



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. J. v. Minister of Employment and Social Development*, 2016 SSTADIS 60

Tribunal File Number: AD-15-1645

BETWEEN:

K. J.

Appellant

and

**Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills
Development)**

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: January 27, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant claimed that she was disabled as a result of a fall at work, consequent ankle/foot surgery, ongoing pain and limitations that resulted from this. She applied for a *Canada Pension Plan* disability pension. The Respondent denied her 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 September 21, 2015 dismissed the appeal.

[2] The Applicant requested leave to appeal the General Division decision to the Appeal Division of the Tribunal. She argued that the General Division based its decision on erroneous findings of fact made in a perverse manner or without regard to the material before it, and that this also resulted in an error in law.

[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 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).

Hence, 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] First, the Applicant argued that leave to appeal should be granted because the General Division made an erroneous finding of fact when it concluded that her refusal to undergo a second foot surgery was unreasonable. She contended that the doctors could not offer any likelihood of success for the surgery, and did not consider the Applicant's legitimate concerns about undergoing further surgery. The General Division decision summarized the evidence that was before it in this regard, including that Dr. Mussett could not provide any guarantee of success with the surgery and the Applicant's concerns regarding its outcome. This was considered by the General Division as it reached its decision. I am not satisfied that it made any error in so doing. This ground of appeal does not have a reasonable chance of success on appeal.

[7] The Applicant also argued that the General Division erred as it found as fact that she would be able to work in a sedentary position after this surgery. She submitted that this may not be the case, and that in effect the decision required that she undergo surgery in order to obtain the disability pension. She also contended that this finding of fact resulted in an error of law. I accept, as reported in the General Division decision, that the goal of the additional surgery was to permit the Applicant to engage in some form of work although that was not guaranteed. I am satisfied that this ground of appeal points to an error in the decision. This is a ground of appeal that may have a reasonable chance of success on appeal.

CONCLUSION

[8] The Application is granted for the reasons set out above.

[9] 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.