.

[3] The Applicant sought leave to appeal to the Appeal Division of this Tribunal. She argued that the issue was whether the Applicant had some residual capacity to work so that she was not disabled under the *Canada Pension Plan* (CPP). She submitted that her physical and mental limitations were recognized in the medical evidence, that she was disabled by a combination of her conditions, that her efforts to attend English classes should be considered the same as an attempt to work, and that the General Division incorrectly applied the relevant case law to the facts of this case.

[4] The Respondent did not file any submissions.

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). Also, 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] The *Department of Employment and Social Development Act* governs the operation of this Tribunal. Section 58 of the *Act* sets out the only grounds of appeal that may be considered to grant leave to appeal a decision of the General Division (the section is set out in the Appendix to this decision). Therefore, I must decide if the Applicant has presented a ground of appeal under section 58 of the *Act* that has a reasonable chance of success on appeal.

[7] The Applicant presented a number of arguments as grounds of appeal in the application for leave to appeal. First, she confirmed that the issue at hand was whether the Applicant had some residual work capacity such that she was not disabled under the CPP. She also set out other facts and arguments that were before the General Division at that hearing, including that she has limited English skills, which would impact her employability in a sedentary position, that her mental health issues were identified as early as 2010 and that it was the combination of physical and mental conditions that rendered her disabled. In addition, she argued that her attendance at an English program should be viewed as an attempt to find work, and that vocational assessments confirmed that she was unable to work. This information was before the General Division when it made its decision. Their repetition is not a ground of appeal that has a reasonable chance of success on appeal.

[8] The Applicant also referred to the Pension Appeals Board decision in *Butler v. MSD* (April 27, 2007) CP21630. This decision stated that the vast majority of pain sufferers are able to work. She argued that if so, pain must be debilitating for the minority of people who are not included in the "vast majority", and that the Applicant fell into this category. The Applicant did not contend that the General Division erred in its statement of the principles from the decision in this case, or that it made any other error regarding this decision. Therefore, this is not a ground of appeal that has a reasonable chance of success on appeal.

[9] The Applicant also contended that there was no medical evidence that she could work. It is a CPP disability pension claimant who must provide evidence to establish that she is unable to work because of her disability (see *Dhillon v. Minister of Human Resources Development*, November 1998, CP5835, PAB). It is not for any other party to prove the

contrary. Therefore, this argument is not a ground of appeal that has a reasonable chance of success.

[10] The Applicant argued, in addition, that the General Division erred in its application of the law, being the decision of the Federal Court of Appeal in *Villani v. Canada (Attorney General)*, 2001 FCA248, *Inclima v. Canada (Attorney General)*, 2003 FCA 117 and *Klabouch v. Minister of Social Development*, 2008 FCA 33. She contended that the test of "substantially gainful occupation" is to be considered in a real world context and on a subjective basis considering the Appellant. Also, she contended that the failure of the Applicant to lead evidence of an effort to obtain and maintain employment should not have been "fatal" to her disability claim if she was patently incapable of working.

[11] The General Division decision did not refer to the *Klabouch* case. It made no error by not doing so. It referred to the *Villani* and *Inclima* decisions. The General Division decision set out the legal principles in these decisions and applied them to the facts of this case. The Appellant did not suggest that the General Division made any error in this regard, but argued that the fact that the Appellant did not present evidence of any attempt to obtain alternate work should not be "fatal" to her claim. The General Division decision concluded that the Applicant retained some capacity to work based on the evidence before it. It then concluded that she did not meet the obligation set out in *Inclima* to demonstrate that she could not obtain or maintain employment because of her disability. It made no error in doing so. Therefore, this ground of appeal does not have a reasonable chance of success on appeal.

CONCLUSION

[12] The Application is refused as the Applicant has not presented a ground of appeal that may have a reasonable chance of success on appeal.

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.

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