Citation: ***S. B. v. Minister of Employment and Social Development*****, 2015 SSTAD 1031**

Date: August 31, 2015

File number: AD-15-919

APPEAL DIVISION

Between:

S. B.

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 she was disabled by fibromyalgia, pain, mental illness and associated limitations when she applied for a *Canada Pension Plan* disability pension. The Respondent denied her claim initially and after reconsideration. She appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals. Pursuant to the *Jobs, Growth and Long-term Prosperity Act* the appeal was transferred to the General Division of the Social Security Tribunal of Canada. The General Division held a hearing in person and on April 30, 2015 dismissed the appeal.

[2] The Applicant requested leave to appeal to the Appeal Division of the Tribunal. She contended that the General Division made a number of errors 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 this Tribunal. Section 58 of the Act sets out the only grounds of appeal that can be considered to grant leave to appeal a decision of the General Division (this is set out in the Appendix to this decision). Therefore, I must decide if the Applicant has presented a ground of appeal that may have a reasonable chance of success on appeal.

[6] First, the Applicant contended that the General Division erred in law by failing to consider all of her disabling conditions in totality. The Applicant suffered from pain, loss of range of motion, mental health issues, etc. The General Division decision considered

each of these conditions separately and concluded that each one was not a severe disability under the *Canada Pension Plan* (CPP). However, in *Bungay v. Canada (Attorney General)*, 2011 FCA 47 the Federal Court of Appeal stated that to determine whether a claimant is disabled under the CPP, the decision maker must take into account all of her impairments, and assess her condition in its totality. This ground of appeal therefore points to an error of law made in the General Division decision. It may have a reasonable chance of success on appeal.

[7] The Applicant also contended that the General Division erred as it only considered the Applicant's restrictions regarding range of motion from fibromyalgia, and not the other limitations caused by this condition. She also specifically suggested that the General Division erred as it did not consider her mental health issues related to fibromyalgia. She argued that this was also an error of law, again relying on the *Bungay* decision. The General Division decision contained a lengthy and detailed summary of the medical evidence that was before it. The analysis of this evidence did not consider any symptoms of fibromyalgia apart from her range of motion. These grounds of appeal also point to an error in the decision and may have a reasonable chance of success on appeal.

[8] The Applicant asserted, further, that the General Division erred in law as it misapprehended the evidence regarding the Appellant's work experience, which caused it to err in its consideration of the factors set out in *Villani v. Canada(Attorney General)*, 2001 FCA 248. She relied on the Supreme Court of Canada decision in *Housen v Nikolaisen*, [2002] 2 SCR 235 to support her contention that misapprehending evidence can be an error in law. The General Division decision clearly set out the Applicant's work experience in a number of jobs but each for only a short time. It is for the General Division to receive the evidence from the parties and weigh it in making its decision. The tribunal deciding whether to grant leave to appeal ought not to substitute its view of the persuasive value of the evidence for that of the tribunal that made the findings of fact (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). However, it may be that the weight given to this evidence resulted in an erroneous application of the *Villani* factors in this case. This ground of appeal may have a reasonable chance of success on appeal.

[9] Finally, the Applicant argued that the General Division erred in its weighing of the evidence regarding her music career and promotion. It is not for the Appeal Division to reweigh the evidence to reach a different conclusion. This is not a ground of appeal that may have a reasonable chance of success on appeal.

CONCLUSION

[10] The Application is granted as the Applicant has presented grounds of appeal that may have a reasonable chance of success on appeal.

[11] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[12] It would be helpful to the Appeal Division if the parties addressed the issue of whether the misapprehension of evidence can be an error of law in their written submissions on appeal (see *Housen v Nikolaisen*, [2002] 2 SCR 235).

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.