Citation: ***M. V. v. Minister of Employment and Social Development*****, 2015 SSTAD 640**

Date: May 25, 2015

File number: AD-15-250

APPEAL DIVISION

Between:

M. V.

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. She claimed that she was disabled by physical and emotional injuries from a motor vehicle accident. The Respondent denied her claim initially and after reconsideration. The Applicant 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 an in person hearing and on February 6, 2015 dismissed the Applicant's appeal.

[2] The Applicant sought leave to appeal to the Appeal Division of the Social Security Tribunal. She presented numerous grounds of appeal, including that the General Division did not properly consider or weigh some of the evidence presented at the hearing, that the General Division decision contained errors of fact made without regard to the material before it, and that the General Division erred in its application of the law to the facts.

[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 decided 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 (this is set out in the Appendix to this decision). Therefore, I must determine if the Applicant has presented a ground of appeal under section

58 of the Act that has a reasonable chance of success on appeal. Each of the grounds of appeal presented is considered below.

Weight Given to Some Evidence

[6] The Applicant asserted that the General Division erred as it did not give proper weight to some of the evidence that was presented at the General Division hearing, being:

a) The report of the Applicant's family physician that accompanied her application for the disability pension;

b) The MRI report dated December 4, 2008; and

c) The orthopedic surgeon's reports dated October 4, 2010 and December 7, 2010.

The General Division was the trier of fact in this case. It was to receive the evidence of the parties, weigh it and make a decision based on this evidence. The Federal Court of Appeal stated clearly that assigning weight to evidence, whether oral or written, is the job of the trier of fact (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). A Member hearing an application for leave to appeal may not substitute their view of the evidence for that of the trier of fact. Therefore, leave to appeal cannot be granted on the basis of these arguments.

Errors of Fact

[7] The Applicant also contended that the General Division made errors of fact without regard to the material before it. These errors included:

a) The General Division decision did not include all of the Applicant's symptoms that were reported by Ms. Entwistle, occupational therapist. For example, the Applicant had headaches that led to vomiting, and needed for assistance with household tasks.

b) The General Division decision did not include all of the conclusions set out by Ms. O'Connor, physiotherapist in her discharge report, including that the Applicant had a subsequent exacerbation of symptoms and was referred to a neurologist;

c) The General Division decision did not set out all of the findings reported after a MRI on November 22, 2010;

d) The General Division decision did not include in its summary of evidence that Dr. Stevens' physical examination of the Applicant did not change from 2010 to 2013; and

e) The General Division decision stated that the Applicant first sought mental health treatment as part of the accident claims process, when she was referred by her family physician because of her symptoms;

[8] Regarding the above arguments, it is not necessary for a decision maker to include each and every piece of evidence presented at a hearing in its reasons for decision. The decision maker is presumed to have heard and considered all of the evidence before it. These alleged factual errors would not be material to the outcome of the appeal. Therefore, I am not satisfied that the omission of these facts in the written decision point to erroneous findings of fact made without regard to the material before the General Division.

[9] However, the Applicant also argued that the General Division decision erred when it stated that the Applicant did not receive psychiatric treatment until 2014 when she received regular mental health treatment in 2009 to 2010 and also took medication during this time for her mental health. This finding of fact was made in error and may have been made without regard to the material that was before the General Division. The General Division placed weight on this finding of fact in reaching its decision. This ground of appeal may have a reasonable chance of success on appeal.

[10] In addition, the Applicant asserted that the General Division decision erred when it stated that Dr. Sharma concluded that the Applicant's depression had moderated when he reported in July 2013 that her depression was moderately severe. It appears that the General Division erred when it set out the conclusions reached by Dr. Sharma. The General Division placed weight on this erroneous finding of fact, which was made without regard to the material before it. Therefore, this ground of appeal may also have a reasonable chance of success on appeal.

[11] The Applicant argued further that the General Division decision erred when it stated that Dr. Stevens' report and conclusions were based on the Applicant's subjective reports and not objective evidence. Dr. Stevens examined the Applicant and based his opinion on his examination, and not simply the Applicant's subjective report of her symptoms. This argument therefore also points to an error of fact made by the General Division without regard to the material before it and may have a reasonable chance of success on appeal.

[12] Further, the General Division decision concluded that Dr. Stevens' diagnosis of chronic pain syndrome suggested that there was a significant psychological component to her condition. The Applicant argued that Dr. Stevens did not reach this conclusion, and hence, this finding by the General Division was a further error of fact made without regard to the material before it. The General Division based its decision, at least in part, on this finding of fact that may have been made without regard to the material before it. This ground of appeal also has a reasonable chance of success on appeal.

[13] Finally in this regard, the Applicant submitted that the General Division erred when it stated that there were no medical reports at the time of the accident. This is true. The decision referred to the reports which summarized the treatment given at that time. Although it did not refer to each such report, I am not satisfied that the General Division made any error in its treatment of evidence regarding treatment the Appellant received around the time of the accident. This ground of appeal does not have a reasonable chance of success on appeal.

Other Errors

[14] The Applicant also argued that the General Division made a number of other errors which were grounds upon which leave to appeal should be granted. First in this regard, the applicant contended that the General Division dismissed the conclusions reached by Dr. Carleton and accepted a contradictory opinion from Dr. Kachur. While it is appropriate for the decision maker to weigh evidence, and give greater weight to some evidence, the Supreme Court of Canada has stated that the decision maker is obliged to give reasons for findings of fact made on disputed or contradictory evidence and upon which the outcome of the matter is largely dependent (see *R. v. Sheppard*, 2002 SCC 26). In this case, the General Division noted that the opinions of Dr. Carleton and Dr. Kachur were different. The decision did not explain

why it gave greater weight to one opinion over the other. Without this it is not clear why the General Division made the decision it did. This ground of appeal may have a reasonable chance of success on appeal.

[15] The Applicant also contended that the General Division erred in law and that it should have placed greater weight on the medical evidence that was obtained close to the Minimum Qualifying Period, but instead placed greater weight on a physiotherapy report that was dated some time prior to that date (see *Cochran v Canada (Attorney General of Canada)*, 2003 FCA 343). All of the reports referred to were written within a year or so of the Minimum Qualifying Period. As set out above, it is for the trier of fact, the General Division, to assess and weigh the evidence. The Tribunal deciding whether to grant leave to appeal should not reweigh the evidence. Therefore, leave to appeal cannot be granted on this basis.

[16] The Applicant also argued that there was no medical evidence to support the General Division conclusion that the Applicant would be able to perform light or sedentary work, such as in a retail environment. It is for the General Division to decide, based on all of the evidence and arguments presented to it, whether an Applicant is disabled under the *Canada Pension Plan*. If she retains some capacity regularly to pursue substantially gainful employment, she is not disabled. The General Division made no error in making this determination. However, the General Division decision did not explain how it reached this conclusion in the face of medical opinions that the Applicant was unable to work. One of the purposes of reasons for a decision is to allow the parties to understand why a decision has been reached. Without some explanation for the conclusion reached in light of contradictory medical evidence, the reasons may be insufficient for this purpose. Thus, this ground of appeal has a reasonable chance of success on appeal.

[17] Finally, the Applicant asserted that the General Division erred as it did not consider all of her personal characteristics, or all of her conditions in reaching its conclusion. The General Division decisions set out the Applicant's age, education and work history. It also noted her ability to communicate in English and considered all of these factors in reaching its conclusion. In addition, the decision referred to and considered each of the physical and

mental conditions presented. Therefore, this ground of appeal does not have a reasonable chance of success on appeal.

CONCLUSION

[18] The Application is granted for the reasons set out above. 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.