



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *F. R. v. Minister of Employment and Social Development*, 2016 SSTADIS 445

Tribunal File Number: AD-16-808

BETWEEN:

**F. R.**

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**  
**Appeal Division**

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Leave to Appeal Decision by: Neil Nawaz

Date of Decision: November 16, 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 16, 2016. The GD conducted a hearing on the record and determined that the Applicant was not incapable of applying for a *Canada Pension Plan* (CPP) disability pension prior to March 2012.

[2] On June 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.

### **FACTUAL OVERVIEW**

[3] The Applicant sustained a workplace injury on July 9, 2008 and, according to his application for CPP disability benefits, ceased working on June 18, 2011.

[4] On February 23, 2012, the Applicant's right leg was amputated below the knee. On March 5, 2012, he applied for CPP disability benefits. At the time, the Respondent determined that his Minimum Qualifying Period (MQP) ended on December 31, 2009, a finding that has never been disputed.

[5] The Respondent initially denied the application but, on reconsideration, granted the Applicant a disability pension, effective April 2011, in accordance with the provisions of paragraph 42(2)(b) of the CPP.

The Applicant appealed the Respondent's decision to the GD, claiming that he was unable to apply for CPP disability benefits earlier because he was "on very strong medications" and

lacked capacity. In its decision dated March 16, 2016, the GD rejected this argument, finding no evidence of incapacity as it is defined in subsection 60(8) of the CPP.

## **THE LAW**

### ***Department of Employment and Social Development Act (DESDA)***

[6] According to subsections 56(1) and 58(3) of 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 General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- (c) The General Division 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*.<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>

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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.

[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.

## **CPP**

[11] 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.

[12] According to paragraph 42(2)(b), a person cannot be deemed disabled for payment purposes more than fifteen months before the Respondent received the application for a disability pension.

[13] Subsections 60(8) and 60(10) set out the requirements for incapacity:

(8) Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an intention to make an application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later...

(10) For the purposes of subsections (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed.

[14] Section 69 specifies that a disability pension is payable from the fourth month after the applicant became disabled.

## **ISSUE**

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

## SUBMISSIONS

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

- His leg was amputated and he was previously “screwed up on medications.” He was in such a crazy state of mind, he did not want to live any longer. He has disowned his family and friends and is now alone. Service Canada accepted this claim of incapacity when it accepted his late request for consideration.
- For reasons that escape him now, he disclosed on his application for CPP benefits that he worked for Bird’s Eye Woodworking from July 2010 to June 2011. This was not true, as confirmed by the attached letter from that company.
- The WSIB made a mistake not having a psychiatric report done in 2008. They also made a mistake by attempting to train him on computer programs, for which he was not qualified.

[17] The Applicant also included with his submissions copies of the following documents:

- Psycho-Vocational Evaluation Report by Leslie Higgins (psychologist) dated October 27, 2010;
- Letter from C. D. dated June 6, 2016 confirming that the Applicant did not work for Bird’s Eye Millwork in 2010, 2011 or any other time;
- Assessment worksheet prepared by the Respondent dated September 19, 2014 permitting an extension of time to make a reconsideration request past the 90-day limitation;
- Various income tax returns.

## ANALYSIS

[18] The issue here is whether, as claimed, the Applicant lacked the capacity to form or express an intention to apply for the CPP disability pension earlier than the date on which he eventually did apply—March 5, 2012.

[19] Having reviewed the GD's decision against the documentary record, I see no error that might warrant intervention. On the issue of retroactive payment, the CPP is clear and unambiguous: Where there is a finding of disability, payment is retroactive no more than 11 months from the date of application due to the combined effect of paragraph 42(2)(b) and section 69 of the CPP. The fact that the Respondent may have conceded that the Applicant *actually* became disabled as of July 2008 will not change this, unless the Applicant can show he was incapacitated from making an application sooner.

[20] It must be noted that the test set out in subsection 60(8) of the CPP is strict: An applicant is required to prove not just that he lacked the capacity to apply for benefits, but that he lacked the capacity *to form or express an intention* to apply. The examination must be focused not on an applicant's capacity to make, prepare, process or complete an application for disability benefits but only on his capacity to form or express an intention to make an application (*Canada (A.G.) v. Kirkland*;<sup>3</sup> *Canada (A.G.) v. Danielson*.<sup>4</sup> In addition, the activities of an applicant during the relevant period may cast light on his or her continuous incapacity to form or express the requisite intention.

[21] Much of the Applicant's submissions on the issue of incapacity amounted to a recapitulation of evidence and argument that, from what I was able to determine, was already presented, or could have been presented, to the GD at the time of hearing. The Applicant suggests that the GD erred in giving inadequate consideration to evidence that he lacked the capacity to form or express an intention to apply for CPP disability benefits earlier than March 2012, but it appears the GD surveyed the medical record and found nothing to indicate he was suffering from dementia or any other mental impairment during the relevant period. The

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<sup>3</sup> *Canada (Attorney General) v. Kirkland*

<sup>4</sup> *Canada (Attorney General) v. Danielson* 2008 FCA 78.

Applicant may have had symptoms of depression, but they would not ordinarily meet the high threshold established by subsection 60(8), and this was reflected in the GD's decision.

[22] The Applicant's request for leave to appeal was accompanied by various supporting documents, some of which were before the GD at the time of hearing (the Psycho-Vocational Evaluation Report) and some of which were not (the letter from Bird's Eye Millwork and the income tax returns). An appeal to the AD is not ordinarily an occasion on which additional 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 is 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.

[23] My review of the record suggests that the Applicant and his former representative have both been operating under certain misapprehensions. First, the fact that Service Canada (an arm of the Respondent) permitted the Applicant an extension of time to request reconsideration<sup>5</sup> has no bearing on a determination of incapacity under subsection 60(8). Second, whether the Applicant was working between July 2010 and June 2011 would be only relevant, for the purpose of his appeal to the GD, in determining whether he had capacity to apply prior to March 2012. However, it appears that, in determining whether the Applicant had capacity to make a CPP application, the GD placed little or no weight on his "untrue" statement that he took post-accident work.

[24] I am reluctant to interfere with a finding of the GD where it has considered and weighed the available evidence and appropriately applied the law. In alleging that the GD failed to give

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<sup>5</sup> Late reconsideration is governed by subsection 81(1.1) of the CPP and subsection 74.1(3) of the *Canada Pension Plan Regulations*.

adequate consideration to essentially the same facts and arguments that were presented to the GD, the Applicant's representative is in effect requesting that I retry entire claim on its merits and decide in his favour. I am unable to do this, as 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.

[25] I see no arguable case on any of the claimed grounds.

### **CONCLUSION**

[26] The application is refused.



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Member, Appeal Division