Citation: ***Minister of Employment and Social Development v. J. S.*****, 2015 SSTAD 1444**

Date: December 15, 2015

File number: AD-15-1286

APPEAL DIVISION

Between:

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

Applicant

and

J. S.

Respondent

Decision by: Valerie Hazlett Parker, Member, Appeal Division

REASONS AND DECISION

INTRODUCTION

[1] The Respondent claimed that he was disabled as a result of back, neck and knee injuries. He applied for a *Canada Pension Plan* disability pension. The Applicant denied his 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 pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division held a videoconference hearing and decided that the Respondent was disabled.

[2] The Applicant requested leave to appeal the General Division decision to the Appeal Division of the Tribunal. It argued that the General Division decision based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before it as it did not address the fact that there was no objective medical evidence that the Respondent was disabled for two years prior to 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).

[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 (see the Appendix to this decision).

I must therefore 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 only ground of appeal presented by the Applicant was that the General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before it. In particular, the Applicant asserted that the General Division erred because it did not address in the decision the fact that there was no medical evidence to support the disability claim for two years prior to the minimum qualifying period.

[7] On reading of the decision it is clear that the Respondent was injured some time prior the Minimum Qualifying Period (MQP). He was treated for his back and knee injuries prior to the MQP. It was not contested that he was only able to return to work after the back injury because his employer provided him with a special light duty position that accommodated his limitations. He was laid off from this job shortly after workers' compensation terminated its involvement with the Respondent, still prior to the MQP.

[8] It was also clear that although there were gaps in medical treatment (some quite lengthy), the Respondent was treated by the same family physician from 1995 until he applied for the disability pension in 2011. The General Division concluded that this doctor penned a number of reports and stated that the Respondent was unable to work since his injuries.

[9] The Applicant correctly submitted that the *Canada Pension Plan Regulations* and decisions of the Court have clearly stated that medical evidence is required to support a disability claim. A medical report dated at the time of the MQP or that refers directly to a claimant's ability to work is not required although it can be of assistance to a claimant. In fact, the courts have concluded that gaps in medical evidence can be overcome by the testimony of the claimant.

[10] In this case, there was medical evidence presented prior to the MQP that set out the Respondent's medical diagnoses, treatment and limitations. There was medical evidence from the family doctor that confirmed that the Respondent continued to have the same disabilities a number of years after the MQP. The Respondent testified about his

limitations and when they arose, and his ability to work. The medical evidence and testimony were consistent.

[11] The Supreme Court of Canada, in *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65 stated that the decision maker need not address every issue raised by a party in their reasons. For a reviewing court, the issue remains whether the decision, viewed as a whole in the context of the record, is reasonable. I am satisfied that the General Division decision in this case is reasonable, and that the General Division did not err by not addressing the lack of medical evidence dated at the time of the MQP. The ground of appeal presented does not have a reasonable chance of success on appeal.

CONCLUSION

[12] The Application is refused for these reasons.

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.