Citation: ***M. Q. v. Minister of Employment and Social Development,*** **2015 SSTAD 1306**

Date: November 9, 2015

File number: AD-15-1140

APPEAL DIVISION

Between:

M. Q.

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 by post-concussion syndrome when he applied for a *Canada Pension Plan* disability pension. The Respondent denied his claim initially and after 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 a hearing in person and on July 27, 2015 dismissed the appeal.

[2] The Applicant sought leave to appeal the General Division decision to the Appeal Division of the Tribunal. He argued that the General Division did not observe the principles of natural justice and that the decision contained errors of law and was based on erroneous findings of fact made without regard to the material before it.

[3] The Respondent did not file any submissions regarding the application requesting leave to appeal to the Appeal Division.

ANALYSIS

[4] 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 (the section is reproduced in 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 may have a reasonable chance of success on appeal.

[6] First, the Applicant argued that leave to appeal should be granted because the General Division did not observe the principles of natural justice. These principles are concerned with ensuring that parties to a claim have an adequate opportunity to present their case, know and meet the case against them and have a decision made by an impartial arbiter based on the law and the facts. In this case, the Applicant argued that because of his post-concussion syndrome he forgot and miscommunicated some important information regarding his claim. He did not set out what this information was or how it could have affected that outcome of the appeal.

[7] The Applicant's argument does not suggest that the Tribunal acted in any way that prevented him from fully and completely presenting his case at the hearing or in writing prior to the hearing. It is incumbent on parties to present their case, not the Tribunal. In addition, without some indication of what information was miscommunicated or forgotten and how that could have impacted the outcome of the matter, I am not satisfied that the principles of natural justice were not observed. This ground of appeal has no reasonable chance of success on appeal.

[8] Next, the Applicant contended that the General Division decision contained errors of law. To begin with in this regard, he argued that the General Division did not consider the totality of the evidence in making its decision, and referred to specific medical reports that were not specifically noted in the decision. The General Division is presumed to have considered all of the evidence before it and need not set out each and every piece of evidence in its decision. In addition, it is for the General Division, as the trier of fact, to hear the evidence of the parties and weigh it to reach its decision. It is not for the Appeal Division when deciding whether to grant leave to appeal to reweigh the evidence to reach a different conclusion (see *Simpson v. Canada (Attorney General)*, 2012 FCA 82). Therefore this ground of appeal does not have a reasonable chance of success on appeal.

[9] The Applicant also argued that the General Division erred as it did not apply the principles set out in the *Villani v. Canada (Attorney General)*, 2001 FCA 248 decision to the facts of this case. The General Division decision correctly set out the principles from this decision. In paragraph 46 of the decision, the General Division specifically addressed the

Applicant's age and education in concluding whether he may have some capacity to work. Therefore I am satisfied that the General Division did not err in this regard.

[10] The Applicant further suggested, however, that the General Division did not turn its mind to whether the post-concussion syndrome would prevent him from being able to retrain for alternate work. It is not clear to me if the General Division considered this. It may have erred in this regard, and leave to appeal is therefore granted on this basis.

[11] The Applicant's suggestion that the General Division erred as it stated that he may be able to work in an alternate field without suggesting a particular job is not a ground of appeal that may have a reasonable chance of success on appeal. It is the claimant who bears the burden of proof that he is disabled. It is not for the Tribunal or any other party to establish what work he could do.

[12] Finally in this regard, the Applicant submitted that the General Division decision contained an error in law as it was unreasonable to expect the Applicant to seek out alternate work (as required by the *Inclima v. Canada (Attorney General)*, 2003 FCA 117decision) in the face of his doctor's advice not to work. The General Division decision correctly set out the legal principle from the *Inclima* decision. However, subsequent decisions have also stated that a claimant may not be required to attempt to obtain and maintain alternate employment if their reason for not doing so is reasonable. It is not clear if the General Division considered this. This may have been an error in law, so this ground of appeal may have a reasonable chance of success on appeal.

[13] I also note that the General Division decision stated that the Minimum Qualifying Period (the date by which a claimant must be found to be disabled to receive the disability pension) was December 31, 2017. It is not possible to determine if a claimant is disabled as of a date in the future. Therefore it should have determined whether the Applicant was disabled as of the date of the hearing. This was not set out or considered in the General Division decision. This was an error of law, and leave to appeal is granted on this basis.

[14] The Applicant further contended that the General Division decision was based on erroneous findings of fact made without regard to the material before it. He asserted that the

General Division found as fact that Dr. Golisky did not address whether the Applicant could work in any alternate capacity when he did so in his reports dated June 2014 and December 2011. The decision was based, at least in part, on this finding of fact. It may have been erroneous and made without regard to the material before it. This ground of appeal also may have a reasonable chance of success on appeal.

[15] The Applicant also submitted that it was an error for the General Division to conclude that the Applicant might be able to work with further counselling when his doctor reported that counselling did not improve his condition and the General Division also concluded that it was not clear that further counselling would be beneficial. This finding may have been made in error in light of the evidence that was presented to the General Division. Leave to appeal is also granted on the basis of this ground of appeal.

CONCLUSION

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

[17] 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.