Citation: ***C. E. v. Minister of Employment and Social Development*****, 2015 SSTAD 639**

Date: May 25, 2015

File number: AD-15-246

APPEAL DIVISION

Between:

C. E.

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 right shoulder pain and associated symptoms. The Respondent denied her claim initially and after reconsideration. She appealed to the Office of the Commissioner of Review Tribunals. The appeal 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 26, 2015 dismissed the Applicant's appeal.

[2] The Applicant requested leave to appeal to the Appeal Division of the Social Security Tribunal. She asserted that the General Division erred as it did not consider the totality of her disabling conditions, did not examine her disability in a "real world" context, that the evidence supported that she was disabled although a definite diagnosis was found after the Minimum Qualifying Period, that she attempted to mitigate her condition by working modified duties prior to her termination, and that retraining would not have been possible. She also pointed to a Pension Appeals Board decision regarding regularity of work.

[3] The Respondent filed no submissions.

ANALYSIS

[4] 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. Hogervors*t, 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 (see the Appendix to this decision). Therefore, 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 grounds of appeal. She contended that the General Division did not consider the totality of her medical conditions. The General Division decision contained a summary of the oral and written evidence that was presented at the hearing. It analyzed this evidence, and considered all of the Applicant's physical and emotional conditions individually and cumulatively to reach its decision. I am not satisfied that it made any error in fact or in law in so doing. Leave to appeal cannot be granted on this basis.

[7] The Applicant also argued that the General Division did not examine her conditions in a "real world context". In *Villani v. Canada (Attorney General)* 2001 FCA 248 the Federal Court of Appeal concluded that in deciding whether a claimant is disabled under the *Canada Pension Plan*, the decision maker must keep in mind the claimant's age, education, language ability, work and life experience among other factors. The General Division decision specifically considered the Applicant's personal circumstances in its decision. Therefore this ground of appeal does not have a reasonable chance of success on appeal.

[8] In addition, the Applicant argued that the evidence of her physical limitations demonstrated that she was disabled prior to the Minimum Qualifying Period (the date by which a claimant must be found to be disabled to receive a *Canada Pension Plan* disability pension) even though a definite diagnosis of her condition was not made until after this date. In *Klabouch v. Canada (Social Development)* 2008 FCA 33 the Federal Court of Appeal stated clearly that it is not the diagnosis of a condition, but its effect on a claimant's ability to work that must be examined in each case. Therefore the fact that the Applicant's condition was not definitively diagnosed prior to the Minimum Qualifying Period was not material to the outcome of this appeal. The General Division made no error of fact or in law, nor did it breach any of the principles of natural justice because its decision was based on the Applicant's condition prior to a firm diagnosis. This argument does not disclose a ground of appeal that has a reasonable chance of success on appeal.

[9] The Applicant also asserted that she mitigated her situation by attempting modified duties at her workplace prior to being terminated from her job. This evidence was presented at the General Division hearing and considered by it when reaching its decision. The repetition of this evidence is not a ground of appeal under section 58 of the Act.

[10] Further, the Applicant argued that she would not be able to retrain due to her limitations. This ground of appeal does not point to any error of fact made by the General Division in a perverse or capricious manner or made without regard to the evidence at the hearing. It also does not point to any error in law or a breach of natural justice. The General Division decision considered that the Applicant had not attempted any retraining or other work. This ground of appeal does not have a reasonable chance of success on appeal.

[11] Finally, the Applicant referred to the *Minister of Human Resources Development v. Bennett* (CP 4752) decision of the Pension Appeals Board. She correctly stated that this decision concluded that the test for disability under the *Canada Pension Plan* is predicated on a claimant's ability to attend employment whenever and as often as is necessary. The General Division decision did not refer to this decision, or to the principle it stands for. Decisions of the Pension Appeals Board are not binding on this Tribunal, so the General Division made no error in not referring to it.

[12] It is not clear if the Applicant was attempting to raise another ground of appeal by referring to this decision. In *Pantic v. Canada (Attorney General)*, 2011 FC 591the Federal Court concluded that a ground of appeal cannot have a reasonable chance of success if it is not clear. Consequently any other ground of appeal that the Applicant may have tried to present based on this decision does not have a reasonable chance of success on appeal.

CONCLUSION

[13] The Application is refused for the reasons set out above. She did not present a ground of appeal that has a reasonable chance of success on appeal.

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.