

Citation: *E. M. v. Minister of Employment and Social Development*, 2015 SSTAD 1056

Date: September 8, 2015

File number: AD-15-931

APPEAL DIVISION

Between:

E. 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 Applicant claimed that he was disabled by back pain that radiated down one leg and depression when he applied for a *Canada Pension Plan* disability pension. The Respondent denied his claim initially and after reconsideration. The Applicant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals. The appeal was transferred to the General Division of the Social Security Tribunal of Canada pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division held a videoconference hearing and on June 25, 2015 dismissed the appeal.

[2] The Applicant requested leave to appeal to the Appeal Division of the Tribunal. He argued that the General Division decision contained a number of errors of law, and errors of fact such that leave to appeal should be granted.

[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. 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). Accordingly 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.

Errors of Fact

[6] The Applicant presented a number of grounds of appeal which he contended pointed to erroneous findings of fact made in a perverse or capricious manner, or without regard to the material that was before the General Division. They are each considered below:

- a) The Applicant contended that the General Division, in error, found that he was in receipt of WSIB benefits. He testified that he did not receive these benefits. This may have been an error in the decision. However, I am not satisfied that this error was made in a perverse or capricious manner, or without regard to the material that was before the General Division, which included a number of documents written by or for WSIB. This ground of appeal does not have a reasonable chance of success on appeal;
- b) The Applicant also contended that the General Division decision erred when it concluded that he was married with children. He has one child. This error was not material to the decision made. I am also not satisfied that it was made in a perverse or capricious manner, or without regard to the material before it. Leave to appeal is not granted on the basis of this ground of appeal;
- c) The Applicant, further, argued that the General Division erred in finding that he had not pursued recommended psychological treatment. In *Bulger v. Minister of Human Resources Development* (May 18, 2000, CP9164) the Pension Appeals Board decided that a claimant is obliged to submit to treatment recommendations, or to provide a reasonable explanation for not doing so. The General Division decision in this case did not consider the Applicant's evidence that he could not afford this treatment, and that his family physician was providing mental health counselling, which may have been a reasonable explanation. This ground of appeal has a reasonable chance of success on appeal;
- d) The Applicant also argued that the General Division did not give proper weight to evidence regarding his functional limitations, even though this was supported by the medical evidence. This ground of appeal essentially asks this Tribunal to reweigh the evidence that was put before the General Division. This is the province of the trier of

fact and not of the Appeal Division when deciding whether to grant leave to appeal (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). The Federal Court stated clearly in *Misek v. Canada (Attorney General)*, 2012 FC 890, that it is not for the Member deciding whether to grant leave to appeal to reweigh the evidence or explore the merits of the General Division decision. Hence, this ground of appeal does not have a reasonable chance of success on appeal; and

- e) Finally in this regard, the Applicant summarized a number of medical reports that were presented at the General Division hearing and supported his claim. These reports were not mentioned in the General Division decision. It is not necessary for a decision to contain reference to each and every piece of evidence that was presented at the hearing, as the Member is presumed to have considered all of the evidence (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). However, this presumption can be rebutted. The fact that there were multiple reports by a number of different doctors that were not mentioned may rebut this presumption in this case. This ground of appeal may have a reasonable chance of success on appeal.

Errors of Law

[7] The Applicant also presented a number of grounds of appeal that he argued demonstrated that the General Division decision contained errors of law, whether those errors appeared on the face of the record or not. They are as follows:

- a) The Applicant argued that the General Division failed to consider the combination of his mental and physical problems. The decision referred to and considered each of the Applicant's disabilities. It is not clear, however, whether they were examined in totality as required by law. This ground of appeal may have a reasonable chance of success on appeal;
- b) The Applicant also argued that the General Division decision did not take into consideration his personal characteristics including his language limitations, education and work experience only in construction. The decision refers to the Applicant's personal characteristics, and weighed them along with the other evidence presented. The

Applicant's disagreement with how they were weighed is not sufficient to point to any error in law. This ground of appeal does not have a reasonable chance of success on appeal;

- c) Further, the Applicant submitted that the General Division ought to have examined his health status at the Minimum Qualifying Period, and in not doing so made an error of mixed law and fact. The General Division decision summarized the evidence that was presented. If there was no medical evidence dated at the time of the Minimum Qualifying Period, it could not be considered by the General Division, but this is not an error of law. This ground of appeal does not have a reasonable chance of success on appeal;
- d) The Applicant also contended that there was no medical evidence that the Applicant had some capacity to work at a substantially gainful occupation at the relevant time. This may be so; however, it is for the claimant to satisfy the General Division that he was unable regularly to pursue any substantially gainful occupation, not for any other party to establish the opposite. This ground of appeal does not have a reasonable chance of success on appeal;
- e) The Applicant, in addition, argued that the fact that a philanthropic employer may maintain an employment relationship with an otherwise disabled worker should not be interpreted as evidence of his capacity to work. I agree. I presume that the Applicant intended to argue that the sedentary work the Applicant completed for his last employer fell into this category. I am not satisfied, however, that there was evidence upon which the General Division could have concluded that this work was offered to the Applicant on a philanthropic basis. This ground of appeal does not have a reasonable chance of success on appeal; and
- f) The General Division decision concluded that it was reasonable to assume that if the Applicant optimized his treatment his pain would decrease, his mobility increase, and his mental health improve such that he could re-enter the workforce in some fashion. The decision did not set out an evidentiary basis for these conclusions. This points to

errors in the decision which give rise to grounds of appeal that may have a reasonable chance of success on appeal.

[8] Finally, the Applicant contended that because the Appeal Division of the Tribunal is permitted to give the decision that the General Division should have given or vary the decision in whole or in part, the appeal in this matter is not in the nature of judicial review. Counsel for the Applicant relied on court decisions to support this argument. I need not decide this issue in order to grant leave to appeal. I invite both parties to make written submissions on this issue with their submissions on the merits of the appeal.

CONCLUSION

[9] For the reasons set out above, I am satisfied that the Applicant has presented grounds of appeal under section 58 of the Act that may have a reasonable chance of success on appeal. Leave to appeal is therefore granted.

[10] 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.