

Citation: *B. M. v. Minister of Employment and Social Development*, 2015 SSTAD 1455

Date: December 21, 2015

File number: AD-15-1294

APPEAL DIVISION

Between:

B. 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 she suffered from back pain, depression and other medical conditions that rendered her disabled. She applied for a *Canada Pension Plan* disability pension. The Respondent denied her claim initially and after reconsideration. The Applicant appealed the reconsideration decision to the General Division of the Social Security Tribunal. The General Division held a teleconference hearing and on September 29, 2015 dismissed her appeal.

[2] The Applicant filed an application requesting leave to appeal to the Appeal Division of the Tribunal. She 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 or without regard to the material before it and errors of mixed fact and law.

[3] The Respondent filed no submissions.

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). 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] The Applicant first contended that leave to appeal should be granted because the General Division based its decision on an erroneous findings of fact made in a perverse or

capricious manner or without regard to the material before it. Specifically, she argued that the General Division erred when it stated, in paragraph 37 of the decision, that the Appellant's claim that her inability to find employment after her last workplace closed was not reflected in her psychiatrist's report. She pointed to written notes of the psychiatrist that did indicate this. The General Division decision summarized the evidence that was presented. It stated that the psychiatrist's notes were illegible. The General Division may not have considered this evidence. This argument points to a ground of appeal that may have a reasonable chance of success on appeal.

[7] Next the Applicant argued that the General Division decision erred when it stated that although she requested complete translation of the hearing, her work history indicated that she could communicate well enough in English to work. She contended that this finding of fact did not consider that all of the Applicant's work experience in Canada was in jobs that were repetitive and did not require communication skills. This ground of appeal may also have a reasonable chance of success as it suggests that the General Division may have based its decision, in part, on an erroneous finding of fact regarding her ability to communicate in English that was made in a perverse or capricious manner or without regard to all of the material that was before it.

[8] In addition, the Applicant contended that her ability to function was not predictable. As a result, she suggested that the General Division decision contained an error of mixed fact and law as it did not consider or address how her functional limitations would preclude employment. I am not satisfied that this ground of appeal may have a reasonable chance of success on appeal. The decision summarized the oral and written evidence before it. This included the Applicant's testimony regarding her functional limitations and their effect on her. It is not for the Appeal Division of the Tribunal, when deciding whether to grant leave to appeal, to reweigh the evidence to perhaps reach a different conclusion than did the General Division.

[9] Further, the Applicant argued that the General Division erred as the decision in *Villani v. Canada (Attorney General)*, 2001 FCA 248 does not require that the decision maker simply determine if a disability pension claimant can speak English, but requires it to assess her

language abilities along with her other personal characteristics to determine if she is disabled in a real world context. Similarly, the Applicant argued that the General Division erred as it stated that at age 58 she would still have a few years of employability, and it should have assessed her age as a component of her personal characteristics as part of the real world analysis. Again with these arguments, the Applicant asks the Appeal Division of the Tribunal to reweigh the evidence that was presented to the General Division to reach a different conclusion. These grounds of appeal do not have a reasonable chance of success on appeal.

CONCLUSION

[10] Leave to appeal to the Appeal Division is granted as the Applicant has presented grounds of appeal that fall within section 58 of the Act and that may have a reasonable chance of success on appeal.

[11] 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.