Citation: ***P. S. v. Minister of Employment and Social Development,*** **2015 SSTAD 1063**

Date: September 10, 2015

File number: AD-15-971

APPEAL DIVISION

Between:

P. S.

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 chronic pain and other injuries 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 pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division held a hearing and on May 19, 2015 dismissed the appeal.

[2] The Applicant requested leave to appeal to the Appeal Division of the Tribunal. He contended that the General Division erred in law, and that his evidence supported his claim that he could not work regularly and predictably.

[3] The Respondent filed no submissions regarding the request for leave to appeal.

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 (the section is set out in the Appendix to this decision). Accordingly, I must decide if the Applicant has presented a ground of appeal under the Act that may have a reasonable chance of success on appeal.

[6] The Applicant repeated some of the evidence that was presented to the General Division, including his inability to cope well with a retraining program. He did not suggest that the General Division erred in its summary of the evidence, or that it based its decision on an

erroneous finding of fact. The repetition of this evidence is not a ground of appeal that may have a reasonable chance of success on appeal.

[7] The Applicant also contended that the General Division erred in law. He stated, correctly, that chronic pain is a subjective condition. He argued, further, that pain and subjective pain levels determine the disability provided the Applicant is deemed credible, as he was in this case. He relied on the decision in *Minister of Health and Welfare v. Densmore* (June 2, 1993, CP2389) to support this argument. With respect, this decision did not state this. The General Division correctly set out what the *Densmore* decision says – the issue depends upon the view which the [decision maker] ultimately takes of the genuineness of what are strictly subjective symptoms. This does not automatically lead to the conclusion that because the Applicant, who was credible, testified that he could not work; he was disabled under the *Canada Pension Plan*. The General Division, as the trier of fact, had to consider and weigh all of the evidence before it to reach its decision.

[8] The Applicant also argued that, based on the decision of the Pension Appeals Board in *Minister of Human Resources Development v. Chase*, (November 6, 1998 CP06540), the evidence of a credible claimant is a critical element of proving the severity of his condition and if he is able to return to some form of gainful employment. Again, the decision stated something different. In *Chase*, the Court concluded that the subjective experiences of the applicant, in regard to the pathology with the resulting consequences on that person's ability to engage in regular substantially gainful employment, were important considerations in the adjudication of the claim. It did not state that the claimant's testimony was dispositive of the case.

[9] The General Division found the Applicant to be a credible witness. It accepted his testimony, and weighed it with the other evidence presented to reach its decision. It made no error in so doing. I am not satisfied that the Applicant's arguments point to any errors of law such that they are grounds of appeal that may have a reasonable chance of success on appeal.

CONCLUSION

[10] The Application is refused for the reasons set out above.

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.