



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *V. E. v. Minister of Employment and Social Development*, 2016 SSTADIS 270

Tribunal File Number: AD-16-424

BETWEEN:

**V. E.**

Applicant

and

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

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**

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**On Leave to Appeal  
Appeal Division**

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DECISION BY: Neil Nawaz

DATE OF DECISION: July 14, 2016

## **REASONS AND DECISION**

### **DECISION**

Leave to appeal is refused.

### **INTRODUCTION**

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal (Tribunal) dated December 21, 2015. The GD conducted a hearing by teleconference on December 10, 2015 and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan* (CPP), as it found that his disability was not “severe” prior to the minimum qualifying period (MQP) of December 31, 2011.

[2] On March 11, 2016, within the specified time limitation, the Applicant submitted to the Appeal Division (AD) an Application Requesting Leave to Appeal detailing alleged grounds for appeal.

[3] For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

### **OVERVIEW**

[4] The Applicant was born in July 1951 and has a long work history, with more than 25 years of valid earnings and contributions under the CPP. The hearing file indicates that he began receiving early CPP retirement benefits as of January 2012. In his application for the CPP disability pension dated March 18, 2013, he claimed to be disabled from work as a result of degenerative disc disease. He indicated that he was working as a carpet and flooring installer until June 8, 2012, when he was laid off.

[5] In its initial denial letter dated June 26, 2013, the Respondent advised the Applicant that he did not qualify for a disability pension because it had determined there was insufficient evidence that his claimed disability was severe and prolonged as of December 31, 2011.

[6] The Applicant requested a reconsideration on September 17, 2013, but the Respondent again denied the claim in a letter dated January 3, 2014. The Applicant appealed this denial to the GD on February 18, 2014.

[7] In a decision dated December 21, 2015, the GD dismissed the Applicant's appeal, finding that, on a balance of probabilities, he did not suffer from a severe disability, under the definition set out in paragraph 42(2)(a) of the CPP, as of the December 31, 2011 MQP. While acknowledging that the Applicant was subject to some functional impairments, the GD found that his post-MQP work suggested that his disability did not meet the disability threshold. The GD also determined that subsection 66.1(1.1) of the CPP and subsection 46.2(2) of the *Canada Pension Plan Regulations* did not allow cancellation of a retirement pension in favour of a disability pension if the date of onset was prior to the month the retirement pension commenced.

## **THE LAW**

[8] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

- (a) Be under 65 years of age;
- (b) Not be in receipt of the CPP retirement pension;
- (c) Be disabled; and
- (d) Have made valid contributions to the CPP for not less than the Minimum Qualifying Period (MQP).

[9] The requirement that an applicant not be in receipt of the CPP retirement pension is also set out in subsection 70(3) of the CPP, which states that once a person starts to receive a CPP retirement pension, that person cannot apply or re-apply, at any time, for a disability pension. There is an exception to this provision, and it is found in section 66.1 of the CPP.

[10] Section 66.1 of the CPP and section 46.2 of the CPP Regulations allow a beneficiary to cancel a benefit after it has started if the request to cancel the benefit is made, in writing, within six months after payment of the benefit has started.

[11] If a person does not cancel a benefit within six months after payment of the benefit has started, the only way a retirement pension can be cancelled in favour of a disability benefit is if the person is deemed to be disabled *before* the month the retirement pension first became payable (subsection 66.1(1.1) of the CPP).

[12] Subsection 66.1(1.1) of the CPP must be read with paragraph 42(2)(b) of the CPP, which states that the earliest a person can be deemed to be disabled is fifteen months before the date the disability application is received by the Respondent.

[13] The effect of these provisions is that the CPP does not allow the cancellation of a retirement pension in favor of the disability pension where the disability application is made fifteen months or more after the retirement pension started to be paid.

[14] Subsection 66(4) of the CPP codifies the discretionary powers of the Respondent:

Where the Minister is satisfied that, as a result of erroneous advice or administrative error in the administration of this Act, any person has been denied

(a) a benefit, or portion thereof, to which that person would have been entitled under this Act...

the Minister shall take such remedial action as the Minister considers appropriate to place the person in the position that the person would be in under this Act had the erroneous advice not been given or the administrative error not been made.

[15] Subsection 54(1) of the DESDA makes it clear that the GD can only take an action that should have otherwise been taken by the Minister:

The General Division may dismiss the appeal or confirm, rescind or vary a decision of the Minister or Commission in whole or in part or give the decision that the Minister or Commission should have given.

[16] According to subsections 56(1) and 58(3) of the DESDA, an appeal to the AD may only be brought if leave to appeal is granted and the AD must either grant or refuse leave to appeal.

[17] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the AD is satisfied that the appeal has no reasonable chance of success.

[18] According to subsection 58(1) of the DESDA the only grounds of appeal are the following:

- (a) The GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or
- (c) The GD 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.

[19] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada*.<sup>1</sup> The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada*.<sup>2</sup>

[20] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the Applicant does not have to prove the case.

## **ISSUE**

[21] Does the appeal have a reasonable chance of success?

## **SUBMISSIONS**

[22] In his Application Requesting Leave to Appeal dated March 11, 2016 and in an addendum dated April 6, 2016, the Applicant submits that the GD failed to observe principles of natural justice in rendering its decision.

[23] The Applicant asserts that he has been a contributor to the CPP since the age of 16 and has a strong character and work ethic. He suggests that the GD's decision was unfair because it did not allow him to cancel his early retirement pension in favour of disability benefits. Early in

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<sup>1</sup> *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC)

<sup>2</sup> *Fancy v. Canada (Attorney General)*, 2010 FCA 63

the application process, one of the Respondent's call centre agents told him that his retirement pension would cease and the disability portion would be effective immediately.

[24] He insists the medical record shows that he suffers from chronic lumbar pain as a result of bulging discs and pinched nerves. He notes that degenerative disc disease only gets worse with age. His back could go at any time, leaving him with no control over his bladder or bowels. Immediate surgery would be required. He has "picked up a bit of work" because he had no choice but to earn a living or lose his house and car. He is a risk to himself and others, but he continues to work against his better judgment, with the help of medication.

## **ANALYSIS**

[25] The GD denied the Applicant's appeal largely because it found he was still working as a full-time floorer as of the MQP. I have examined the decision to determine whether it discloses a ground that might be successful on appeal and find no arguable case that the GD breached natural justice or otherwise erred in fact or law. The GD assessed the available evidence and concluded that the Applicant had residual capacity for substantially gainful employment as of December 31, 2011. I see no reasonable chance of success on appeal for any of the grounds raised by the Applicant.

[26] In his Application for Leave to Appeal, the Applicant insisted that he met the legislative criteria for disability and cited evidence of a prolapsed disc and a pinched nerve that cause ongoing back pain and other debilitating symptoms. In doing so, the Applicant appears to be asking the AD to reweigh the evidence and decide in his favour, but I am unable to do so, as my authority permits me to determine only whether any of his reasons for appealing fall within the specified grounds and whether any of them have a reasonable chance of success. While the GD's analysis did not arrive at the conclusion the Applicant would have preferred, it is not my role to reassess the evidence but to determine whether the decision is defensible on the facts and the law. An appeal to the AD is not an opportunity for an applicant to re-argue their case and ask for a different outcome.

[27] It is clear that the Applicant disagrees with the provisions of the CPP that limit the ability of a recipient of an early retirement pension to cancel it in favour of a disability pension.

However, the Tribunal—both the GD and the AD—is bound to apply the law as it is written. Subsection 66.1(1.1) of the CPP says that the cancellation of a retirement pension for a disability pension is possible only where the applicant can be deemed disabled *before* the retirement pension becomes payable. The Applicant has not disputed that the law required him to show that he became disabled prior to December 31, 2011, nor has he ever introduced any evidence to show that that he attempted to cancel his early retirement benefit within the requisite six months.

[28] The Applicant has also suggested that he was given inadequate guidance by a representative of the Respondent when he submitted his application for disability benefits. Even if this is true, neither the GD nor the AD have jurisdiction to provide a remedy. If the Respondent, in its discretion, has not seen fit to take appropriate remedial action, then it is not the Tribunal's role to step in and vary that decision. The Applicant is in effect asking the Tribunal to use its discretion to exercise fairness by converting his retirement pension into a disability benefit or by granting him retroactive disability benefits. Unfortunately, the Tribunal has no such discretion; it can only exercise such jurisdiction as granted by its enabling statute. Support for this position may be found in *Canada (MHRD) v. Tucker*,<sup>3</sup> among many other cases, which have held that an administrative tribunal is not a court but a statutory decision-maker and therefore not empowered to provide any form of equitable relief.

## CONCLUSION

[29] The application for leave to appeal is refused.



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Member, Appeal Division

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<sup>3</sup>*Canada (Minister of Human Resources Development) v. Tucker*, 2003 FCA 278