

Citation: *R. D. v. Minister of Employment and Social Development*, 2015 SSTAD 327

Appeal No. AD-15-86

BETWEEN:

R. D.

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 9, 2015

DECISION

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

INTRODUCTION

[2] The Applicant claimed that he was disabled by osteoarthritis, colitis, diverticulitis, irritable bowel syndrome, sleep apnea and depression when he applied for a *Canada Pension Plan* disability pension. The Respondent denied the application initially and after reconsideration. The Applicant appealed to the Office of the Commissioner of Review Tribunals. Pursuant to the *Jobs, Growth and Long-term Prosperity Act*, the matter was transferred to the General Division of the Social Security Tribunal on April 1, 2013. The General Division held a teleconference hearing, and on December 29, 2014 dismissed the Applicant's appeal.

[3] The Applicant sought leave to appeal from the General Division decision. He argued that leave to appeal should be granted because the General Division decision erred in fact and in law, and breached the principles of natural justice.

[4] The Respondent made no 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). 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 can be considered to grant leave to appeal from a decision of the General Division (this is set out in the Appendix to this decision). Therefore, I must decide if the Applicant has presented one of these grounds of appeal that has a reasonable chance of success on appeal.

[7] The Applicant put forward numerous arguments as grounds of appeal. He contended that the General Division erred as it failed to weigh the impact of the injuries that the Applicant had. It is for the trier of fact (the General Division in this case) to weigh the evidence before it. The decision maker deciding whether to grant leave to appeal is not to reweigh the evidence to reach a different conclusion (see *Simpson v. Canada (Attorney General)*, 2012 FCA 82). Therefore, this is not a ground of appeal that has a reasonable chance of success on appeal.

[8] The Applicant, similarly, contended that the General Division did not consider the evidence of depression from his family physician. The decision referred to this evidence and considered it. Therefore, for the same reasons set out above, this argument is not a ground of appeal that has a reasonable chance of success on appeal.

[9] The Applicant also submitted that the General Division decision ignored his functional limitations when it concluded that his disability was not severe, in part at least, because he was not being treated by any medical specialists. The General Division considered the evidence regarding the Applicant's ongoing medical treatment and reached a conclusion on this evidence. Again, it is not for me to reweigh this evidence when considering whether to grant leave to appeal. This is not a ground of appeal that has a reasonable chance of success on appeal.

[10] The Applicant argued, in addition, that the General Division did not refer to the Applicant's credibility. Therefore, he submitted, the General Division must have given no weight to his evidence, which violated the principle of natural justice that required the General Division to give the Appellant a fair hearing as this denied him the opportunity to be heard. The General Division is not required to make specific findings of credibility in each case. Hence, no error is disclosed by the fact that the General Division made no statement regarding the Applicant's credibility.

[11] Further, the amount of weight given to a claimant's evidence does not determine whether that claimant had a full and fair hearing before the General Division. Thus, I find that the General Division breached none of the principles of natural justice in this regard,

and this argument is not a ground of appeal that has a reasonable chance of success on appeal.

[12] The Applicant contended, further, that the General Division erred as it did not consider the “new test” for substantially gainful employment contained in recent *Canada Pension Plan Regulations*. This test applies to application for CPP disability pension made on May 29, 2014 or thereafter. The Applicant applied for a CPP disability pension in September 2010, so the General Division made no error in not referring to this legal test. This is not a ground of appeal that has a reasonable chance of success on appeal.

[13] The Applicant also argued that the General Division erred as the decision did not comment on his oral testimony regarding his functional capacity, so it was not clear whether the General Division considered this evidence. The General Division decision makes scant reference to any evidence regarding the Applicant’s functional abilities or limitations. There was no reference to his activities of daily living or employment related tasks. Section 68 of the *Canada Pension Plan Regulations* requires that this information be provided by a claimant. Thus, it is to be considered. In addition, disability under the CPP relates to a claimant’s function, not the diagnosis of a condition, so functional evidence must be considered. Therefore, this argument points to an error in the General Division decision that may have a reasonable chance of success on appeal.

[14] Further, the Applicant referred to the Pension Appeals Board decision in *M.C. v. Minister of Human Resources and Skills Development* (October 6, 2010, CP 26420). This decision concluded that a claimant must present evidence of efforts to find suitable employment or a reasonable explanation for not doing so. The Applicant argued that the General Division decision misstated this legal principle as it stated only that the claimant had an obligation to seek suitable alternate employment. The *M.C.* decision is not binding on the Social Security Tribunal. Therefore the General Division made no error in not referring to it specifically.

[15] The General Division is required, however, to consider and weigh all of the evidence before it in making its decision. The Applicant alleged that it did not consider his explanation for not seeking alternate employment. The General Division decision contains

no reference to any such explanation. Hence, the Applicant has pointed to an error by the General Division that may be a ground of appeal that may have a reasonable chance of success on appeal.

CONCLUSION

[16] The Application is granted as the Applicant has presented grounds of appeal that may have a reasonable chance of success.

[17] 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.

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