

**Citation: *P. M. v. Minister of Employment and Social Development*, 2015 SSTAD 1329**

**Date: November 16, 2015**

**File number: AD-15-1185**

**APPEAL DIVISION**

**Between:**

**P. M.**

**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 ongoing myofacial pain, injuries and mental illness that resulted from a motor vehicle accident. 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 an in person hearing and on July 30, 2015 dismissed the appeal.

[2] The Applicant requested leave to appeal to the Appeal Division of the Tribunal. He argued that the General Division decision was based on erroneous findings of fact made in a perverse or capricious manner.

[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 (reproduced 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.

[6] The Applicant presented a number of arguments which he stated were grounds of appeal. First, he contended that the General Division erred when it questioned the Applicant's credibility for not producing reports from specific independent medical examinations. He contended that it was not possible to file these reports with the Tribunal because of filing deadlines imposed by the General Division. The General Division did not question the Applicant's credibility because he did not file these reports, but because he claimed to have no recollection of the examinations. It is for the General Division to hear the evidence of the parties and assess credibility. I am not satisfied that it erred by doing so. This ground of appeal does not have a reasonable chance of success on appeal. The Applicant is also reminded that the General Division Member retains discretion to permit the late filing of documents. Nothing in this file indicated that the Applicant attempted to file the reports in question.

[7] The Applicant also contended that the General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner as it concluded from Dr. Tahlan's notes that the Applicant could work when the notes only indicated that it appeared that the Applicant did not have a psychological condition that would prevent him from working. First, the Applicant argued that a failure to indicate that a claimant cannot work is not the same as stating that a claimant can work. This ground of appeal points to an erroneous finding of fact that may have been made in a perverse manner. The decision was based on this finding of fact, at least in part. Therefore this ground of appeal may have a reasonable chance of success on appeal.

[8] Next, the Applicant argued that the General Division erred as it did not consider the interaction between the Applicant's physical and psychological symptoms. The General Division decision contained a detailed summary of the medical evidence and testimony that was before it. I am satisfied that it considered all of the evidence. Notwithstanding this, it is not clear if the General Division turned its mind to the interplay between the physical and psychological conditions that affected the Applicant. This ground of appeal also points to an erroneous finding of fact that may have been made in a perverse or capricious manner or without regard to the material before it. The General Division decision was based on this finding. This ground of appeal therefore may also have a reasonable chance of success on appeal.

[9] The Applicant also submitted that the General Division conclusion that the work placement and rehabilitation services would not have continued to work with the Applicant unless he had some capacity to work was also erroneous. He suggested that the correct interpretation of this evidence was that the Applicant had no capacity to work as these services had not been able to find a suitable job for him in approximately 5 years. It is for the General Division to hear the evidence, weigh it and make a decision based on the evidence and the law. This argument asks this Tribunal to retry the evidence to reach a different conclusion. In *Gaudet v. Attorney General of Canada* 2013 FCA 254 the Federal Court of Appeal held that a reviewing tribunal is not to retry the issues. The Appeal Division, on an application requesting leave to appeal, is to determine if the Applicant has put forward a ground of appeal that may have a reasonable chance of success on appeal. This argument is not a ground of appeal under section 58 of the Act.

[10] In addition, the Applicant argued that the General Division disregarded the fact that he had not been working for a number of years despite treatment and rehabilitation. This was specifically mentioned in the General Division decision. It was considered by the General Division in reaching the decision in this matter. This is not a ground of appeal that may have a reasonable chance of success on appeal.

[11] Finally, the Applicant requested a hearing in person and wrote that he looked forward to testifying. An appeal before the Appeal Division of this Tribunal is not a re-hearing of the case on its merits. It is an appeal under sections 58 and 59 of the Act, which has been described as a hearing in the nature of judicial review or as a circumscribed review of the matter. The Applicant should not expect to be able to present direct evidence at the hearing of this appeal unless it goes to one of the grounds of appeal.

## **CONCLUSION**

[12] The Application is granted as the Applicant has presented a ground of appeal under section 58 of the Act that may have a reasonable chance of success on appeal.

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

[14] The parties may include submissions on the form that the hearing should take (e.g. in writing, videoconference, in person, etc.) along with their submissions on the merits of this 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.