Citation: *S. G. v. Minister of Employment and Social Development*, 2015 SSTAD 387

Appeal No. AD-15-99

BETWEEN:

S. G.

Appellant

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 20, 2015

DECISION

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

INTRODUCTION

[2] The Appellant applied for a *Canada Pension Plan* disability pension. She claimed that she was disabled by a number of mental illnesses and neck pain. The Respondent denied her claim initially and after reconsideration. The Appellant 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 December 10, 2014 dismissed the Appellant's claim.

[3] The Appellant sought leave to appeal from the Appeal Division of the Tribunal. She argued that the General Division made errors of fact in a capricious manner, that it erred in law, and was biased thereby breaching a principle of natural justice.

[4] The Respondent filed no submissions.

ANALYSIS

[5] The Federal Court decided that 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. 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 Appellant has presented a ground of appeal that has a reasonable chance of success on appeal.

[7] First, the Appellant argued that the General Division decision contained a number of factual errors. Many of these errors were minor, and would have no impact on the decision reached by the General Division. I am not satisfied that any of these errors were made in a perverse or capricious manner, or without regard to the material before the General Division. I am therefore not satisfied that the presentation of the following errors is a ground of appeal that has a reasonable chance of success on appeal:

a) The General Division decision stated that the Appellant used Chinese medicine five times each day, when she did not testify that she did so this frequently;

b) The General Division decision stated that the Appellant took a "hiatus" in psychotherapy for two years, which she did not;

c) The General Division decision stated the date span of medical notes incorrectly;

d) The General Division decision misstated the date of a medical report in December 1994;

e) The General Division decision misstated the page references for some documents filed with the Tribunal;

f) The General Division decision stated that Dr. White last saw the Appellant in 1994 when there were receipts from him in 1995;

g) The General Division decision incorrectly stated that the Appellant's father passed away in 2010;

h) The General Division incorrectly stated the reason that she left one job;

[8] The Appellant also submitted that the General Division decision only partly summarized some of the medical evidence as it did not mention specifically each diagnosis contained in each medical report, or all of the symptoms. In addition, the decision did not refer to Dr. Bray's report or Dr. Gorman's diagnosis. The Federal Court of Appeal concluded that the Tribunal is presumed to have considered all of the evidence before it, including testimony and written material. Each and every piece of evidence need not be

mentioned in the written decision (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). No error is made when the General Division decision did not contain each and every detail of each medical report that was presented at a hearing. These arguments therefore do not disclose a ground of appeal that has a reasonable chance of success on appeal.

[9] Further, the Appellant contended that the General Division did not weigh Dr. Pettle's opinion that the Appellant was "due *Canada Pension Plan* Disability Benefits" and was a legitimate patient with legitimate complaints. With this argument, the Appellant essentially asks this Tribunal to reweigh the evidence that was before the General Division to reach a different conclusion. The *Simpson* decision stated that assigning weight to evidence, whether oral or written, is the job of the trier of fact, which is the General Division. The Tribunal hearing an application for leave to appeal may not substitute their view of the evidence for that of the trier of fact. Thus, this submission is not a ground of appeal that has a reasonable chance of success on appeal.

[10] The Appellant submitted, as well, that the General Division decision contained an error when it stated that there was little evidence of any pathology for her pain in light of reports from Dr. Pettle, Dr. Kirwin, Dr. Posa and the hospital emergency report. This evidence was before the General Division at the hearing, and the reports were considered by the General Division when it made its decision. Again, it is not for the Tribunal, when considering whether to grant leave to appeal, to reweigh the evidence to reach a different conclusion. This ground of appeal does not have a reasonable chance of success on appeal.

[11] Furthermore, the Appellant argued that since the General Division, in her opinion, made so many factual errors, and because the General Division referred to the Appellant using Chinese medicine five times each day, which was erroneously recorded only in a document prepared by the Respondent, the General Division was biased, or there was a reasonable apprehension of bias. The Appellant correctly set out the legal test for bias in a case such as this. I am not persuaded, however, that the fact that there may have been errors in a decision leads to the conclusion that the decision maker was biased. Also, the fact that one erroneous statement made by the Respondent was repeated in the decision does not lead to the conclusion that the decision maker was biased, or that there may reasonably be an

apprehension of bias in this case. This ground of appeal does not have a reasonable chance of success on appeal.

[12] The Appellant presented two grounds of appeal that have a reasonable chance of success on appeal. She contended that the General Division conclusion that the Appellant's family doctor did not consider her pain serious was not founded on the evidence. The General Division decision reached this conclusion but gave no evidentiary basis for it. It may thus be an error of fact made in a capricious or perverse manner or without regard to the material before it. This is a ground of appeal that has a reasonable chance of success on appeal.

[13] In addition, the Appellant contended that the General Division erred as it did not consider all of her medical conditions, or conduct a "whole person" review of her circumstances. The Appellant claimed that she was disabled by post-traumatic stress disorder, anxiety, stress, panic symptoms and neck pain. She contended that although the General Division decision analyzed the evidence regarding her pain, it did not fully consider her other conditions, or the cumulative effect of all of her conditions. She relied on the Federal Court of Appeal decision in *Bungay v. Canada (Attorney General)*, 2011 FCA 47. This case concluded that all of a claimant's conditions and not just the most serious one must be considered when determining whether a claimant is disabled under the *Canada Pension Plan*. In this case, the General Division decision emphasized the Appellant's pain complaint. Although it mentioned her mental health, it did not do so in any detail, and did not consider the cumulative effect of all of the Appellant's conditions on her capacity to work. This ground of appeal therefore has a reasonable chance of success on appeal.

[14] Finally, the Appellant argued that the General Division erred in its summary of the Appellant's testimony and that of her witness on various matters. She had requested the audio recording and stated that it would verify her contention on appeal. Without any reference to the audio recording or presentation of what was recorded I am unable to assess these arguments to determine whether they disclose any grounds of appeal that have a reasonable chance of success on appeal. I am prepared to receive further submissions from

the parties, together with a transcript from the General Division hearing, at the hearing of this appeal if the Appellant wishes to pursue her claim on this basis.

CONCLUSION

[15] The Application is granted as the Appellant has presented at least one ground of appeal that has a reasonable chance of success on appeal.

[16] 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.