

**Citation: *J. P. v. Minister of Employment and Social Development*, 2015 SSTAD 1228**

**Date: October 19, 2015**

**File number: AD-15-1092**

**APPEAL DIVISION**

**Between:**

**J. 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 he was disabled as a result of injuries to his back and both ankles when he applied for a *Canada Pension Plan* disability pension. The Respondent refused his application initially and upon 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 teleconference hearing and on July 31, 2015 dismissed the appeal.

[2] The Applicant sought leave to appeal to the Appeal Division of the Social Security Tribunal. He contended that the General Division decision contained numerous errors of fact, errors of mixed fact and law, errors of law and that it breached the principles of natural justice. Accordingly, leave to appeal should be granted.

[3] The Respondent filed no submissions regarding the application 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 may be considered to grant leave to appeal a decision of the General Division (see the Appendix to this decision). Accordingly, I must 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] First, the Applicant argued that leave to appeal should be granted in this case because 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. In particular, he contended that because the decision made no specific comment on the Applicant's credibility it must not have weighed his testimony. Therefore, the decision was based without considering all of the material that was before it. While it may be of assistance to the parties reading the decision to have the credibility of a witness assessed, this is not necessary in each case. In addition, the fact that no finding of credibility was made does not automatically lead to the conclusion that the Applicant's testimony was not considered. This argument is not a ground of appeal that has a reasonable chance of success on appeal.

[7] The Applicant also argued that the General Division erred in fact as it "ignored" his functional limitations and instead focused on the diagnosis of his condition. The decision set out the various diagnoses that had been made and the evidence to support them. It also set out that the Applicant returned to work on modified duties, and his limitations with respect to sitting, standing, etc. This evidence was considered by the General Division in reaching its conclusion. This ground of appeal does not have a reasonable chance of success on appeal.

[8] The Applicant submitted, in addition, that the General Division decision contained an error of fact as it did not consider how taking medication impacted his ability to operate a motor vehicle, and otherwise limited him. The General Division decision notes that the Applicant was limited as a result of taking medication. It is not clear what weight was placed on this by the General Division in making its decision. The purpose for reasons for decision is to allow the parties to understand the decision that was made, and why it was made, when examined in the context of the evidence, arguments and the hearing in this case (*R. v. M.*, 2008 SCC 51). I am not satisfied that the reasons for decision fulfill this purpose with respect to this issue. This ground of appeal may have a reasonable chance of success on appeal.

[9] Further, the Applicant contended that the General Division did not consider what possible workplace would employ him. It is not for the General Division to do this. It is for the Applicant to establish, on a balance of probabilities, that he was unable regularly to pursue any substantially gainful occupation at the relevant time. Hence, the General Division did not err in

not considering what employer might retain the Applicant. This is not a ground of appeal that may have a reasonable chance of success on appeal.

[10] The Applicant also presented grounds of appeal that he argued demonstrated that the General Division decision contained errors of mixed fact and law. First in this regard, he argued that the General Division erred when it stated (paragraph 44 of the decision) that the Applicant's failure to look for work within his limitations led to the conclusion that he did not suffer from a severe disability. The apparent failure to look for work within his limitations was but one consideration listed in the decision to conclude that the Applicant did not suffer from a severe disability at the relevant time. This statement in the decision is not in error, and does not disclose a ground of appeal that may have a reasonable chance of success on appeal.

[11] However, the Applicant argued that he testified as several junctures during the hearing about starting his own business in an attempt to work. Although this evidence was reported in the decision it was not analysed by the General Division in reaching the decision in this case. This argument therefore points to an error in the decision, and this ground of appeal may have a reasonable chance of success on appeal.

[12] Finally in this regard, the Applicant submitted that the General Division did not consider his educational barriers, including that he required special learning accommodations to complete high school. This evidence is also set out in the General Division decision. It is not clear if it was considered in making the decision. The Federal Court of Appeal, in *Villani v. Canada (Attorney General)*, 2001 FCA 248 stated specifically that a claimant's education is to be considered when determining if he is disabled under the *Canada Pension Plan*. Hence I am satisfied that this is a ground of appeal that may have a reasonable chance of success on appeal.

[13] The Applicant also contended that the General Division decision contained errors in law. The first ground of appeal presented in this respect was that the General Division failed to apply a test for what work is considered substantially gainful under the *Canada Pension Plan*. He further contended that he had testified that he would be able to work for two hours each day, but that this would not be substantially gainful employment. This testimony is not mentioned in the General Division decision. Although it is not necessary for each and every piece of evidence to be noted in a decision (see *Simpson v. Canada (Attorney General)*, 2012 FCA 82), if the issue of

whether the Applicant could complete any substantially gainful occupation was argued before the General Division, it should have been considered in the decision. The fact that it was not considered may point to an error in the General Division decision. This ground of appeal may have a reasonable chance of success on appeal.

[14] The Applicant further contended that the General Division decision erred in law as it did not consider whether his capacity to work was regular, as required by decisions made under the *Canada Pension Plan*. He contended that there was extensive testimony on this issue at the hearing, but that it was not included in the decision. The Applicant is correct that the General Division decision did not analyse any evidence that may have been presented on this issue. If the issue of whether the Applicant could work regularly was raised before the General Division, it should have been considered and the issue decided. As such, this ground of appeal may also have a reasonable chance of success on appeal.

[15] In addition, the Applicant submitted that the General Division decision contained an error of law as it did not specifically consider the cumulative effect of all of the Applicant's disabilities. The decision set out the injuries and medical conditions that the Applicant suffers from. It considered them as a whole. I am not satisfied that this ground of appeal has a reasonable chance of success on appeal.

[16] Finally with respect to errors of law, the Applicant argued that the General Division erred when it concluded that the decision made by the Social Benefits Tribunal was not relevant to the matter before it. I glean from his argument that the Appellant suggested that the General Division should have accepted the findings of fact and credibility made by this other Tribunal. It did not do so. It made no error in not doing so. One of the functions of the General Division is to hear the evidence presented by the parties, weigh the evidence, and reach a decision based on the law and the facts. It would be improper to rely on the decision made by a different tribunal to do this for it, especially when the parties to that proceeding are different, the evidence presented may have been different, and the legal test to be met to receive benefits is different. This ground of appeal does not have a reasonable chance of success on appeal.

[17] I am not persuaded that the General Division erred in asking questions about the Social Benefits Tribunal proceedings, as some of the information may have been relevant to this matter.

The evidence presented at that hearing was not noted in the General Division decision. I am thus satisfied that it did not rely on it in reaching its decision in the matter at hand. This ground of appeal does not have a reasonable chance of success on appeal.

[18] Finally, the Applicant argued that the principles of natural justice were not observed in this case. In particular, he argued that no reference was made to his oral testimony or his credibility. Therefore, the Applicant concluded that no weight was given to this evidence, and a failure to weigh his oral evidence breached the natural justice principle of ensuring that the Applicant was given a fair hearing. With respect, the General Division decision does refer to the Applicant's oral testimony (see paragraph 43 for example). In addition, the fact that no finding of credibility was made does not lead to the conclusion that the Applicant did not receive a fair hearing. He did not allege that he was not able to fully present his case, meet the case against him, or have the decision made by an impartial decision maker based on the law and the facts. I am not satisfied that this ground of appeal points to any breach of the principles of natural justice. It does not have a reasonable chance of success on appeal.

[19] Finally, the Applicant also argued that the General Division was obliged to include an assessment of his credibility in its reasons; otherwise it would violate the principles of natural justice requiring a fair hearing. With respect, if a claimant's credibility is not at issue before the General Division, it is not necessary to address this in the reasons for decision. The Applicant did not suggest that credibility was an issue, and there is no other indication that it was. I am not persuaded that this argument discloses a ground of appeal under section 58 of the Act.

[20] The Applicant requested that I listen to the entire recording of the General Division hearing prior to deciding whether to grant leave to appeal. I did not do so as it was not necessary to deal with the issue at hand. If, however, either party wishes to rely on any part of the General Division hearing at the hearing of the appeal, he should either provide an accurate transcription of the relevant portions of the hearing, or point all parties to the correct time stamp on the recording that should be considered. This could be done in conjunction with the submissions filed on the merits of the appeal.

## **CONCLUSION**

[21] The Application is granted for the reasons set out above.

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

[23] The parties may also make submissions of the form of hearing of the appeal; videoconferencing is not available where the Applicant resides at this time.

*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.