

**Citation: *J. G. v. Minister of Employment and Social Development*, 2015 SSTAD 572**

**Date: May 7, 2015**

**File number: AD-15-205**

**APPEAL DIVISION**

**Between:**

**J. G.**

**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 as a result of injuries from a car accident, incontinence and bowel problems when she applied for a *Canada Pension Plan* disability pension. 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 appeal was transferred to the General Division of the Social Security Tribunal pursuant to the *Jobs, Growth and Long-term Prosperity Act*. On January 28, 2015 the General Division dismissed the appeal.

[2] The Applicant sought leave to appeal to the Appeal Division of the Social Security Tribunal. She argued that the General Division decision contained errors of fact, errors of mixed law and fact, errors of law, and that the principles of natural justice had been breached.

[3] The Respondent did not file any 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 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.

[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). Therefore, I must determine if the Applicant has presented a ground of appeal that has a reasonable chance of success.

## **Errors of Fact**

[6] The Applicant presented numerous arguments to be granted leave to appeal. First, she contended that the General Division decision contained an error of fact as it concluded that the Applicant's explanation of her back injury, being slipped discs, was not supported by the medical evidence presented at the hearing and the General Division placed some weight on this finding of fact. In *Klabouche v. Canada (Social Development)* 2008 FCA 33 the Federal Court of Appeal concluded that it is not the diagnosis of a condition that renders a person disabled under the *Canada Pension Plan*, but the effect that the condition has on her ability to pursue a substantially gainful occupation. The General Division decision did not contain any analysis of the impact that the Appellant's back pain had on her capacity to work. This ground of appeal thus points to an error of fact and is a ground of appeal that may have a reasonable chance of success on appeal.

[7] The Applicant also alleged that this error must have been detrimental to the Applicant's credibility. The General Division decision did not mention the Applicant's credibility. It made no error in not doing so. Consequently this is not a ground of appeal that has a reasonable chance of success on appeal.

[8] Further, the Applicant argued that the General Division did not consider that her condition worsened when she could no longer access ongoing treatment because her insurer would not pay for this. The General Division decision considered the Applicant's progress with treatment after the accident, and noted the worsening of her condition when treatment stopped. It then concluded that the Applicant had not followed treatment recommendations regarding attendance at a pain clinic. The decision also set out the Applicant's physical limitations. It is not clear if the General Division considered that the Applicant's condition worsened when treatment stopped in reaching its decision. This ground of appeal may have a reasonable chance of success on appeal.

## **Errors of Mixed Fact and Law**

[9] The Applicant also presented a number of arguments that she contended pointed to errors of mixed fact and law, and supported her application to be granted leave to appeal. She

contended that it was improper for the General Division to inquire whether the Applicant was in receipt of insurance or sickness benefits. It is not improper for the General Division to gather relevant information from an applicant. In this case, as there were numerous medical reports presented, some of which were prepared for an insurer this information could have been relevant to the weight given to the medical evidence presented. In addition, the General Division decision contained no reference to any such source of income, so I am not satisfied that this was given any weight in determining whether the Applicant was disabled. This ground of appeal does not have a reasonable chance of success on appeal.

[10] The Applicant also contended that the General Division did not explain why it gave greater weight to the medical reports prepared by the insurer. The General Division decision stated that appropriate weight was given to the reports of two specialists who were tasked with providing independent opinions. It gave little weight to the medical reports prepared after the Minimum Qualifying Period. The decision did not, however, provide reasons for findings of fact that were made on contradictory evidence. In *R.v. Sheppard* (2002 SCC 26) the Supreme Court of Canada stated that a decision maker is obliged to give reasons for findings of fact made on contradictory evidence and upon which the outcome of the case is dependent. In this case, the outcome of the case was dependent, at least in part, on which contradictory medical opinions were given greater weight by the General Division. It did not explain its reasoning for preferring some medical opinions over others. This is an error of mixed law and fact that is ground of appeal that has a reasonable chance of success on appeal.

[11] The Applicant also submitted that the General Division erred as it did not attempt to discover whether the medical reports penned after the Minimum Qualifying Period reflected the Applicant's condition before that date. In the summary of Dr. Waisman's report, the General Division decision stated that his prognosis for the Applicant was guarded because she had suffered from pain for more than two years. This would indicate that the condition may have been present at the Minimum Qualifying Period. Accordingly, this is a ground of appeal that has a reasonable chance of success on appeal.

[12] In addition, the Applicant contended that the General Division decision erred as although it found that she had not attempted to find work within her limitations, it did not

consider any explanation for her failure to do so. The Applicant contended that this was an error of mixed fact and law. In *Boyle v. Minister of Human Resources Development* (June 10, 2003 CP18508) the Pension Appeals Board concluded that the claimant did not have to provide evidence that he attempted to find alternate work within his limitations as his prior job was available to him at any time he thought he could handle it. Although this decision is not binding on the General Division, the legal principle was relevant in this case. The fact that the General Division did not consider that the Applicant may have had a valid reason for not seeking alternate employment was an error of mixed fact and law that is a ground of appeal that may have a reasonable chance of success on appeal.

[13] Finally in this regard, the General Division decision did not consider the cumulative effect of all of the Applicant's disabling conditions on her capacity to pursue any substantially gainful occupation. There is scant reference in the decision to the Applicant's incontinence or bowel difficulties. In *Bungay v. Canada (Attorney General)*, 2011 FCA 47 the Federal Court of Appeal concluded that a disability claimant's medical conditions, in totality, must be considered. The General Division's failure to do this is a ground of appeal that may have a reasonable chance of success on appeal.

### **Errors of Law**

[14] The Applicant argued that the General Division decision also contained errors of law. In this regard she contended, first, that the General Division erred as it did not consider and apply the test for what is a "substantially gainful occupation" set out in recent *Canada Pension Plan Regulations*. These *Regulations* apply only to *Canada Pension Plan* disability pension applications made after May 29, 2014. This Applicant applied for the pension before this date, so no error was made by not referring to these *Regulations*.

[15] The Applicant argued, in the alternative, that the General Division erred when it stated that the Applicant should have been able to work "in some capacity" as it should have considered whether she was capable regularly of pursuing any substantially gainful occupation. The decision contained incorrect statement of the legal test for whether a disability is severe under the *Canada Pension Plan*. The application of an incorrect legal test is an error of law that is a ground of appeal that may have a reasonable chance of success on appeal.

## **Principles of Natural Justice**

[16] Finally, the Applicant contended that the General Division breached the principles of natural justice in this case. She argued that as the General Division decision made little or no reference to her credibility, it was reasonable to assume that it placed no weight on her testimony. This violated the principles of natural justice because if no weight was given to the Applicant's testimony, she was denied the right to be heard. This argument is not persuasive. One cannot assume that no weight was given to a claimant's testimony simply because no specific finding was made regarding her credibility. The decision summarized the testimony and considered it.

[17] In addition, the amount of weight given to a claimant's testimony is not related to whether she had the opportunity to be heard. It is for the General Division, as the trier of fact, to listen to all the evidence presented at a hearing and weigh it in coming to its decision. The Appellant did not contend that she was not able to fully present her case. Therefore, this argument does not disclose a ground of appeal that has a reasonable chance of success.

## **CONCLUSION**

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

[19] 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.