



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *T. F. v. Minister of Employment and Social Development*, 2016 SSTADIS 359

Tribunal File Number: AD-16-507

BETWEEN:

T. F.

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: September 13, 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 January 27, 2016. The GD had earlier 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) ending December 31, 2005 (or the potential pro-rated date of January 31, 2006).

[2] On April 14, 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.

THE LAW

[3] 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.

[4] 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.

[5] 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.

[6] 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

[7] 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

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

SUBMISSIONS

[9] Accompanying the application requesting leave to appeal were 30 pages of clinical notes from Dr. Bradley Bobby, a general practitioner, for the period July 2006 to January 2016. On May 9, 2016, the Applicant's representative filed a letter with the AD that made the following submissions:

- (a) The Applicant stopped working in March 9, 2004. She has numerous medical issues that prevent her from performing even the simplest of tasks. Her medical conditions, in combination with the medication she must take to cope with her chronic pain, make it impossible for her to perform any work.
- (b) She has worked her entire employment history as a heavy labourer, which has taken a tremendous toll on her body. She has no transferable skills that would enable her to work in another field. She is challenged by numerous functional limitations and is unable to perform any household duties.

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

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

- (c) In making its decision, the GD erred in law by failing to consider all of the medical evidence, which strongly suggested her disability is severe and prolonged.

ANALYSIS

[10] Much of the Applicant's submissions amount to a recapitulation of evidence and argument that was already presented to the GD. She alleges that the GD erred in law by failing to consider all of the medical evidence, which she maintains established disability under the CPP criteria. However, beyond this broad allegation, 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.

[11] The Applicant claims that the GD failed to consider all the evidence but does not specify what aspect of the testimony or documentary record she believes was overlooked. It is settled law that an administrative tribunal charged with finding fact is presumed to have considered all of the evidence before it and need not discuss each and every element of a party's submissions.³ That said, I have reviewed the GD's decision and found no indication that it ignored, or gave inadequate consideration to, any of the Applicant's major submissions.

[12] My review of the decision indicates that the GD analyzed in detail the Applicant's claimed medical conditions—principally chronic pain in her shoulder, neck, back and arms—and whether they affected her capacity to regularly pursue substantially gainful employment during the MQP. In doing so, the GD took into account the Applicant's personal characteristics—including her age, education and work experience—but found they were not significant impediments to her ability to retrain or perform alternate work.

[13] 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 state their disagreement with the decision of the GD, nor is it

³ *Simpson v. Canada (Attorney General)*, 2012 FCA 82

sufficient for an applicant to express her continued conviction that her health conditions render her disabled within the meaning of the CPP.

[14] In the absence of a specific allegation of error, I find the Applicant's claimed grounds of appeal are in essence 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 as a member of the AD 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.

[15] Finally, I note that the Applicant has submitted to the AD additional documents. Dr. Bobby's clinical notes were not made available to the GD at the time of the hearing on December 14, 2015, and his cover letter, which offers a brief assessment of the Applicant's condition, was dated March 22, 2016—well after the GD's decision was issued.

[16] 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. 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, but he or she 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.

[17] I see no reasonable chance of success on any ground claimed by the Applicant.

CONCLUSION

[18] The application is refused.



Member, Appeal Division