

Citation: *M. K. v. Minister of Employment and Social Development*, 2015 SSTAD 1055

Date: September 4, 2015

File number: AD-15-937

APPEAL DIVISION

Between:

M. K.

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 migraine headaches and other physical and mental health conditions when she applied for a *Canada Pension Plan* disability pension. The Respondent denied her claim initially and after reconsideration. The Applicant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals. On April 1, 2013 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 hearing and on May 27, 2015 dismissed the appeal.

[2] The Applicant requested leave to appeal to the Appeal Division of the Tribunal. She argued that the General Division erred in law, and made erroneous findings of fact in a perverse or capricious manner, or without regard to the material before it. She set out a number of alleged factual errors.

[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). I must therefore decide if the Applicant has presented a ground of appeal under the Act that may have a reasonable chance of success on appeal.

[6] First, the Applicant argued that the General Division made an error in law, whether that error appeared on the face of the record or not. She did not explain how this error was to have been made. The mere allegation of an error in law is insufficient to establish this as a ground of appeal.

[7] The Applicant also contended that the General Division decision contained errors of fact made in a perverse or capricious manner, or without regard to the material before it. They are each considered below:

- a) The Applicant submitted that the General Division erred in concluding that evidence from Dr. Inamdar did not support that she suffered from headaches. The General Division did not reach this conclusion. It concluded that the Applicant's testimony was not supported by some of Dr. Inamdar's reports. This ground of appeal does not have a reasonable chance of success on appeal;
- b) The Applicant further argued that the General Division erred in concluding that her headaches did not prevent her from reading or concentrating. The General Division decision heard the Applicant's evidence and weighed it with the medical reports and other evidence to reach this conclusion. This is what the General Division is to do. Mere disagreement with the conclusion reached does not establish a ground of appeal that may have a reasonable chance of success on appeal;
- c) The Applicant also suggested that the General Division erred as it did not take into account that when she has good days and bad days is unpredictable in reaching its decision. This argument was advanced at the General Division hearing, and was considered. Its repetition is not a ground of appeal;
- d) The Applicant, further, argued that the General Division erred in discounting the medical report of Dr. Smith because she was a Chiropractor. This was only one factor that was considered as the General Division weighed Dr. Smith's evidence. As the trier of fact, it is for the General Division to weigh the evidence presented. No ground of appeal that has a reasonable chance of success on appeal is presented with this argument;

- e) Similarly, the Applicant suggested that the General Division erred in disregarding the evidence of Dr. Debretson on the basis that she advocated for the Applicant. The General Division considered this, the fact that this doctor did not know the Applicant at the relevant time and other factors in deciding what weight to give to this evidence. Again, it is not for the Appeal Division of the Tribunal to reweigh the evidence to reach a different conclusion. This argument also does not disclose a ground of appeal that may have a reasonable chance of success on appeal;
- f) The Applicant, in addition, argued that the General Division erred in concluding that her disability was not severe. This does not disclose a ground of appeal. This is precisely what the General Division is to decide. Disagreement with this conclusion is not a ground of appeal;
- g) The Applicant also argued that the General Division decision found that she was not credible, in part because she testified about how long she could sit for differently than what she wrote in her disability pension application questionnaire. The Applicant contended that her testimony and written evidence were consistent, but that the General Division erred. The General Division based its decision partly on its finding of credibility. This argument points to an erroneous finding of fact that may have been made without regard to all of the evidence that was before the General Division. This ground of appeal may have a reasonable chance of success on appeal;
- h) The Applicant submitted that the General Division erred in concluding that there was no substantive information regarding her back pain. She pointed to specific medical reports that contained this evidence. It is not clear to me whether she referred to the correct documents in her submissions, as some of them do not refer to back pain at all. Nevertheless, I am satisfied that there was some objective evidence to support the Applicant's contention that she had back/hip pain. Therefore, I am satisfied that this ground of appeal also points to an error of fact made without regard to the material before the General Division, and that it may have a reasonable chance of success on appeal;

- i) Further, the Applicant contended that the General Division erred as it did not take into account that her headaches improved with medication, but that she can no longer tolerate this medication. The decision stated that the Applicant improved when taking this medication. It also stated that she was weaning off it. The decision did not state that the Applicant could no longer tolerate the medication. This may have been an error of fact made without regard to the material before it. This ground of appeal may have a reasonable chance of success;
- j) Finally, the Applicant suggested that the General Division erred as it did not consider that she could perform stated activities only on good days, and that on bad days she could do none of them. It appears that the General Division concluded that the Applicant was able to use the computer, drive, walk for 60 minutes and lift up to 30 pounds most or every day. It based its decision at least in part on this finding of fact, which may be an erroneous one made perversely or without regard to all of the evidence that was presented. This ground of appeal may also have a reasonable chance of success on appeal.

CONCLUSION

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

[9] 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.