Citation: ***B. S. v. Minister of Employment and Social Development,*** **2015 SSTAD 550**

Date: May 4, 2015

File number: AD-15-202

APPEAL DIVISION

Between:

B. S.

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 claimed that she was disabled by fibromyalgia, chronic pain, urinary urgency and mental illness in her application for a *Canada Pension Plan* disability pension. The Respondent denied her claim initially and after reconsideration. The Applicant 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 an in person hearing and on October 27, 2014 dismissed the Applicant's appeal.

[2] The Applicant first filed an application requesting that the General Division rescind or amend its decision. Subsequently she filed the Application Requesting Leave to Appeal to the Appeal Division. She advised the Social Security Tribunal in writing that she did not wish to have the decision rescinded or amended, but wished to pursue the Application for Leave to Appeal. I have considered the documents related to the application to rescind or amend the General Division decision and the Application Requesting Leave to Appeal to the Appeal Division in making my decision.

[3] In support of her request for leave to appeal the Applicant argued that she had a severe and prolonged disability, that she remained an employee of the school board where she last worked but was on unpaid sick leave, that the General Division decision contained errors of fact that were made in a perverse or capricious manner or without regard to the material before it, that the General Division did not consider the cumulative effect of all of her disabilities, that the decision took comments made by her treating physician out of context to mean what was not intended, and that the General Division did not consider that she had complied with treatment recommendations. The Applicant also outlined her physical limitations, and she wished to present new evidence to support her claim.

[4] The Respondent filed 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). 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 (see the Appendix to this decision). Hence, 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 to support her Application. First, she contended that she had a severe and prolonged disability and outlined a number of physical, cognitive and mental limitations. This evidence was before the General Division at its hearing. Its repetition is not a ground of appeal as it does not point to any error of fact, error of law or breach of natural justice.

[8] The Applicant also wished to submit new evidence to support her claim including a MRI report, some scholarly works, her letter of termination from the school board received after the General Division hearing and a recent letter from her family physician. The *Department of Employment and Social Development Act* does not include the presentation of new evidence as a ground of appeal that can be considered.

[9] The Applicant asserted, further, that the General Division erred when it concluded that she had not co-operated in her treatment. She conceded that she did not continue with the aquafit program which is noted in the General Division decision. The Appellant argued, however, that she stopped going to the public pool because she could not get there as she does not drive, and cannot use public transportation. She continued to exercise in her own hot tub. While the General Division decision noted that the Appellant does not drive, it did not explain

any reason for her not continuing with recommended pool exercises. This may have been a factual error made by the General Division without regard to the material before it. This ground of appeal may have a reasonable chance of success on appeal.

[10] In addition, the Applicant submitted that the General Division erred as it did not consider the cumulative impact of all of her disabilities. The General Division decision set out the applicant's numerous medical conditions. It did not, however, consider the cumulative impact of all of these conditions on her capacity to engage in substantially gainful employment. The law is clear that the decision maker must consider all of a claimant's disabling conditions, not just the main one to determine whether she is disabled under the CPP (*Bungay v. Canada (Attorney General)*, 2011 FCA 47). Therefore, this ground of appeal may have a reasonable chance of success on appeal.

[11] The Applicant also contended that the General Division erred when it concluded that she had not adequately attempted to obtain alternate work within her limitations although she continued to be employed by the school board. In *Boyle v. Minister of Human Resources Development* (April 29, 2003 CP 18508) The Pension Appeals Board accepted that a claimant did not have to seek alternate employment because a job was available for him with his prior employer whenever he felt that he could return to it. This legal principle may be relevant in this case. The General Division did not consider it. This may be an error which is a ground of appeal that has a reasonable chance of success on appeal.

[12] Further, the Applicant asserted that the General Division decision misquoted a report from her doctor when it stated that the doctor opined that she could not return to her prior job; the report stated that she could not return to her prior job, or any other work. The General Division may have made an erroneous finding of fact without regard to the material before it as it may not have considered the doctor's entire opinion. This ground of appeal may also have a reasonable chance of success.

[13] The Applicant pointed to other factual errors in the General Division decision, being a reference to the wrong doctor's name as the author of a particular report, and to references to doctors by the incorrect gender. These errors would have no effect on the outcome of this matter. They were not made in a perverse or capricious manner, or without regard to the

material before the General Division. Consequently, these arguments do not have a reasonable chance of success on appeal.

[14] However, the General Division decision may include errors of fact that were made in a perverse manner. The decision concluded that the Applicant deemed herself capable of working because she had requested a functional evaluation from the school board to determine what work she was capable of. Therefore, it concluded that the Applicant could return to sedentary work.

The decision also stated that the Applicant's testimony that she would only have been able to continue with her last job for a further two or three months was conjecture as she was willing to continue working with some accommodations. The decision did not explain why her testimony led to these contradictory conclusions or what weight was given to this evidence. This points to an error, and is a ground of appeal that may have a reasonable chance of success on appeal.

CONCLUSION

[15] The Application is granted because the Applicant has presented grounds of appeal that may have 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.