Citation: *C. G. v. Minister of Employment and Social Development*, 2015 SSTAD 694

Appeal No. AD-15-220

BETWEEN:

C. G.

Applicant

and

Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Hazelyn Ross

DATE OF DECISION: June 4, 2015

DECISION

[1] Leave to appeal to the Appeal Division of the Social Security Tribunal of Canada is refused.

INTRODUCTION

[2] On January 26, 2015, the General Division of the Social Security Tribunal, (the Tribunal), issued a decision denying the Applicant a *Canada Pension Plan*, (CPP), disability benefit. The Applicant has filed an application seeking leave to appeal, (the Application), the General Division decision.

ISSUE

[3] The issue before the Tribunal is "does the Appeal have a reasonable chance of success?"

THE LAW

[4] Appeals of a General Division decision are governed by sections 56 to 59 of the *Department of Employment and Social Development Act*, (DESD Act). Subsections 56(1) and 58(3) govern the grant of leave to appeal, providing that "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal."

[5] Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." Subsection 58(1) sets out the only grounds of appeal. They include breaches of natural justice; errors of law and errors of fact; and errors of mixed fact and law.[1]

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[1] **58(1) Grounds of Appeal** –

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.

SUBMISSIONS

[6] Through her Counsel, the Applicant submitted that the General Division made numerous errors of law; errors of fact; as well as errors of mixed fact and law.

ANALYSIS

[7] Applications for leave to appeal are the first stage of the appeal process. The threshold is lower than that which must be met on the hearing of the appeal on the merits. However, 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 Human Resources Development)*, [1999] FCJ No. 1252 (FC).

[8] The Federal Court of Appeal has 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. Canada (Attorney General)*, 2010 FCA 63. Therefore, the Tribunal must first determine if the reasons for the Application relate to a ground of appeal that would have a reasonable chance of success.

Did the General Division commit Errors of Fact?

[9] The Applicant alleges that the General Division Member made several errors of law including,

1. Misapplying case law;
2. Failing to address all of the Applicant's medical conditions;
3. Failing to assess the Applicant's subjective level of pain when several medical reports made a diagnosis of Chronic Pain Disease;
4. Relied on the family physician's "expectation" as opposed to medical documentation when assessing her employability;
5. Equated attendance at school with an actual work environment;

6. Incorrectly stated the test for mitigation by reference to a threshold to seek treatment "aggressively"; rejected as insufficient the applicant's subjective evidence where there were no reports to confirm her organic knee injury;

7. Misinterpreted the Applicant's attempts to return to the workforce.

[10] It goes without saying that the Applicant disagrees with the General Division decision. However, the Tribunal finds that many of the alleged errors of law have not been made out.

[11] First, while the Applicant charges that the General Division misapplied case law, she did not specifically state how the General Division did so. The Tribunal is left to guess at the allegation. In these circumstances, the Tribunal finds that the Applicant has not raised an arguable case on this point.

[12] The Applicant went on to submit that the General Division failed to address all of her medical conditions. Failure to consider all of an appellant's medical conditions would be an error of law. However, contrary to the Applicant's submissions, the General Division addressed both her "organic" (knee) conditions and her inorganic (chronic pain disease) conditions. The Applicant disagrees with the Member's conclusions, but that does not mean that there was a failure to address all of the Applicant's medical conditions. The Tribunal is not satisfied that this ground would give rise to a successful appeal.

[13] Similarly, the Tribunal finds that the General Division did turn its mind to and addressed the Applicant's subjective level of pain. At paragraph 58, in the context of her non-attendance at a pain management clinic, the General Division observes that the Applicant testified that her level of pain interferes with everything. This is hardly a dismissal of the Applicant's subjective testimony; rather it shows that the General Division Member integrated the Applicant's testimony into her analysis. Accordingly, the Tribunal finds that the allegation is not supported and is not a ground on which the appeal would likely succeed.

[14] The Applicant took exception to the General Division relying on the prognosis of her family physician. With respect, the Tribunal finds that an arguable case has not been raised in this regard. The Applicant's family physician had not only been treating her for several years,

he saw her through her knee surgeries. In the Tribunal's view he was well placed to make the prognosis he did and the General Division committed no error by relying on it.

[15] With respect to the argument that attendance at school cannot be equated with an actual work capacity, the Tribunal acknowledges that there is conflicting case law on this point. However, the determination is fact based *(Fraser v. MHRD),* September 20, 2000 CP 11086 (PAB). The General Division is in the position of having to make the determination and in the absence of error, which the Tribunal does not find; there is no reason to disturb the General Division finding. Furthermore, there is nothing in the General Division analysis to support the submission. This is not a ground on which the appeal would likely succeed.

[16] The Applicant has submitted that in assessing her attempts to mitigate, the General Division misstated the test for mitigation by reference to a threshold to seek treatment aggressively. The Tribunal finds that in making this statement the General Division did not err. The statement repeats that made in *A.P. v. MHRSD*, (December 15, 2009) CP 26308 (PAB), which case, in the Tribunal's view, remains good law. This is not a ground on which the appeal could succeed.

[17] With respect to the Applicant's further submission that the General Division improperly rejected her subjective evidence about her organic knee injury, the Tribunal is not persuaded of this submission. The Applicant's family physician did state that she would have to be reassessed after her knee surgeries. However, no assessment was before the General Division. The case law and in particular *Villani v. Canada (A.G.), 2001 FCA 248,* speaks to the need for objective medical evidence in the determination of severity. The General Division Member did not err in her finding that the absence of such evidence left her unable to properly assess critical matters in regard to the Applicant's medical procedures and treatments. Leave cannot be granted on this ground.

[18] The Applicant has also submitted that the General Division misinterpreted her efforts to return to the work force. The Tribunal finds no such error. As late as January 21, 2013, the Applicant was working at a regular part-time job. The General Division Member noted that accommodations had been made that took cognizance of the Applicant's working restrictions. Whether or not the Applicant found the tasks menial is not the point. What had to be assessed

was whether she had retained capacity to engage regularly in a substantially gainful employment. The Tribunal is not persuaded that the General Division Member erred in her assessment of the Applicant's retained work capacity.

[19] Finally, with respect to the Applicant's submission that the General Division Member erred in finding the Applicant's comment "disturbing" that she had not been seen by a pain specialist or by her conclusions about the Applicant's ability to drive to London, the Tribunal rejects the interpretations placed upon the Member's statements. It is perhaps preferable that Members do not express their personal opinions about testimony. However, given that the Applicant did testify that she had been referred to a pain clinic, given that the Applicant drove to London to consult with her family physician, and given the level of pain the Applicant testified to, the General Division Member's comment is understandable. The Tribunal finds it does not give rise to error of any kind. It should be noted that the Applicant's submission stated that she had not been referred to a pain management clinic, however, the General Division Member records that the Applicant testified that her family physician had made such a recommendation.

CONCLUSION

[20] The Applicant has submitted that the General Division made numerous errors of law, errors of fact and errors of mixed fact and law. Through her Counsel she has presented a number of arguments that, she submits, support the Application. For the reasons set out above the Tribunal is not satisfied that the Applicant has raised an arguable case. In addition, the Tribunal finds that many of the arguments raised by the Applicant essentially speak to her disagreement with the outcome of the hearing before the General Division. This Tribunal is not in a position to reweigh the evidence and to come to legal conclusions different from those rendered by the General Division. Accordingly, the Tribunal will not grant leave in respect of the Application.

[21] The Application for Leave to Appeal is refused.

Hazelyn Ross
Member, Appeal Division