Citation: ***A. P. v. Minister of Employment and Social Development,*** **2015 SSTAD 1227**

Date: October 19, 2015

File number: AD-15-1091

APPEAL DIVISION

Between:

A. P.

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 physical and mental conditions that were caused by a motor vehicle accident when she applied for a *Canada Pension Plan* disability pension. The Respondent denied her claim initially and after reconsideration. The Appellant 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 pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division held a videoconference hearing and on July 6, 2015 dismissed the appeal.

[2] The Applicant sought leave to appeal to the Appeal Division of the Tribunal. She contended that the General Division based its decision on a number of factual errors that were made without regard to the material before it.

[3] The Respondent filed no submissions with respect to the application requesting 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 (this is set out in 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 that has a reasonable chance of success on appeal.

[6] The Applicant presented a number of grounds of appeal that she claimed substantiated her argument that the General Division decision was based on erroneous findings of fact made in a perverse or capricious manner or without regard to the material before it. They are set out below:

a) The Applicant contended that the General Division erred as it did not resolve an apparent inconsistency in the medical reports, as Dr. Boulias reported that the Appellant would have difficulty with her pre-accident employment and that with respect to her lumbar spine she did not have an impairment that would prevent her from completing her pre-accident job of personal support worker. There is no inconsistency in these reports as one refers to the Appellant's overall condition, and the other refers only to her lumbar spine condition. The General Division did not err by not specifically addressing this in its decision. Leave to appeal is not granted on the basis of this ground of appeal.

b) The Appellant also argued that the General Division did not consider her age, educational achievement and that her only work experience was as a Personal Support Worker in reaching its decision. The decision summarized this evidence and considered it. With this ground of appeal, the Applicant has asked the Appeal Division to reweigh the evidence that was presented to the General Division. 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. This ground of appeal therefore does not have a reasonable chance of success on appeal.

c) The Applicant further submitted that the General Division did not consider that she attempted to retrain but was discouraged from doing so by the retraining agency. This was set out in the decision and considered by the General Division in reaching its decision. Again, it is not for the Appeal Division to reweigh the evidence that was before the General Division. Leave to appeal is refused on the basis of this ground of appeal.

d) The Applicant similarly submitted that the General Division decision contained an erroneous conclusion as it found that she retained some capacity to perform light

sedentary work or to retrain. Again with this ground of appeal the Applicant has asked the Appeal Division of the Tribunal to reweigh the evidence that was before the General Division to reach a different conclusion. I am not persuaded that this ground of appeal has a reasonable chance of success.

e) Further, the Applicant argued that the General Division did not take into consideration the evidence of severe psychological issues that was presented. The General Division decision summarized this evidence. It considered it along with the Applicant's testimony regarding the termination of mental health treatment prior to the minimum qualifying period. The General Division decision contained no error in this regard. This ground of appeal does not have a reasonable chance of success on appeal.

f) In addition, the Applicant contended that the General Division decision contained an error as it did not consider that her doctor had never "cleared" her to return to work. The decision states that the Applicant sought this from her doctor but it was not provided. Rom a review of the decision I am not certain whether the fact that "medical clearance" to return to work was refused was considered by the General Division. This ground of appeal points to an erroneous finding of fact that may have been made without regard to the evidence that was before the General Division and upon which the decision was based, at least in part. This ground of appeal may have a reasonable chance of success on appeal.

g) Finally, the Applicant argued that the General Division made erroneous findings of fact when it inferred that Dr. Boulias and Dr. Richards did not rule out her ability to perform sedentary work as this was not set out specifically in their reports. It is difficult to understand the evidentiary basis upon which these inferences were made, especially as it appears that the medical reports were prepared for purposes other than the disability pension application. As such, these grounds of appeal point to erroneous findings of fact that may have been made in a perverse or capricious manner or without regard to the material before the General Division. These grounds of appeal may have a reasonable chance of success on appeal.

CONCLUSION

[7] The Application is granted as the Applicant presented grounds of appeal that fall within section 58 of the Act and may have a reasonable chance of success on appeal.

[8] 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.