

Citation: *M. L. v. Minister of Employment and Social Development*, 2015 SSTAD 1253

Date: October 26, 2015

File number: AD-15-1112

APPEAL DIVISION

Between:

M. L.

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 neck pain, partial blindness and an ankle injury when he applied for a *Canada Pension Plan* disability pension. The Respondent denied his claim 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 on April 1, 2013 pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division held an in person hearing and on July 15, 2015 dismissed the appeal.

[2] The Applicant requested leave to appeal to the Appeal Division. He contended that the General Division erred as it applied the incorrect test for disability under the *Canada Pension Plan* and it incorrectly interpreted the facts.

[3] The Respondent did not file any 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 may be considered to grant leave to appeal a decision of the General Division (this is set out in the Appendix to this decision). Therefore I must decide if the Applicant has presented a ground of appeal that falls within section 58 of the Act and that may have a reasonable chance of success on appeal.

[6] The Applicant argued that the General Division erred in two ways. First he argued that General Division considered the effect of each of the Applicant's disabilities, but did not consider their cumulative effect on his capacity regularly to pursue any substantially gainful occupation. This resulted in the wrong test for disability being considered. The General Division decision summarized the evidence with respect to each of the Applicant's medical conditions, including those that were diagnosed after the minimum qualifying period (the date by which a claimant must be found to be disabled in order to receive a disability pension). It did not, however, consider the cumulative effect that all of his conditions had on his capacity to work at the relevant time. This ground of appeal may have a reasonable chance of success on appeal.

[7] Second, the Applicant argued that the General Division erred in its treatment of the evidence regarding his attendance at a retraining program and subsequent work placement. First in this regard he suggested that the fact that the Applicant could not successfully attend and complete a work placement demonstrated his lack of capacity to work more than attending school demonstrated that he had some capacity to work. With this argument, the Applicant asks the Appeal Division to reweigh the evidence that was presented to the General Division to reach a different conclusion. In *Simpson v. Canada (Attorney General)*, 2012 FCA 82 the Federal Court of Appeal stated clearly that this is not the function of the Appeal Division when deciding whether to grant leave to appeal; the General Division is the trier of fact and is to weigh the evidence. This argument does not point to a ground of appeal that may have a reasonable chance of success on appeal.

[8] The Applicant also disagreed with the General Division decision conclusion that the Appellant's thought that he could complete parts of a job indicated that he had some capacity to work. Rather, he argued that the General Division should have considered whether the Applicant could complete all aspects of the job in question. This ground of appeal points to an erroneous finding of fact that may have been made by the General Division. However, I am not satisfied that this finding of fact, if it was erroneous, was made in a perverse or capricious manner or without regard to the material before it. Hence, it does not have a reasonable chance of success on appeal.

[9] Finally in this regard, the Applicant argued that the General Division dismissed his evidence regarding his application to work at Benson Automotive – that he would not provide a list of restrictions to them and so was not hired. He argued that if he had done so, he would not have been hired, which demonstrated that he could not work. This conclusion is contrary to that reached in the General Division decision, which stated that he was not hired for reasons other than his health (for not providing the information). This ground of appeal also does not point to an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before it. The evidentiary basis for the General Division conclusion that this work application was not pursued due to difficulties with compensation board (which told him not to provide a list of restrictions) is clearly 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 before it. This ground of appeal does not have a reasonable chance of success on appeal.

CONCLUSION

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

[11] 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.