

**Citation: *A. F. v. Minister of Employment and Social Development*, 2015 SSTAD 590**

**Date: May 12, 2015**

**File number: AD-15-221**

**APPEAL DIVISION**

**Between:**

**A. F.**

**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, and claimed that she was disabled by mental illness and physical restrictions. 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 appeal was transferred to the General Division of the Social Security Tribunal pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division scheduled a teleconference hearing. The Applicant did not attend this hearing. Three days after the scheduled date for the hearing the Applicant's Representative contacted the Tribunal and asked that the hearing be rescheduled as she thought that when she received the Respondent's written submissions the matter would proceed on the basis of the written record. The General Division refused the request to reschedule the hearing. It 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 did not consider the main medical condition that prevented her from working, that she had an explanation for not continuing to take prescribed medication, and that the General Division made incorrect assumptions regarding her treatment. She also contended that the General Division was biased.

[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 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). Consequently 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.

[6] The Applicant presented a number of arguments as grounds of appeal. First, she submitted that her main disabling symptom, being the inability to focus, was “ignored/undermined” by the General Division. The General Division decision summarized the medical evidence presented at the hearing. This included comments by the practitioners about the Appellant’s inability to focus or concentrate. This information was not analyzed by the General Division in reaching its decision. In *R. v. Sheppard*, (2002 SCC 26) the Supreme Court of Canada decided that a decision maker is obliged to provide reasons for findings of fact made on contradicted evidence and upon which the outcome of the case is largely dependent. The General Division found that the Applicant had some capacity to work or retrain, but did not explain how this conclusion was reached in light of evidence that she could not focus on any job. The outcome of this case was dependent, at least in part, upon this finding of fact. This ground of appeal therefore points to an error made by the General Division and may have a reasonable chance of success on appeal.

[7] The Applicant also provided an explanation for why she stopped taking some medication (because it made her like “a zombie”), and stated that although she did not pursue physiotherapy because she could not afford it, she participated in home exercises. This evidence was not before the General Division at the hearing in this matter. Section 58 of the *Department of Employment and Social Development Act* does not list the presentation of new evidence as a ground of appeal.

[8] However, in this case, the presentation of this evidence supports the contention that the principles of natural justice may have been breached by the General Division. The Applicant did not dispute that her Representative received the Notice of Hearing that was sent by the Tribunal. Neither the Representative nor the Applicant attended the hearing. Three days after the scheduled date for the hearing, the Representative asked that another hearing date by

scheduled as she misunderstood the Respondent's written submissions. These submissions were dated approximately two weeks prior to the hearing, and were forwarded to the Applicant upon receipt by the Tribunal. The Applicant submitted that upon receipt of the submissions she believed that the matter had been decided, and that the submissions were the General Division decision. She later contacted the Tribunal and asked that the hearing be rescheduled. The General Division denied this request, and decided the matter based on the written material before it. The General Division decision was issued after the Appellant's Representative asked that the hearing be rescheduled.

[9] It may be that the Applicant was not able to fully present her case and answer the concerns of the Respondent by proceeding in this fashion. This points to a breach of the principles of natural justice by the General Division in this case, which is a ground of appeal that may have a reasonable chance of success on appeal.

[10] The Applicant also contended that the General Division made an assumption when it stated that Dr. Rehman would have provided her with psychotherapy if he concluded that her condition warranted it. The General Division decision did not set out the evidentiary basis for reaching the conclusion that Dr. Rehman would have provided this treatment. This may be an erroneous finding of fact made in a perverse or capricious manner or without regard to the material that was before the General Division. This ground of appeal has a reasonable chance of success on appeal.

[11] Finally, the Applicant wrote "Prejudicial comments causing a bad predisposition". From other statements made in the Application Requesting Leave to Appeal to the Appeal Division it appears that the Appellant has alleged that the General Division was biased. She provided two examples of "predispositions" in support of this argument, with explanations for her conduct as referred to above. This ground of appeal, however, is not clear. In *Pantic v. Canada (Attorney General)*, 2011 FC 591, the Federal Court concluded that a ground of appeal cannot be said to have a reasonable chance of success if it is not clear. Therefore, this ground of appeal has no reasonable chance of success.

## **CONCLUSION**

[12] The Application is granted as the Applicant has presented at least one ground of appeal that may have a reasonable chance of success.

[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.