Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *L. W. v. Minister of Employment and Social Development,* 2016 SSTADIS 339

Tribunal File Number: AD-16-653

BETWEEN:

**L. W.**

Applicant

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

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: August 31, 2016

Canada

## 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 February 9, 2016. The GD had conducted a hearing by videoconference 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, 2014.

[2] On May 9, 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. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

### OVERVIEW

[3] The Applicant was 39 years old when she applied for CPP disability benefits in June 2012. In her application, she disclosed that she held bachelor’s and master’s degrees in computer science and had completed a programming course in advanced SAS programming. She was last employed as a business intelligence system specialist for the Bank of Montreal, a job she left in May 2012 following a diagnosis of lupus.

[4] At the hearing before the GD on January 5, 2016, the Applicant testified that she experienced a number of debilitating symptoms as a result of her condition, including fatigue, headaches, diarrhea, inability to concentrate and abdominal, chest and joint pain. Although she said her condition had improved since she stopped working, her symptoms continued to fare up unpredictably.

[5] In its decision, the GD dismissed the Applicant's appeal, finding that, on a balance of probabilities, she retained work capacity and did not suffer from a severe disability. While the GD acknowledged that the Applicant had lupus, it found that her condition was stable and had responded well to medication, allowing her to pace herself throughout the day. She had not attempted to find work that might better suit her condition, even though she was relatively young and well educated.

**THE LAW**

[6] 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.

[7] 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.

[8] 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.

[9] 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]

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

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

[10] 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**

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

**SUBMISSIONS**

[12] In her application requesting leave to appeal, the Applicant made the following submissions:

(a) In its decision, the GD failed to take note of her serious and chronic health condition and unsuccessful attempts to find work that would accommodate her lupus symptoms. Not only does she experience pain and discomfort, she also struggles with fatigue and diarrhea and has difficulty concentrating. It was unreasonable for the GD to expect that there would no flare-ups if she worked from home, and it did not specify what alternative work she might be capable of doing.

(b) In its reasons, the GD erred and displayed bias in suggesting that Imuran, a lupus medication prescribed by her doctor, is milder than CellCept. While Imuran is safer than CellCept, it should not be regarded as milder or less effective. She is taking Imuran in case she wants to have another child, which is her right. The GD incorrectly implied that she should be taking the more “robust” CellCept, as she was doing egg retrieval.

(c) The GD unfairly overlooked her medical history and limitations. Her lupus is severe and prolonged, and she has been following all medical advice. Her condition did improve, but the GD ignored her testimony about her other medical problems, including her kidney and liver failure, thrombotic thrombocytopenic purpura (TTP) and pulmonary embolism.

(d) The GD erred in referring to Dr. Louise Perlin as “he” on pages 4 and 8 of its decision and in stating that she “would consider adding CellCept” on page 9. The Applicant alleges these errors indicated that the GD was not serious in its approach to her case.

[13] The Applicant also included with her submissions lab results dated April 28, 2016.

## ANALYSIS

### (a) Failure to Take Note of Serious and Chronic Health Condition

[14] The Applicant suggests that the GD dismissed her appeal despite medical evidence indicating that her condition was “severe and prolonged” according to the criteria governing CPP disability. The Applicant also suggests that the GD was unreasonable in anticipating that there would be no flare-ups if she worked from home and in not specifying what alternative work she might be capable of doing.

[15] Outside of these broad allegations, the Applicant has not identified how, in coming to its decision, the GD failed to observe a principle of natural justice, committed an error in law or made an erroneous finding of fact. My review of the decision indicates that the GD analyzed in detail the Applicant’s claimed medical conditions—principally lupus and associated symptoms—and how they affected her capacity to regularly pursue substantially gainful employment as of the MQP ending December 31, 2014. In doing so, the GD took into account the Applicant’s background and her attempts—or lack thereof—to seek alternative employment that would accommodate her impairments. I see nothing in the GD’s analysis to suggest that it expected the Applicant to work from home, nor do I see any indication that it assumed doing so would eliminate flare-ups. Furthermore, in finding that the Applicant was capable regularly of pursuing a substantially gainful occupation, the GD was not obligated to specify the precise nature of that occupation.

[16] While applicants are not required to prove the grounds of appeal at the leave stage, they must set out some rational basis for their submissions that fall into the enumerated grounds of appeal. The AD ought not to have to speculate as to the true basis of the application. It is not sufficient for an applicant to merely state their disagreement with the decision of the GD, nor is

it sufficient for an applicant to express their continued conviction that their health conditions renders them disabled within the meaning of the CPP.

[17] In the absence of a specific allegation of error, I must find this claimed ground to be so broad that it amounts to a request to retry the entire claim. If she is requesting that I reconsider and reassess the evidence and substitute my decision for the GD's in her favour, 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.

**(b) Mischaracterization of Medications**

[18] The Applicant alleges that the GD erred in suggesting that Imuran is milder than CellCept. Although she did not explicitly say so, she implies that the GD concluded that she had not yet attempted all treatment alternatives, having not taken the supposedly more "robust" CellCept.

[19] It is true that, in relaying the Applicant's testimony, the GD described CellCept as "stronger" in paragraph 20, but it is not obvious to me that this is an error or mischaracterization. The Applicant herself stated in her leave application that Dr. Perlin called CellCept "a more effective medicine" and two of Dr. Perlin's reports suggested that "a more aggressive lupus- related suppression" might be tried once the Applicant had completed her IVF cycles. Above all, I note that the GD made only a passing reference in its analysis to the Applicant's use of immunosuppressives, and there is no indication it drew an adverse inference from the fact that she had never tried CellCept.

[20] Finally, even if the GD did made a factual error on this point, it was immaterial in that the GD appears not have based its decision on it. I see no arguable case on this ground.

**(c) Disregard of Testimony on Other Medical Conditions**

[21] The Applicant alleges that the GD ignored her testimony about her past kidney and liver failure, TTP and pulmonary embolism. In fact, the GD did refer to these illnesses, which appear to have been pregnancy-related, in paragraphs 13 and 14 of its decision. While the GD did not

make specific reference to them in its analysis, it is a principle of administrative law that a decision-maker need not refer to each and every item of evidence before it and is entitled to assign weight to the evidence as it deems appropriate.

[22] In my view, this ground has no reasonable chance of success on appeal.

**(d) Other Alleged Errors**

[23] The GD's mistake about Dr. Perlin's gender is immaterial and of no consequence to the decision.

[24] It appears that the Applicant denies that she ever agreed to "consider adding CellCept," as reported on page 9, but the reference comes from the GD's summary of Dr. Perlin's February 11, 2013 report. Having looked at the original reproduced in the hearing file, I do not see how the GD erred in representing the substance of Dr. Perlin's words.

[25] I see no arguable case on either of these grounds.

**(e) Bias**

[26] The Applicant made vague allegation of bias against the GD, but other than expressing disagreement with the dismissal of her appeal, she did not specify how the GD breached a principle of natural justice, or otherwise acted unfairly, in the conduct of her hearing.

[27] The threshold for a finding of bias is high, and the onus of establishing bias lies with the party alleging its existence. The Supreme Court of Canada[3] has stated that test for bias is: "What would an informed person, viewing the matter realistically and practically and having thought the matter through conclude?" A real likelihood of bias must be demonstrated, with a mere suspicion not being enough. Not every favourable or unfavourable disposition attracts the label of impartiality. Bias denotes a state of mind that is in some way predisposed to a particular result that is closed with regard to particular issues.

[28] I will not speculate on what ground the Applicant alleges bias, but if she believes that the GD dismissed evidence without reason or improperly substituted its own medical opinions

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[3] *Committee for Justice and Liberty v. Canada (National Energy Board)* 1976 2 (SCC), 1978 1SCR

for those of medical practitioners, then I see no basis for either suggestion. Having reviewed the GD's decision, I not persuaded that an informed and reasonable person, viewing the matter realistically and practically, would conclude that the GD was biased.

### (f) Additional Information

[29] Finally, I note that the Applicant submitted additional medical information that was prepared after the hearing before the GD. An appeal to the AD is not ordinarily an occasion on which new evidence can be considered, given the constraints of subsection 58(1) of the DESDA, which do not give the AD any authority to make a decision based on the merits of the case.

[30] Once a hearing before the GD has concluded, there is a very limited basis upon which any new or additional information can be raised. An applicant could consider making an application to the GD to rescind or amend its decision. However, an applicant would need to comply with the requirements set out in section 66 of the DESDA and sections 45 and 46 of the *Social Security Tribunal Regulations.* Not only are there strict deadlines and requirements that must be met to succeed in an application to rescind or amend, but an applicant would also need to demonstrate that any new facts are material and that they could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

## CONCLUSION

[31] The Applicant has not identified grounds of appeal under subsection 58(1) that would have a reasonable chance of success on appeal. Thus, the application is refused.

Member, Appeal Division