Citation: ***D. P. v. Minister of Employment and Social Development,*** **2015 SSTAD 523**

Date: April 24, 2015

File number: AD-15-180

APPEAL DIVISION

Between:

D. P.

Applicant

and

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Respondent

Decision by: Valerie Hazlett Parker, Member, Appeal Division

REASONS AND DECISION

INTRODUCTION

[1] The Applicant applied for a *Canada Pension Plan* disability pension in 2002. The Respondent refused this claim initially and after reconsideration. The Applicant appealed to the Office of the Commissioner of Review Tribunals. In July 2004 a Review Tribunal held a hearing and dismissed the Applicant's appeal.

[2] The Applicant again applied for a *Canada Pension Plan* disability pension in April 2011. She claimed that she was disabled by pain and mental illness which arose from the same cause as set out in her earlier application. The Respondent refused the Applicant's claim initially and after reconsideration. The Applicant again appealed to the Office of the Commissioner of Review Tribunals. The matter was transferred to the General Division of the Social Security Tribunal on April 1, 2013 pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division held a videoconference hearing and on March 11, 2015 dismissed the Applicant's claim.

[3] The Applicant sought leave to appeal to the Appeal Division of the Tribunal. She contended that the General Division decision contained errors in facts made without regard to the material before it.

[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). The Federal Court of Appeal has also found that an arguable case at law is akin to whether legally an applicant has a reasonable chance of success: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, *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 (see the Appendix to this decision). Hence, I must decide if the Applicant has presented a ground of appeal under s. 58 of the *Act* that has a reasonable chance of success on appeal.

[7] As the Applicant's Minimum Qualifying Period to be eligible to receive this pension continued to be December 31, 2004 and the Review Tribunal decision was final, the Applicant had to be found to have become disabled under the *Canada Pension Plan* between July 2004 (the date of the Review Tribunal hearing) and December31, 2004 (the Minimum Qualifying Period). This was not disputed.

[8] In support of her request for leave to appeal the Applicant submitted that she was disabled under the *Canada Pension Plan*, and that the disability arose between July 2004 and December 31, 2004. She further argued that the conditions of chronic pain syndrome, mood disorder with dysthymia and depression were present between July 13, 2004 and December 31, 2004 and not considered by the OCRT in its decision. She referred to specific medical reports regarding these conditions.

[9] The Applicant's repetition of her contention that she was disabled is not a ground of appeal that has a reasonable chance of success on appeal. It does not point to any error of fact or of law, or to any breach of the principles of natural justice made by the General Division.

[10] In addition, I accept that the Applicant was not diagnosed with chronic pain syndrome, mood disorder with dysthymia or depression prior to the Review Tribunal hearing in 2004 despite having symptoms of these conditions. However, in *Klabouch v. Canada (Social Development)* 2008 FCA 33 the Federal Court of Appeal concluded that it is not the diagnosis of a condition but its impact on a claimant's ability to work that is determinative of disability. Consequently, I am not satisfied, in this case, that the fact that new diagnoses were made based on the same symptoms is a ground of appeal that has a reasonable chance of success on appeal.

[11] The General Division decision contained a thorough summary of the medical evidence and testimony that was presented at the hearing and that was before the Review Tribunal in 2004. This evidence was considered and weighed. The General Division decision sets out a clear basis for its conclusion that the Applicant did not suffer a new disabling condition, or

suffer an exacerbation of symptoms such that she became disabled during the relevant time period. The Federal Court stated clearly in *Misek v. Canada (Attorney General)*, 2012 FC 890, that it is not for the Member deciding whether to grant leave to appeal to reweigh the evidence or explore the merits of the Review Tribunal decision. Therefore, this ground of appeal does not have a reasonable chance of success on appeal.

CONCLUSION

[12] The Application is refused for these reasons.

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.