



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. P. v Minister of Employment and Social Development*, 2019 SST 1474

Tribunal File Number: AD-19-869

BETWEEN:

K. P.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Valerie Hazlett Parker

Date of Decision: December 30, 2019

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] K. P. worked for many years as a utility worker. He stopped working in 2012 due to limitations from a left knee injury. The Claimant applied for a Canada Pension Plan disability pension and claimed that he was disabled by this condition.

[3] The Minister of Employment and Social Development refused the application because it decided that the Claimant's disability was not severe. The Claimant appealed this decision to the Tribunal. The Tribunal's General Division dismissed the appeal. It also decided that the Claimant's disability was not severe.

[4] Leave to appeal the General Division decision to the Tribunal's Appeal Division is refused because the appeal does not have a reasonable chance of success on the basis that it failed to consider that the Claimant's prior job was still available to him.

GROUND OF APPEAL

[5] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It provides rules for appeals to the Appeal Division. An appeal is not a re-hearing of the original claim. Instead, I must decide whether the General Division:

- a) failed to provide a fair process;
- b) failed to decide an issue that it should have, or decided an issue that it should not have;
- c) made an error in law; or
- d) based its decision on an important factual error.¹

[6] However, before I can decide an appeal, I must decide whether to grant leave

¹ This paraphrases the grounds of appeal set out in s. 58(1) of the DESD Act

(permission) to appeal. The DESD Act says that leave to appeal must be refused if the appeal does not have a reasonable chance of success.² Therefore, to be granted leave to appeal the Claimant must present at least one ground of appeal (reason for appealing) that falls under the DESD Act and on which the appeal has a reasonable chance of success.

ISSUE

[7] Does the appeal have a reasonable chance of success because the General Division made an error when it failed to consider that the Claimant's prior job was still available to him?

ANALYSIS

[8] The General Division decision states that it had to decide that since the Claimant was unable to return to his physically demanding previous employment, whether he was regularly able to pursue alternative work.³ The General Division then considered the oral and written evidence, and decided that the Claimant had not met his legal obligation to demonstrate that he was unable to obtain and maintain employment because of his health condition.⁴

[9] The Claimant argues that the General Division made an error because it failed to consider that his last job was still available to him if he was able to return to it. Such a failure would be an error in law.

[10] However, the appeal does not have a reasonable chance of success on this basis. The Federal Court of Appeal teaches that where there is evidence of work capacity a disability pension claimant must demonstrate that they were unable to obtain and maintain employment because of their health condition.⁵ The General Division decided that although the Claimant could not do the physically demanding duties that he had done before, he had capacity for lighter work. The Claimant made no efforts to return to any employment.⁶ The General Division was aware that the Claimant could have returned to his prior employment, and considered this when it decided that he was not able to do so. It decided that the Claimant had not met his legal

² DESD Act s 58(2)

³ General Division decision at para. 15

⁴ *Inclima v. Canada (Attorney General)*, 2003 FCA 117

⁵ *Ibid.*

⁶ General Division decision at para. 17

obligation to demonstrate that he could not obtain and maintain employment within his limitations because of his health condition.

[11] The appeal does not have a reasonable chance of success on the basis that the General Division failed to consider that his last job was still available for the Claimant.

CONCLUSION

[12] Leave to appeal is therefore refused.

Valerie Hazlett Parker
Member, Appeal Division

REPRESENTATIVE:	K. P., Self-represented
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