Citation: ***E. M. v. Minister of Employment and Social Development,*** **2015 SSTAD 1374**

Date: November 30, 2015

File number: AD-15-1231

APPEAL DIVISION

Between:

E. 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 Appellant claimed that he was disabled by pain that resulted from back and knee injuries when he applied for a *Canada Pension Plan* disability pension. The Respondent denied his claim initially and after reconsideration. The Appellant 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 August 13, 2015 dismissed the appeal.

[2] The Appellant requested leave to appeal the General Division decision to the Appeal Division of the Tribunal. He argued that the General Division decision made two erroneous findings of fact that were grounds of appeal that may have a reasonable chance of success on appeal.

[3] The Respondent filed no submissions with respect to the application requesting leave to appeal.

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). 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 argued that the General Division decision contained two erroneous findings of fact made without regard to the material before it and upon which leave to appeal should be granted. First, he contended that the General Division erred when it concluded that there was no evidence of any medical condition that pre-existed his right knee injury that became worse after the injury. He submitted that the Applicant testified that his back pain became worse, that he was referred for diagnostic testing regarding this and that his medication for back pain increased after the knee injury and prior to the end of the minimum qualifying period (the date by which a claimant must be found to be disabled in order to receive the disability pension). He referred to specific medical reports to substantiate this argument.

[7] The General Division decision did not refer to the Applicant's evidence in this regard. In its analysis of the evidence, the General Division did not consider the Appellant's back pain, any change in that condition or the diagnostic testing that was done prior to the minimum qualifying period. The General Division concluded that no pre-existing medical condition became worse after the knee injury and based its decision, at least in part, on this finding of fact. I am satisfied that the Applicant's argument points to an erroneous finding of fact that may have been made without regard to the material that was before the General Division. This ground of appeal may have a reasonable chance of success on appeal.

[8] The Applicant also argued that the General Division erred when it found as fact that the Applicant withdrew from a WSIB labour market reentry program without justification. He referred to a WSIB report which stated that the Applicant was unable to complete the program and that he withdrew from it, and the Applicant's testimony that he was unable to complete the program. The General Division decision found as fact that the Applicant demonstrated that he had some capacity to work at the time of the minimum qualifying period because he attended the labour market reentry program for approximately six months before he withdrew. It relied, at least in part, on this finding of fact. I am satisfied that this finding of fact may have been made without regard to all of the testimony and written evidence that was before it. This ground of appeal also may have a reasonable chance of success on appeal.

CONCLUSION

[9] The Application is granted because the Applicant has presented grounds of appeal that may have a reasonable chance of success on appeal.

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

Valerie Hazlett Parler
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.