



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

**Citation: *N. I. v. Minister of Employment and Social Development*, 2016 SSTADIS 30**

**Date: January 15, 2016**

**File number: AD-16-107**

**APPEAL DIVISION**

**Between:**

**N. I.**

**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 hearing loss, physical limitations regarding his shoulders, arms and hands and ongoing pain. He applied for a *Canada Pension Plan* disability pension. The Respondent denied his application 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 a videoconference hearing and on September 21, 2015 dismissed the 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 based its decision on erroneous findings of fact made in a perverse or capricious manner or without regard to the material before it, and that it erred in law.

[3] The Respondent filed no submissions regarding the application for leave to appeal.

### ANALYSIS

[4] 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). I must therefore 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] First, the Applicant argued that leave to appeal should be granted because the General Division relied on the medical evidence regarding his conditions over his testimony when it decided that his disability was not severe. In particular, he contended that pain is a subjective condition and may be experienced disproportionately to what is revealed by diagnostic testing, and that it is not the diagnosis, but the effect of a disabling condition that is to be considered when deciding if a claimant suffers from a severe and prolonged disability.

[7] The Applicant correctly set out the relevant legal principles in this regard. However, with this ground of appeal 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 and not of an appeal body (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). The Federal Court stated clearly in *Misek v. Canada (Attorney General)*, 2012 FC 890, that it is not for the Member deciding whether to grant leave to appeal to reweigh the evidence or explore the merits of the General Division decision. This ground of appeal does not have a reasonable chance of success on appeal.

[8] The Applicant also argued that the General Division erred when it concluded that socio-economic factors are not a relevant consideration as he could not take on some jobs because they were beyond his physical limitations. The General Division correctly stated that socio-economic factors, such as the availability of work, is not a relevant consideration in a *Canada Pension Plan* disability pension claim. This argument is not a ground of appeal that falls within section 58 of the Act.

[9] Finally, the Applicant contended that the General Division erred in law as it did not consider if the Applicant's part-time employment was a substantially gainful occupation. Counsel for the Applicant relied on the Adjudicative Framework published by the Department of Employment and Social Development which states that some claimants can work and still be found to be incapable of pursuing a substantially gainful occupation. She also relied on decisions of the Pension Appeals Board that concluded that certain working situations were not a substantially gainful occupation in particular cases.

[10] Again, counsel for the Applicant correctly summarized the law, including that in some cases a disability pension claimant may be disabled despite working, if that work is not

substantially gainful. The General Division decision did not consider if the Applicant's work, part time as a janitor, was substantially gainful. This may have been an error in law. As such, this ground of appeal may have a reasonable chance of success on appeal.

## **CONCLUSION**

[11] Leave to appeal is granted as the Applicant has put forward a ground of appeal that falls under section 58 of the Act and that may have a reasonable chance of success on appeal.

[12] 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.