Social Security Tribunal of Canada
Tribunal de la sécurité sociale du Canada

Citation: *L. M. v. Minister of Employment and Social Development*, 2018 SST 292

Tribunal File Number: AD-18-171

BETWEEN:

L. N.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Valerie Hazlett Parker

Date of Decision: March 28, 2018

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] L. N. (Claimant) obtained a Master's Degree in Business Administration and last worked as a real estate portfolio manager. She was injured in a car accident in December 2012, which resulted in physical and emotional limitations. The Claimant applied for a Canada Pension Plan disability pension and claimed that she was disabled by these injuries. The Minister of Employment and Social Development refused the application. The Claimant appealed this decision to the Social Security Tribunal. The Tribunal's General Division dismissed the appeal. Leave to appeal this decision to the Tribunal's Appeal Division is dismissed because there is no reasonable chance that the appeal will succeed.

ISSUES

[3] Is there a reasonable chance that the appeal might succeed based on the following grounds?

a) the General Division failed to consider an additional neurological opinion;

b) the General Division "chastised" the Claimant for not taking medical marijuana; or

c) the General Division erred in its consideration of the Claimant's attempts to obtain alternate employment.

ANALYSIS

[4] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It provides only three grounds of appeal that can be considered, namely that the General Division failed to observe a principle of natural justice or made a jurisdictional error; made an error in law; or based its decision on an erroneous finding of fact made in a

perverse or capricious manner or without regard for the material before it.[1] In addition, leave to appeal is to be refused if the appeal has no reasonable chance of success.[2]

[5] The Claimant submits that the General Division erred because it based its decision on erroneous findings of fact. To succeed on appeal on this basis she must establish three things: that the findings of fact were erroneous; that they were made perversely, capriciously, or without regard for the material before the General Division; and that the decision was based on one of these findings of fact.

Issue 1: Did the General Division fail to consider an additional medical opinion?

[6] The Claimant submits that she has obtained an opinion from a neurosurgeon who reviewed radiology reports and confirmed that there is a neurological component to her injury. The General Division decision summarized all the medical evidence before it. There was no evidence of a neurological aspect to the Claimant's condition. The decision does note, however, that the Claimant had attended a private clinic for a further opinion.

[7] The Federal Court of Appeal teaches that new evidence is generally not permitted on an appeal under the DESD Act.[3] Therefore, because this additional medical opinion—which found a neurological component to the injury—was not before the General Division, it cannot be considered when deciding whether to grant leave to appeal.

[8] Further, if this information was not before the General Division, the General Division did not err by not considering it.

[9] The appeal has no reasonable chance of success on this basis.

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[1] Subsection 58(1) of the DESD Act
[2] Subsection 58(2) of the DESD Act
[3] *Canada (Attorney General) v. O'Keefe*, 2016 FC 503

Issue 2: Did the General Division "chastise" the Claimant for not using medical marijuana?

[10] Dr. Hershler recommended that the Claimant use a topical marijuana oil for her pain.[4] The decision recites this recommendation, but makes no further comment on it. The finding of fact that a doctor recommended that the Claimant use marijuana oil is not erroneous; there is a clear evidentiary basis for it. The decision was not based on this finding of fact. Therefore, this ground of appeal does not point to an error made by the General Division.

Issue 3: Did the General Division err in its consideration of the Claimant's attempts to find alternate employment?

[11] The Federal Court of Appeal teaches that where there is evidence of work capacity, a disability pension claimant must demonstrate that they could not obtain or maintain employment because of their health condition.[5] This is set out in the General Division decision.[6] The General Division considered the Claimant's attempts to return to work, including exploring a franchise opportunity, running for city council, work on some municipal committees, and considering a job opportunity prior to the car accident. The General Division concluded that these attempts were all taxing positions, and that the Claimant had not attempted to obtain or maintain work within her limitations.[7] These findings of fact were not erroneous. The evidence before the General Division established that the Claimant had physical limitations.[8] She also has limitations with computer use.[9] These would preclude her success at the jobs attempted. Therefore, the appeal has no reasonable chance of success based on this argument.

[12] I have reviewed the General Division decision and the written record. I am satisfied that the General Division did not overlook or misconstrue any important information. It also made no error in law, and there is no suggestion that it failed to observe the principles of natural justice.

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[4] Report of November 2014, summarized in paragraph 23 of the decision
[5] *Inclima v. Canada (Attorney General)*, 2003 FCA 117
[6] Paragraph 41of the General Division decision
[7] Paragraphs 43 and 44 of the General Division decision
[8] Paragraph 6 of the General Division decision
[9] Paragraph 11 of the General Division decision

CONCLUSION

[13] Leave to appeal is refused.

Valerie Hazlett Parker
Member, Appeal Division

REPRESENTATIVES:	L. N., Self-represented