Citation: ***C. B. v. Minister of Employment and Social Development,*** **2015 SSTAD 1482**

Date: December 31, 2015

File number: AD-15-1315

APPEAL DIVISION

Between:

C. B.

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 pain, a number of physical conditions and mental illness 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 General Division of the Social Security Tribunal. The General Division dismissed the appeal on the basis of the written record.

[2] The Applicant requested leave to appeal the General Division decision to the Appeal Division of the Tribunal. She submitted that the General Division erred as it did not conduct an oral hearing in this matter, did not apply the correct legal test of disability, and she disagreed with the how the General Division weighed the evidence before it.

[3] The Respondent filed no submissions with respect to the application requesting 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 (the provision is set out in the Appendix to this decision). Therefore, 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, argued that leave to appeal should be granted because the General Division did not apply the correct test when it decided that the medical evidence did not establish that the Applicant was not disabled. The Applicant did not, however, explain how the incorrect test was applied or what the correct test was that should have been applied. The General Division decision set out the correct definition of disability in the *Canada Pension Plan* and also correctly stated that the Applicant had the burden of proof to establish that she was disabled. On the basis of what was presented I am not satisfied that this ground of appeal may have a reasonable chance of success on appeal.

[7] The Applicant also disagreed with the weight that the General Division gave to the medical evidence that was before it. In particular, she disagreed with how the General Division placed greater weight on reports by medical specialists, without specifically referring to a report written by the Applicant's family physician who had treated her for over 25 years. The General Division is presumed to have considered all of the evidence before it, and need not make reference to each and every piece of evidence that was presented (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). In addition, it is for the trier of fact, the General Division in this case, to make findings of fact. It is not for the Tribunal when deciding whether to grant leave to appeal to reweigh the evidence to reach a different conclusion (*Simpson*). Accordingly, this ground of appeal also does not have a reasonable chance of success on appeal.

[8] Further, the Applicant argued that the General Division erred as it did not provide the Applicant with an oral hearing, and instead decided her appeal based on the written material that was filed. She contended that her main disabling condition was pain, which cannot be empirically measured, and a proper assessment of her subjective evidence on this was necessary.

[9] The *Social Security Tribunal Regulations* provide for what form hearings before the Tribunal may take. Section 21 of the Regulations provides that hearings may be conducted by telephone, videoconference, by personal attendance or on the basis of the written material that was filed. The General Division Member is to make this decision, which is discretionary. The Regulations do not provide for any limits on this discretion.

[10] However, the General Division of the Tribunal must also observe the principles of natural justice. These principles are concerned with ensuring that parties to a disability claim are able to fully present their case, know and respond to the case against them, and to have the decision made by an impartial decision-maker based on the facts and the law. In this case, the Applicant alleged that she was not able to fully present her case as she was not able to present any oral evidence. *In Minister of National Health and Welfare v. Densmore* (1993, CP 2389 Pension Appeals Board), the Court considered a disability claim based on a chronic pain condition. It concluded that this was a condition that could not be assessed objectively, so the claimant's subjective testimony had to be weighed and her credibility assessed in order for the decision to be made. The General Division in this case did not consider that the Applicant's pain was a subjective condition. The decision did not rely on the Applicant's written evidence regarding the impact of her disability on her capacity to function. It did hold an oral hearing. This may have been an error as it points to a breach of the principles of natural justice. This ground of appeal may have a reasonable chance of success on appeal.

[11] In addition, the Supreme Court of Canada dealt with the issues of procedural fairness and natural justice in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. In that case, the Court stated clearly that a decision that affects the rights, privileges or interests of an individual is sufficient to trigger the application of the duty of fairness. The concept of procedural fairness is variable and its content is to be decided in the specific context of each case. A number of factors that may be considered to determine what the duty of fairness requires in a particular case. They include the nature of the decision being made and the process followed in making it, the nature of the statutory scheme and the terms of the statute in question, the importance of the decision to the individual affected, the legitimate expectations of the person challenging the decision, and the choices of procedure made by the agency itself, particularly when the legislation gives the decision-maker the ability to choose its own procedure. The General Division may not have considered this when it decided this matter on the basis of the written record. This also points to an error regarding the principles of natural justice in this case.

CONCLUSION

[12] The Application is granted because 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.

[13] 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.