Citation: ***J. M. v. Minister of Employment and Social Development,*** **2015 SSTAD 1476**

Date: December 29, 2015

File number: AD-15-1245

APPEAL DIVISION

Between:

J. 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 he was disabled by anxiety disorder when he applied for a *Canada Pension Plan* disability pension. The Respondent denied his 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 videoconference hearing and on August 6, 2015 dismissed his appeal.

[2] The Applicant requested leave to appeal the General Division decision to the Appeal Division of the Tribunal. He contended that the General Division decision contained errors of law and based its decision on errors of fact made in a perverse or capricious manner or without regard to the material before it.

[3] The Respondent did not file any submissions regarding the application 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). 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 argued that the General Division decision contained two errors of law such that leave to appeal should be granted. First in this regard, he argued that the General

Division erred in law as it failed to take into account his subjective testimony regarding his mental illness and its effect on his capacity to work in the absence of medical evidence on this that was dated near or after his return to part time work in 2014. The General Division decision summarized all of the evidence presented to it including the medical reports and the testimony. It considered this evidence in reaching its decision. Therefore this is not a ground of appeal that may have a reasonable chance of success on appeal.

[7] Also, the Applicant argued that the General Division did not apply the "real world" principles set out in *Villani v. Canada (Attorney General),* 2001 FCA 248 to the facts before it, which was an error in law. He submitted that his education and training was obtained prior to the onset of the anxiety disorder, and that his capacity to work should be considered in light of his personal circumstances at the current time.

[8] The Applicant correctly stated that it is not enough to set out the legal principles stated in *Villani*, but that they must be applied to the facts of the case at hand. It is also correct that the Applicant's personal circumstances are to be considered. The General Division did not err in considering the Applicant's education and work history. This ground of appeal does not have a reasonable chance of success on appeal.

[9] The Applicant also submitted that the General Division decision was based on four errors of fact made in a perverse or capricious manner or without regard to the material before it. First in this regard the Applicant suggested that the General Division the General Division based its decision on an erroneous finding of fact that he would be able to work for 20 hours per week throughout the year. The evidence presented to the General Division, as contended in the application for leave to appeal and summarized in the decision, was that the Applicant worked shifts of 3-5 hours five days per week in a university cafeteria. These hours were reduced during the summer when the university was not in session. The Applicant also did not always stay for longer shifts or overtime when it was offered to him. The decision then "calculated" the amount of income that the Applicant could be expected to earn if he worked 20 hours each week as assumed, and found that this would be substantially gainful. The finding of fact that the Applicant was capable of working 20 hours each week throughout the

year may have been made in a perverse manner or without regard to all of the material that was before the General Division.

[10] In addition, the General Division relied on the *Canada Pension Plan Regulations* which provide a mathematical calculation for what is to be considered a substantially gainful occupation. This provision in the Regulations was not binding on the General Division as the Respondent's decision to deny the claim was made prior to its proclamation. The General Division decision acknowledged this. However, it did not analyse other considerations set out in court decisions (see *Atkinson v. Canada (Attorney General)*, 2014 FCA 187) when determining if the Applicant was capable of pursuing a substantially gainful occupation. This may be an error of law, and therefore this ground of appeal may have a reasonable chance of success on appeal.

[11] The Applicant submitted, further, that the General Division erred as it did not give much weight to medical evidence that stated that his disability was severe and prolonged. With this argument, he essentially asks this Tribunal to reevaluate and reweigh the evidence that was put before the General Division. This is the province of the trier of fact. The tribunal deciding whether to grant leave to appeal ought not to substitute its view of the persuasive value of the evidence for that of the General Division who made the findings of fact – *Simpson v. Canada (Attorney General)*, 2012 FCA 82. Therefore, I find that this argument is not a ground of appeal that may have a reasonable chance of success on appeal.

[12] Finally, the Applicant argued that the General Division erred when it stated that the Applicant had not made an effort to find work other than that in which he was engaged in 2014. He repeated his evidence presented to the General Division that he could not do so because he found interviews anxiety-provoking, etc. This evidence was considered by the General Division. Again, 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. This ground of appeal does not have a reasonable chance of success on appeal.

CONCLUSION

[13] The Application is granted as the Applicant presented a ground of appeal that may have a reasonable chance of success on appeal.

[14] 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.