Citation: ***J. R. v. Minister of Employment and Social Development,*** **2015 SSTAD 584**

Date: May 11, 2015

File number: AD-15-225

APPEAL DIVISION

Between:

J. R.

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 physical limitations and pain when she applied 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. 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 teleconference hearing and on February 12, 2015 dismissed the Applicant's appeal.

[2] The Applicant sought leave to appeal to the Appeal Division of the Social Security Tribunal. She argued that the General Division erred as it misapplied the law and the evidence, that it did not consider that the Applicant was disabled by chronic pain, that it did not consider all of her physical limitations, and that it took some of the oral and written evidence out of context.

[3] The Respondent filed no submissions.

ANALYSIS

[4] 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 concluded 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.

[5] 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). Consequently I must decide if the Applicant has presented a ground of appeal that has a reasonable chance of success on appeal.

[6] The Applicant contended that the General Division erred as it did not appreciate that the basis of the Applicant's claim was that she suffered from chronic pain. She argued that this was supported by the medical evidence; however, the General Division did not assess the Applicant's subjective experience of pain or its impact on her ability to function. The General Division decision made only a passing reference to chronic pain. It did not set out any limitations caused by this condition, or the Applicant's evidence in this regard. This may have resulted in erroneous findings of fact made without regard to the material before the General Division and/or errors of mixed law and fact. This ground of appeal has a reasonable chance of success on appeal.

[7] The Applicant also argued that the General Division erred as it made no assessment of the Applicant's credibility. She contended that a decision of the Pension Appeals Board concluded that this ought to be done to properly assess whether to accept or reject the Applicant's claimed level of impairment. Decisions of the Pension Appeals Board are not binding on this Tribunal. The General Division therefore made no error in not referring to this particular decision, or in not specifically applying the principle set out in this decision to the facts of this matter. The General Division did not err when it made no specific finding with respect to the Applicant's credibility. This ground of appeal does not have a reasonable chance of success on appeal.

[8] The Applicant also argued, based on another Pension Appeals Board decision that the General Division erred because it did not consider that chronic pain is a progressive condition. Therefore although it may not be diagnosed until after a Minimum Qualifying Period, it may exist prior to that date. Again, this decision is not binding on the General Division, so no error was made in not referring to it.

[9] The Applicant submitted, in addition, that chronic pain was diagnosed or discussed both before and after the Minimum Qualifying Period. The General Division decision summarized the medical evidence that was presented at the hearing. The Federal Court of Appeal has decided 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 of the review tribunal – *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

In this case, however, it may be that this presumption can be rebutted as there was scant mention of chronic pain in the summary of the evidence and no analysis of this evidence. This ground of appeal has a reasonable chance of success on appeal.

[10] The Applicant also asserted that the General Division decision took her oral evidence and some of the medical evidence out of context, and provided examples of this. For example, the Applicant pointed out that after her work placement trial at Home Depot she was deemed to be unemployable. This conclusion was not mentioned in the decision, nor was the fact that the work duties she could not complete were crucial to the job. I am persuaded that this may have resulted in erroneous findings of fact made without regard to the material before the General Division. This ground of appeal also has a reasonable chance of success on appeal.

[11] Finally, the Applicant submitted that the General Division decision did not consider all of her physical limitations or early workplace restrictions. The General Division decision did not consider the Applicant's elbow or neck pain, or that her treatment providers had restricted her from repetitive neck and head movement. In *Bungay v. Canada (Attorney General)* 2011 FCA 47the Federal Court of appeal concluded that in determining whether a claimant is disabled under the *Canada Pension Plan*, a decision maker must consider all of their medical conditions and restrictions. Hence, this ground of appeal has a reasonable chance of success on appeal.

CONCLUSION

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

[13] 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.