Citation: ***M. M. v. Minister of Employment and Social Development,*** **2015 SSTAD 771**

Date: June 19, 2015

File number: AD-15-322

APPEAL DIVISION

Between:

M. M.

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 Appellant applied for a *Canada Pension Plan* disability pension. She claimed that she was disabled by injuries and a sleep disorder caused by a car accident in 2007. The Respondent denied her claim initially and after reconsideration. The Appellant appealed to the Office of the Commissioner of Review Tribunals. 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 held a hearing and dismissed the appeal.

[2] The Appellant sought leave to appeal to the Appeal Division of the Social Security Tribunal. She argued that the General Division made erroneous findings of fact without regard to the material before it, and that it erred in law.

[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 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 the Social Security Tribunal. Section 58 of the Act sets out the only grounds of appeal that can be considered (this is set out in the Appendix to this decision). The Appellant contended, first, that the General Division made erroneous findings of fact without regard to the material before it. She argued that it did so when it concluded that the Appellant was capable of working despite evidence that she was bedridden for two to three days each week by migraine headaches.

[6] The General Division decision considered the evidence of the Appellant's headaches with the other oral and written evidence that was presented. The General Division was the trier of fact. As such, it was obliged to receive the evidence presented, weigh it, and make a decision based on the evidence and the law. The *Simpson v. Canada (Attorney General)*, 2012 FCA 82 decision stated that assigning weight to evidence, whether oral or written, is the job of the trier of fact, which is the General Division. A Member hearing an application for leave to appeal may not substitute their view of the evidence for that of the trier of fact. Hence, this ground of appeal does not have a reasonable chance of success on appeal.

[7] The Appellant also presented a number of arguments that she claimed pointed to errors of law made in the General Division decision. First, she contended that the General Division erred as it reached no conclusion regarding whether the Appellant's disability was prolonged. The *Canada Pension Plan* requires that a claimant be found to have a disability that is both severe and prolonged. In this case the General Division concluded that her disability was not severe. It made no error in not examining whether the disability was prolonged under these circumstances. This ground of appeal does not have a reasonable chance of success on appeal.

[8] Both the General Division decision and the Appellant set out that in determining whether the Appellant was disabled, the General Division had to examine her disability in a "real world context" (see *Villani v. Canada (Attorney General)* 2001 FCA 248). The *Villani* decision stated that to do so, the decision maker should consider a claimant's age, education, work and life experience among other factors. This is a correct statement of the law. The Appellant contended, however, that the General Division erred as it concentrated on the Appellant's transferrable skills rather than her age, education, work and life experience. She further argued that transferrable skills were either not relevant as this was not mentioned in the *Villani* decision as a factor to be considered, or at best a minor factor in the real world context.

[9] The *Villani* decision stands for the legal proposition that all of a disability pension claimant's circumstances are to be considered when determining whether she is disabled. This includes her academic and work achievements, and her personal circumstances. The decision did not set out an exhaustive list of factors that were to be mechanically applied in each case. The General Division in this case did not err when it considered and placed weight on its

finding of fact that the Appellant had transferrable skills. This ground of appeal does not have a reasonable chance of success on appeal.

[10] Finally, the Appellant contended that the General Division erred in law as it applied the incorrect definition of severe. The decision stated that the Appellant " ... suffered from a complete inability to participate in any gainful employment working within her functional limitations" in the decision, although it also correctly set out the definition of severe near the beginning of the decision. The Appellant argued that in applying this incorrect definition of severe, the General Division did not consider whether the Appellant would be able **regularly** (my emphasis) to pursue a substantially gainful occupation. Given the nature of the Appellant's disability, including migraine headaches, it was an error to not consider the issue of regularity. Upon review of the General Division decision, it appears that the General Division may have applied the incorrect legal test for severe in this case. This ground of appeal has a reasonable chance of success on appeal.

CONCLUSION

[11] The Application is granted as the Appellant has presented a ground of appeal that has a reasonable chance of success on appeal.

[12] 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.