

Citation: *G. S. v. Minister of Employment and Social Development*, 2015 SSTAD 1331

Date: November 16, 2015

File number: AD-15-1194

APPEAL DIVISION

Between:

G. S.

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 chronic back pain, depression, insomnia and other conditions 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 Office of the Commissioner of Review Tribunals. The appeal was transferred to the General Division of the Social Security Tribunal pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division held an in person hearing and on August 6, 2015 dismissed the appeal, concluding that the Applicant's disability was severe but not prolonged.

[2] The Applicant sought leave to appeal to the Appeal Division of the Tribunal. He argued that the General Division erred in fact and in law in the decision.

[3] The Respondent filed no submissions with respect to 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 may be considered to grant leave to appeal a decision of the General Division (this is reproduced in 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 presented a number of arguments which he suggested demonstrated that the General Division erred in its reasoning when it concluded that the Applicant's disability was not prolonged. Specifically, he argued that:

- a) the General Division erred when it decided that his disability was not prolonged even though it decided that the severe disability was long standing and of indefinite duration. The decision did not reach this conclusion specifically, although it did set out that the Applicant had been suffering from pain for over four years;
- b) the General Division appeared to have concluded that because the Applicant had upcoming medical appointments his disability was not prolonged. He argued that the General Division found that the Applicant had been compliant with treatment. So, the fact that further appointments were scheduled should not prevent a finding of a prolonged disability in this case. This was especially so as there was no evidence that these appointments would lead to treatment that would definitely improve his condition and two doctors wrote that they were uncertain how to resolve or explain the Applicant's back pain. In addition I note that the Applicant had previously attended at a pain clinic and consulted with a neurosurgeon. Two of the pending appointments were for further such consultations; and
- c) the General Division decision contained an error of fact as on the facts found in the decision the General Division should have concluded that the disability was prolonged.

[7] In *R. v. Sheppard*, 2002 SCC 26 the Supreme Court of Canada set out the purposes for written reasons. This includes ensuring that the parties know what decision was reached and why it was reached. In light of the arguments above it may not be clear why the General Division decided that the Applicant's disability was not prolonged. Therefore, these grounds of appeal may have a reasonable chance of success on appeal.

[8] The Applicant also argued that the General Division erred in law with respect to the burden of proof in this case. He suggested that the Respondent bore the burden of demonstrating that the further consultations and treatment that were pending would improve the Applicant's condition. With respect, this is not a correct statement. It is the Applicant who bears

the burden of proof in this matter – to demonstrate that he suffered from a severe and prolonged disability at the relevant time. The General Division made no error in this regard. This ground of appeal does not have a reasonable chance of success on appeal.

[9] The Applicant also contended that the General Division erred when it relied on the Federal Court of Appeal decision in *Kambo v. Minister of Human Resources Development*, 2005 FCA 353. However, he agreed with the legal principle that the General Division stated that this decision stood for. On that basis, I can find no error made by the General Division. Leave to appeal is not granted on this basis.

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.