

Citation: *V. E. v. Minister of Employment and Social Development*, 2015 SSTAD 642

Date: May 25, 2015

File number: AD-15-259

APPEAL DIVISION

Between:

V. E.

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 applied for a *Canada Pension Plan* disability pension. She claimed that she was disabled by physical injuries suffered in an automobile accident, migraines and left arm neuropathy. The Respondent denied her claim initially and after reconsideration. The Applicant appealed to the Office of the Commissioner of Review Tribunals. The appeal was transferred to the General Division of the Social Security Tribunal on April 1, 2013 pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division held an in person hearing on March 9, 2015 and dismissed the appeal.

[2] The Applicant sought leave to appeal to the Appeal Division of the Social Security Tribunal. She argued that leave to appeal should be granted on a number of grounds, including that the General Division erred in law when it made adverse findings against the Applicant for rejecting surgery and medication to assist in the treatment of her condition and required the Applicant to undergo these treatments, that it failed to give appropriate weight to some evidence, and that it acted beyond its jurisdiction when it concluded that the Applicant should have sought out community resources without having any evidence that these were available.

[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 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 may be

considered to grant leave to appeal a decision of the General Division (see the Appendix to this decision). I must therefore decide if the Applicant has presented a ground of appeal under the Act that has a reasonable chance of success on appeal.

[6] The Applicant argued, first, that the General Division erred in law. She submitted that it did so by failing to give appropriate weight to evidence that supported her inability to maintain gainful employment. The General Division decision contained a summary of the evidence that was before it. It referred to various vocational and functional ability assessments and their conclusions. It does not appear that there was any direct evidence that the Applicant made any attempts to work. The General Division is the trier of fact. As such, it is to receive evidence from the parties, weigh it and reach a decision based on the evidence. With this argument, the Appellant 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, this argument is not a ground of appeal that has a reasonable chance of success.

[7] The Applicant argued that the General Division also erred in law when it made adverse findings against her regarding her decision not to undergo surgery or take certain medications. The General Division referred to a decision of the Pension Appeals Board (*A.P. v MHRSD* (December 15, 2009) CP 26308) that stated that disability pension claimants have an obligation to aggressively seek treatment and make reasonable and realistic efforts to obtain work within their limitations. The General Division made no error in referring to this decision. The General Division decision did not, however, apply the principles from this decision to the facts before it. This may have been an error as it does not explain how this decision was considered by the General Division in making its decision. This ground of appeal may have a reasonable chance of success.

[8] The Applicant submitted, further, that the General Division decision erred in law when it required her to submit to risky surgery and to take medication that she had decided not to take in order to meet her legal obligations. First, regarding the surgery, the General Division

decision stated that this surgery would not necessarily resolve the Applicant's issues. It did not indicate that the Applicant was obliged to undergo this. Regarding medication, the General Division decision stated that the Applicant's evidence was inconsistent on this point. However, the decision contained no explanation of how this evidence was analyzed or weighed. In *R. v. Sheppard* (2002 SCC 26) the Supreme Court of Canada discussed the purposes for giving reasons for a decision. One purpose is so the parties know why the decision was made. With no explanation of how this evidence was considered, the General Division reasons do not fulfill this purpose. This is an error upon which leave to appeal is granted.

[9] Finally, the Applicant asserted that the General Division exceeded its jurisdiction when it stated that the Applicant should have accessed community resources for treatment without any evidence that these were available or had been offered to her by a treating practitioner. The General Division decision does not contain any reference to any evidence of any community based resources that were or could have been made available to the Applicant. It may therefore have exceeded its jurisdiction by indicating that the Applicant should have accessed these. This ground of appeal also may have a reasonable chance of success on appeal.

CONCLUSION

[10] The Application is granted as the Applicant has presented grounds of appeal 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.