Citation: ***C. L. v. Minister of Employment and Social Development,*** **2015 SSTAD 1456**

Date: December 21, 2015

File number: AD-15-1295

APPEAL DIVISION

Between:

C. L.

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 was disabled as a result of physical injuries that caused ongoing back and ankle pain, hypertension, diabetes, mental illness, cognitive deficits and other conditions when 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 Office of the Commissioner of Review Tribunals. The appeal was transferred to the General Division of the Social Security Tribunal of Canada pursuant to the *Jobs, Growth and Long-term Prosperity Act* in April 2013. The General Division held a videoconference hearing and on August 29, 2015 dismissed the appeal.

[2] The Applicant requested leave to appeal the General Division decision to the Appeal Division of the Tribunal. She argued that the General Division breached the principles of natural justice, exceeded its jurisdiction and erred in law and in fact such that the General Division decision should not stand.

[3] The Respondent filed no submissions regarding the request for leave to appeal to the Appeal Division.

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 (the section is reproduced in the Appendix to this decision).

[6] The Applicant presented a number of grounds of appeal and argued that each one had a reasonable chance of success on appeal. First, she contended that the General Division erred as it did observe the principles of natural justice. The Applicant had been referred to a neurosurgeon, but had not attended with this doctor prior to the General Division hearing. In its decision, the General Division stated that without a report from the neurosurgeon it did not have this specialist's opinion regarding her work capacity, and did not have any diagnosis, treatment recommendations or prognostic statement. The General Division decided that without this it was unable to assess critical matters such as treatment undertaken, medication trials, recommendations that would have been made, compliance with those recommendations and benefits, if any, from the treatment. The Applicant argued that if the General Division was to rely so heavily on the neurosurgeon's report, it should have adjourned the hearing so that this evidence could have been presented and considered. Not doing so breached the principles of natural justice as it prevented the Applicant from presenting evidence that the General Division deemed to be necessary and relevant.

[7] The Applicant bears the burden of proof in this matter; that is, she must prove that it was more likely than not that she was disabled at the relevant time. It was her obligation to present evidence to the General Division to assist her in her claim. The General Division did not have an obligation to seek out evidence, or to assist the Applicant to find evidence that supported her claim. The Applicant did not suggest that she had requested that the hearing in this matter be adjourned so that she could obtain and present further medical evidence that may have supported her claim. The General Division took no active steps to prevent her from obtaining or presenting evidence from the neurosurgeon or any other person. However, it appears that the General Division may have based its decision on erroneous findings because of the absence of this evidence. This argument points to an error made by the General Division that may be within section 58 of the Act and that may have a reasonable chance of success on appeal.

[8] Similarly, the Applicant suggested 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 when it stated that treatment options may be available to the Applicant after the neurosurgical consultation. She submitted that there was no evidentiary basis for this

conclusion. Without any report from this doctor, there could not have been any such evidence. This ground of appeal points to what may have been an erroneous finding of fact made by the General Division, and it may have a reasonable chance of success on appeal.

[9] The Applicant also submitted that the General Division exceeded its jurisdiction by assuming, with no evidentiary basis, that pursuing further medical treatment for her physical and psychological conditions would have improved them. The decision sets out treatment recommendations that were made to the Applicant, and her compliance with them. It did not conclude that her condition would have improved if she had accessed further treatment. This ground of appeal does not have a reasonable chance of success on appeal.

[10] In addition, the Applicant argued that the General Division erred as it did not assess whether her disability was severe and prolonged under the *Canada Pension Plan* in spite of its conclusion that she did not adequately pursue treatment. The General Division decision stated that it had considered all of the evidence and concluded that the Applicant did not suffer from a severe or prolonged disability. This ground of appeal does not have a reasonable chance of success on appeal.

[11] The Applicant also presented grounds of appeal related to her cognitive deficits. First, she contended that the General Division decision contained an error in law as it did not consider her learning difficulties and her lack of computer literacy in making its decision. She relied on the Federal Court of Appeal decision in *Villani v. Canada (Attorney General)*, 2001 FCA 248 to support her argument that this should have been considered as part of the "real world approach" that is to be applied to disability pension claims. It is clear that it is an error of law not to assess a disability pension claim without considering this "real world approach" (see *Garrett v. Canada (Minister of Human Resources Development)*, 2005 FCA 84). The Applicant contended that her cognitive deficits impeded her ability to search for an obtain work that was not physically demanding, and her ability to seek out and follow various treatment recommendations. The General Division decision noted that the Applicant did not have transferrable skills and that she was able to complete tasks in her last job as a cleaner/veterinary receptionist, as well as additional duties assisting with surgery and x-rays. The General Division concluded that the Applicant had capacity to complete sedentary work. It is not clear, however,

whether the General Division considered what, if any, sedentary work the Applicant was capable of completing in light of her age, work experience, and cognitive limitations. The decision did not comment on whether the Applicant would be able to retrain for such a position. The decision also did not analyse the impact of the Applicant's cognitive limitations on her ability to access and follow treatment recommendations. I am persuaded that this ground of appeal points to an error of law that may have a reasonable chance of success on appeal.

[12] The Applicant, further, contended that the General Division based its decision on an erroneous finding of fact that she failed to follow treatment advice with respect to her medical conditions. She contended that there was evidence that she followed this advice. The General Division decision summarized the evidence regarding all treatment recommendations that were made and the Applicant's compliance with them. The basis for its conclusion that she had not fully complied was set out. I am not persuaded that this ground of appeal has a reasonable chance of success on appeal.

[13] The Applicant also submitted that the General Division erred in stating that she should have followed the recommendations of Dr. Chandler that were set out in his report to her family doctor. She contended that it was outside of Dr. Chandler's expertise to make recommendations regarding a back injury, and in addition, the Applicant was not referred to any of the specialists mentioned in this letter. Without any such referral, the Applicant could not reasonably have been expected to seek out such treatment. This ground of appeal suggests that the General Division may have based its decision, in part at least, on findings of fact made in a perverse or capricious manner or without regard to the material that was before it. This ground of appeal may have a reasonable chance of success on appeal.

[14] Finally, the Applicant argued that leave to appeal should be granted as the General Division decision was based on an erroneous finding of fact that she failed to make efforts to find suitable employment after her most recent employment ended. She contended that there was evidence of her efforts to find other work. The General Division decision does not refer to this evidence. It is not necessary for a decision to refer to each and every piece of evidence that is presented (see *Simpson v. Canada (Attorney General)*, 2012 FCA 82). However, in this case, as the General Division decided that the Applicant had not taken adequate steps to obtain and

maintain employment within her limitations, the evidentiary basis for this conclusion should be set out. The decision stated that the Applicant did not make efforts to work. If there was evidence of work attempts, this ground of appeal has a reasonable chance of success. Leave to appeal is granted on this basis. I would expect the Applicant to provide a copy of a transcription of the relevant portions of the General Division hearing, or to point to the time marker on the recording of the hearing that supports her argument in this regard as part of her submissions on the merits of this appeal.

CONCLUSION

[15] The Application for leave to appeal is granted as the Applicant has presented grounds of appeal that are within section 58 of the Act that may have a reasonable chance of success on appeal.

[16] 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.