Citation: ***S. W. v. Minister of Employment and Social Development*****, 2015 SSTAD 1184**

Date: October 2, 2015

File number: AD-15-1037

APPEAL DIVISION

Between:

S. W.

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 as a result of a myriad of physical and mental health conditions including a congenital heart condition, Grave's disease, injuries from a motor vehicle accident, depression, anxiety and post-traumatic stress disorder. The Respondent denied her application initially and after reconsideration. She 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 on April 1, 2013 pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division held a videoconference hearing and on June 22, 2015 dismissed the appeal.

[2] The Applicant requested leave to appeal to the Appeal Division of the Tribunal. She argued that the General Division based its decision on erroneous findings of fact and that it made 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 (see the Appendix to this decision). I must therefore decide if the Applicant has presented a ground of appeal that falls within section 58 of the Act and has a reasonable chance of success on appeal.

[6] The Applicant first argued that the General Division based its decision on erroneous findings of fact made in a perverse or capricious manner or without regard to the material before it. She claimed that the General Division decision erred in this way when it concluded that she had not demonstrated a significant change in her capacity from when she had worked full time. The General Division decision contained a detailed summary of the written and oral evidence that was presented. It weighed this evidence in making its decision, and the evidentiary basis for this decision was set out. I am not satisfied that this finding of fact was made erroneously in a perverse or capricious manner or without regard to the material that was before the General Division. This ground of appeal does not have a reasonable chance of success on appeal.

[7] The Applicant also contended that the General Division erred in fact when it concluded that she had not reasonably followed treatment options and relied on a decision of the Federal Court of Appeal to support this argument. The Applicant correctly stated that this Court, in *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211, decided that the decision maker must consider whether a disability claimant's refusal to undergo treatment is unreasonable. In this case, the General Division decision set out what treatments were recommended to the Applicant and those that she did not follow, including continuing to take medication, participation in counselling, EMDR treatment and twice discharging herself from hospital against the advice of her doctor. The General Division also considered the Applicant's explanations for this behaviour. I am not persuaded that the General Division made any finding of fact in a perverse or capricious manner or without regard to the material before it on this issue. This ground of appeal also does not have a reasonable chance of success on appeal.

[8] Similarly, the Applicant asserted that whether a refusal to undergo medical treatment was reasonable must be considered in the context of the Applicant's circumstances (*Bulger v. Canada (Minister of Human Resources Development)*, May 18, 2000 CP 9164). The General Division considered the Applicant's reasons for not following recommendations where this was provided, whether the treatment options proposed were available to the Applicant near where she lived, and also considered the waiting period to access a psychiatrist. I am not persuaded that the General Division did not consider the Applicant's circumstances when it decided that

she had not reasonably followed treatment recommendations. This ground of appeal does not have a reasonable chance of success on appeal.

[9] The Applicant further submitted that the General Division erred when it stated that the Applicant had not provided any updates from Dr. Chawla after her initial meeting with him in November 2013. This doctor's notes were provided to the Tribunal. The General Division decision referred to these notes and subsequent appointments that the Applicant had with Dr. Chawla. The decision thus contained an error regarding whether updated information had been provided. I am not persuaded, however, that this error was made in a perverse or capricious manner or without regard to the material that was before the General Division. The General Division decision was not based on this error. This argument is not a ground of appeal that may have a reasonable chance of success on appeal.

[10] The Applicant also summarized the evidence that was before the General Division at the hearing and argued that due to her physical limitations she could not work at a sedentary job. This is not a ground of appeal under the Act.

[11] Finally, the Applicant argued that the General Division decision contained an error in law as it did not assess her disability in light of the factors set out in the *Villani v. Canada (Attorney General)*, 2001 FCA 248 decision. The court has clearly stated that to not do so is an error of law. The General Division decision in this case made no reference to the *Villani* decision and did not consider the Applicant's age, education, language abilities or work and life experience. This ground of appeal points to an error in law and may have a reasonable chance of success on appeal.

CONCLUSION

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

[13] 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.