Citation: ***Minister of Employment and Social Development v. J. W.*****, 2015 SSTAD 1284**

Date: November 4, 2015

File number: AD-15-1122

APPEAL DIVISION

Between:

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Applicant

and

J. W.

Respondent

Decision by: Valerie Hazlett Parker, Member, Appeal Division

REASONS AND DECISION

INTRODUCTION

[1] The Respondent claimed that she was disabled by seizures/drop attacks when she applied for a *Canada Pension Plan* disability pension. The Applicant refused her claim initially and after reconsideration. The Respondent 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 in April 2013 pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division held a teleconference hearing and on July 14, 2015 decided that the Respondent was disabled.

[2] The Appellant requested leave to appeal this decision to the Appeal Division of the Tribunal. It argued that the General Division erred in law, based its decision on four erroneous findings of fact made in a perverse or capricious manner, and provided inadequate written reasons for its decision.

[3] The Respondent filed no submissions regarding the request 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 can be considered to grant leave to appeal a decision of the General Division (this is set out in the Appendix to this decision). Hence, 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.

Error in Law

[6] The Applicant contended that leave to appeal should be granted on the basis that the General Division decision contained errors in law. First in this regard, it argued that the General Division failed to properly apply the law to the facts before it as it acknowledged that there was no medical evidence regarding the relevant time and concluded that the Respondent was disabled. The Federal Court of Appeal, in *Villani v. Canada (Attorney General)*, 2001 FCA 248 decided that there must be some medical evidence to support a disability claim. I acknowledge that there was no medical evidence that supported the Respondent's claim penned near the time of the Minimum Qualifying Period (the date by which a claimant must be found to be disabled in order to receive a *Canada Pension Plan* disability pension). The law is also clear that there must be some medical evidence upon which the decision is based. This ground of appeal may have a reasonable chance of success on appeal.

[7] The Applicant further submitted that the General Division erred as it did not consider the Respondent's personal characteristics such as her age, education and work experience when deciding if she was disabled. The *Villani* decision and many decisions which have followed it have clearly stated that a disability pension claimant's personal characteristics must be considered in determining whether she is disabled under the *Canada Pension Plan* (CPP). The court has also decided that a failure to apply the *Villani* principles in a CPP disability case is an error in law. Merely citing the *Villani* decision is insufficient. In this case, the General Division decision correctly set out what *Villani* stands for. It did not, however, apply this decision to the facts before it. This may be an error of law, so this ground of appeal may also have a reasonable chance of success on appeal.

[8] Similarly, the Applicant contended that the General Division erred in law when it stated that the Respondent "suffered" from 12 to 15 seizures each month. It contended that the General Division then concluded that the Respondent was disabled based on her suffering. The Applicant is correct that a claimant cannot be found disabled only because of her suffering. However, I am not satisfied that the General Division decision was based on the Respondent's suffering. This word was used to describe how frequently the Respondent experienced seizures, not how they affected her. This ground of appeal does not have a reasonable chance of success on appeal.

[9] Finally on this issue, the Applicant argued that the General Division erred in law as it did not apply the principle set out in the *Inclima v. Canada (Attorney General)*, 2003 FCA 117 decision – that if a claimant has some capacity to work she must demonstrate that she was unable to obtain or maintain employment because of her disability. The Applicant suggested that the General Division decision was unclear whether it considered that the Respondent only tried to work at her usual job. The decision does not appear to have considered whether the Respondent was able to obtain or maintain employment because of her claimed disability. This may have been an error of law, and leave to appeal is granted on this basis.

Erroneous Findings of Fact

[10] The Applicant also argued that leave to appeal should be granted because the General Division decision was based on erroneous findings of fact made in a perverse or capricious manner. First in this regard the Applicant argued that it was unreasonable for the General Division to conclude that the Respondent was advised not to work as early as 2002 as there was no documentary evidence to support this and the testimony was not clear on this point. A review of the General Division decision and the partial transcription of the hearing provided by the Applicant support this argument. Leave to appeal is granted on this basis.

[11] The Applicant further argued that the General Division's finding of fact that the Respondent attempted a number of returns to work but that she could not continue because of pain and seizures was not substantiated by the oral or the written evidence and was therefore an erroneous finding of fact made in a perverse or capricious manner. Again, the partial transcription of the hearing supports the Applicant's position. The decision was based, at least in part, on this finding of fact which may have been erroneous. This ground of appeal may have a reasonable chance of success on appeal.

[12] In addition, the Applicant argued that the General Division findings of fact that she suffered seizures because of a conversion disorder, and that she had suffered seizures from 2000 to the present was not supported by the evidence. I am not satisfied that the decision that the Respondent was disabled under the CPP was based on whether she was diagnosed with a conversion disorder as it is not the diagnosis of a condition but its effect on the claimant's ability to work that is determinative. However, there did not appear to be clear evidence of when and

how frequently the Respondent endured seizures from 2000 to the date of the hearing. If there is no evidence to support this, the finding of fact was erroneous and may have been made in a perverse or capricious manner. This ground of appeal may also have a reasonable chance of success on appeal.

[13] Finally in this regard, the Applicant suggested that the General Division erroneously concluded that the medical evidence generally accorded with the Respondent's testimony, as there was very little medical evidence upon which to make this finding of fact. This may be so. The decision seems to have been based, in part, on this finding of fact. Thus, this ground of appeal may also have a reasonable chance of success on appeal.

[14] The Applicant also suggested that no medical reports confirmed that the Respondent was treated for injuries she claimed were caused by her seizures. It does not appear, however, that the decision was based on whether the Respondent received treatment for these injuries. This is not a ground of appeal that may have a reasonable chance of success on appeal.

[15] Finally in this regard, the Applicant argued that the General Division erred when it preferred the Respondent's testimony to that of the medical reports when they conflicted. With this argument, it essentially asks this tribunal to reevaluate and reweigh the evidence that was put before the General Division. This is the province of the trier of fact. The tribunal deciding whether to grant leave to appeal ought not to substitute its view of the persuasive value of the evidence for that of the Tribunal that made the findings of fact – *Simpson v. Canada (Attorney General)*, 2012 FCA 82. Therefore this argument is not a ground of appeal that has a reasonable chance of success.

Inadequate Reasons for Decision

[16] The Applicant also argued that the leave to appeal should be granted because the General Division decision written reasons for its decision were inadequate. In particular it argued that the analysis of the law and the evidence was so thin that it was difficult to know if the correct legal test was applied to decide if the Respondent was disabled. In *R. v. Sheppard*, 2002 SCC 26 the Supreme Court of Canada set out the purposes of written reasons. They are to allow the parties to understand what decision was made, why it was made, and to allow for effective

appellate review of the decision. In this case, the General Division set out the evidence that it relied on to make its decision. It may not be clear, however, why it reached the decision it did. It is also not clear if the General Division considered the Applicant's reasons for denying her the disability pension as they were not mentioned, nor considered in the decision. While a decision need not set out each and every argument that was presented at a hearing, it should consider the arguments that formed the basis of a party's position.

[17] I also accept the Applicant's argument that the General Division decision did not consider the impact of the lack of medical evidence related to the relevant period of time. Finally, I am satisfied that the General Division reasons for its decision of when she became disabled may have been inadequate as it does not explain the basis for this decision.

[18] Accordingly, these grounds of appeal may also have a reasonable chance of success on appeal.

CONCLUSION

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

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

[21] The Applicant requested permission to file a copy of the audio recording of the General Division hearing to support its position on this appeal. It may do so. It would be helpful, however, if the Applicant would set out the time(s) on the recording that it will refer to in its argument, or provide an accurate transcription of the hearing with the relevant portions marked. If the Respondent wishes to rely on any part of the General Division hearing she should do the same.

[22] The parties may make submissions regarding the form that the hearing of the appeal should take with their submissions on the merits of the appeal.

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.