



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *V. F. v. Minister of Employment and Social Development*, 2016 SSTADIS 288

Tribunal File Number: AD-16-570

BETWEEN:

V. F.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: July 29, 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 dated March 17, 2016. The GD conducted an in-person hearing and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan* (CPP), as it found that her disability was not “severe” prior to the minimum qualifying period (MQP) of December 31, 1997.

[2] On April 15, 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 58 years old when she applied for CPP disability benefits on September 11, 2012. In her application, she disclosed that she was a high school graduate and was last employed in 1997, when she was laid off from a position as a sales clerk. She claimed that severe anxiety and depression prevented her from maintaining any kind of substantially gainful work.

[5] At the hearing before the GD on March 15, 2016, the Applicant testified about her background and work experience. She also described her condition and the ways in which her symptoms limited her ability to function. She reported that she had suffered from depression and anxiety since 1983 and her condition deteriorated after the death of her daughter in 1998.

[6] In its decision of March 17, 2016, the GD dismissed the Applicant's appeal, finding that, on a balance of probabilities, she did not suffer from a severe disability as of the MQP. The GD also found that, while the Applicant was entitled to Division of Unadjusted Pensionable Earnings (DUPE) as of June 2014, the month she applied for a DUPE, attribution of credit splits to her account did not help her advance her MQP. As she had applied for CPP disability benefits in September 2012, the latest date that she could be deemed disabled was June 2011—the same month she married her former husband. The GD found that there was virtually no medical evidence from the period around December 1997 to substantiate the Applicant's claim of disability.

THE LAW

DESDA

[7] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (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.

[8] 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.

[9] 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.

[10] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada*.¹ 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*.²

[11] 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.

CPP

[12] 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).

[13] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[14] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

[15] Under section 55.1 of the CPP, a spouse may apply for a DUPE, which triggers an equitable sharing of CPP credits after a separation or divorce.

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

² *Fancy v. Canada (Attorney General)*, 2010 FCA 63

[16] Subsection 55.2(9) of the CPP relates to when a benefit becomes payable where there is a DUPE:

Where there is a division under section 55.1 and a benefit is or becomes payable under this Act to or in respect of either of the persons subject to the division for a month not later than the month following the month in which the division takes place, the basic amount of the benefit shall be calculated and adjusted in accordance with section 46 and adjusted in accordance with subsection 45(2) but subject to the division, and the adjusted benefit shall be paid effective the month following the month in which the division takes place but in no case shall a benefit that was not payable in the absence of the division be paid in respect of the month in which the division takes place or any prior month.

ISSUE

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

SUBMISSIONS

[18] In her Application Requesting Leave to Appeal, the Applicant submitted that the GD erred in law and based its decision on erroneous findings of fact. She also submitted that:

- (a) She believes she had a severe and prolonged disability from 1983 to the MQP date of December 31, 1997.
- (b) The proof of her disability is contained in Dr. Harricharan's records, which consistently indicate that she was depressed.
- (c) At the hearing, she testified that she was unable to pursue any substantially gainful occupation in the years preceding her MQP date. In 1997, she was only working part-time casual—maybe one or two days at the end of the year.
- (d) Side effects from her antidepressant and anti-anxiety drugs, such as drowsiness and nausea, made it difficult for her to work and lead a normal life. Only in the last six months has she stopped crying. She is still on medications and expects to be on them for the rest of her life.

ANALYSIS

[19] I note that the Applicant apparently accepts the GD's determination that the applicable MQP date was December 31, 1997 and does not question the GD's determination that the June 2014 DUPE did not assist her in advancing her eligibility period for CPP disability. I have reviewed the GD's decision and see no error in fact or law on this issue.

[20] The Applicant alleges that the GD erred in finding that her disability fell short of the severity threshold. She itemized various aspects of her impairments that she claimed demonstrated her incapacity to sustain substantially gainful employment.

[21] I find the Applicant's claimed grounds of appeal to be so broad that they amount to a request to retry the entire claim. The Applicant's submissions on this ground are essentially a recapitulation of evidence and argument already presented to the GD. In essence, she is requesting that I reconsider and reassess the evidence and decide in her favour, but I am unable to do this. My authority permits me to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds of subsection 58(1) and whether any of them have a reasonable chance of success.

[22] The Applicant implied that the GD ignored, or failed to give due weight to, the clinical notes and records of Dr. Harricharan, who was her psychiatrist from 1995 to 2003. It is a well-established principle of law that an administrative tribunal need not refer in its reasons to each and every piece of evidence before it and is presumed to have considered all the evidence.³ As it happens, my review of the GD's decision indicates that the GD was aware of the Applicant's psychiatric history in the 1990s, specifically referring in paragraph 21 to treatment provided by Dr. Harricharan during those years. While Dr. Harricharan may have found the Applicant to be depressed, his diagnosis does not necessarily mean the Applicant's condition was disabling. In this case, it was open to the GD as finder of fact to weigh the available evidence and make an assessment about the severity of the Applicant's psychological condition prior to December 31, 1997.

³ *Simpson v. Canada (AG)*, 2012 F.C.J. No. 334

[23] As an aside, I note that the apparently GD erred in paragraph 1 of its decision, when it stated that the Applicant's CPP disability application was date stamped on March 13, 2013. In fact, it was date-stamped on September 11, 2012, but I do not find this error material to the outcome of the decision. Subsequent passages, such as paragraph 11, indicate that the GD based its calculation of the Applicant's nominal deemed date of disability on the correct date of application.

[24] As the Applicant has not identified any specific errors of fact or law, I am unable to consider granting leave under the claimed grounds of appeal.

CONCLUSION

[25] The Application is refused.



Member, Appeal Division