



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. H. v. Minister of Employment and Social Development*, 2016 SSTADIS 51

Tribunal File Number: AD-16-135

BETWEEN:

M. H.

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

REVISED DECISION February 12, 2016

DATE OF DECISION: January 22, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant claimed that she was disabled as a result of significant physical injuries and mental illness that resulted from a motorcycle accident. She applied for a *Canada Pension Plan* disability pension. The Respondent denied her claim initially and upon reconsideration. The Applicant appealed the reconsideration decision to the General Division of the Social Security Tribunal. The General Division held an in-person hearing and on October 9, 2015 dismissed the appeal.

[2] The Applicant sought leave to appeal the General Division decision to the Appeal Division of the Tribunal. She claimed that the General Division erred in law, erred in fact, and based its decision on erroneous findings of fact made without regard to the material before it.

[3] The Respondent filed no submissions regarding the request 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 can be considered to grant leave to appeal a decision of the General Division (the section is set out in the Appendix to this decision). Accordingly I must decide if the Applicant has presented a ground of appeal that is 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 decision contained an error in law when it equated the Applicant's ability to attend a

part-time schooling program with capacity regularly of pursuing any substantially gainful occupation. She further stated that she was enrolled in a program that was to be completed in approximately twelve to sixteen months, but that she hoped to complete it within four years. The Applicant argued that the General Division failed to consider this fact, which helped to demonstrate that she did not have capacity to work. The General Division decision contained a summary of the Applicant's academic achievements. Regarding the retraining program, it found that the Applicant's faithful taking of this course for many years demonstrated her ability to perform activities at a sedentary level. In some circumstances, the ability to perform retraining tasks can demonstrate some capacity to work. This ground of appeal ~~may~~ does not have a reasonable chance of success on appeal.

[7] The Applicant also disagreed with the General Division conclusion that her inability to obtain a job after the accident was a result of market conditions rather than her disability. The decision did not set out the evidentiary basis for this finding of fact. I am satisfied that this ground of appeal points to an erroneous finding of fact that may have been made in a perverse or capricious manner or without regard to the material that was before it. This ground of appeal may have a reasonable chance of success on appeal.

[8] Further, the Applicant submitted that the General Division erred in fact and in law when it concluded that there was no evidence that her efforts at obtaining and maintaining employment were unsuccessful because of her health. She pointed to the evidence, also referred to in the General Division decision, that the Applicant took on a part-time position at a bank but left it due to an increase in symptoms. After reviewing the decision, I am satisfied that this ground of appeal may have a reasonable chance of success as it points to an error that may have been made within the meaning of section 58 of the Act and that may have a reasonable chance of success on appeal.

[9] The Applicant also argued that the General Division decision contained errors as it reached conclusions based on conjecture. Specifically, she contended that it was conjecture to comment on her ability to work after completing the retraining program in the future, to state that she would have continued to work at her pre-accident employment if she had not been terminated, and that it was reasonable to expect her mental health to continue to improve with

further therapy. I am satisfied that these grounds of appeal also point to findings of fact that may have been made without regard to all of the evidence. They have a reasonable chance of success on appeal.

[10] Finally, a review of the General Division decision reveals an error in law with respect to the Minimum Qualifying Period (the date by which a claimant must be found to be disabled in order to receive the disability pension). In paragraph 6 of the decision, it states that the Minimum Qualifying Period is December 31, 2011. In paragraph 62 of the decision it refers to the Minimum Qualifying Period as December 2010 or the end of June 2011 with proration. This is an error in law, and leave to appeal must be granted on this basis.

CONCLUSION

[11] Leave to appeal is granted for the reasons set out above.

[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.