



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. O. v. Minister of Employment and Social Development*, 2016 SSTADIS 459

Tribunal File Number: AD-16-860

BETWEEN:

A. O.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: November 25, 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 (SST) dated April 12, 2016. The GD had earlier conducted a hearing on the basis of the documentary record and determined that it was barred from considering the merits of the Applicant's claim for a disability pension under the *Canada Pension Plan* (CPP).

[2] On June 22, 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 BACKGROUND

[3] The Applicant applied for a CPP disability pension on January 5, 2011. She had valid contributions to the CPP that established a minimum qualifying period (MQP) ending December 31, 2009. The Respondent denied the application initially and, in a letter dated February 23, 2012, upon reconsideration.

[4] The Applicant appealed this decision to the Review Tribunal (RT), the predecessor body to the GD. In a decision dated January 24, 2013, the RT upheld the decision of the Respondent, finding that the Applicant did not have a disability that met the criteria of "severe and prolonged" as per CPP legislation. On May 14, 2013, the AD refused the Applicant's request for leave to appeal.

[5] The Applicant submitted another CPP disability application on October 7, 2013. As she had registered no new income since her first application, her MQP was unchanged. In a letter dated March 3, 2014, the Respondent denied the application at the initial level because the RT

had previously found that she did not qualify for CPP disability benefits as of December 31, 2009 and its decision was final and binding.

[6] The Applicant did not request reconsideration from the Respondent. Instead, she filed a notice of appeal with the GD on March 21, 2014. In a letter dated May 13, 2014, the GD advised the Applicant that her application was incomplete as she had not filed a copy of the reconsideration letter, as required under subsection 24(1) of the SST Regulations. The May 13, 2014 letter of the Applicant also explained the following:

An appeal cannot be filed before a reconsideration decision has been made by the Department of Employment and Social Development Canada. If the Department of Employment and Social Development Canada has not yet made a reconsideration decision, your Notice of Appeal will be returned to you. Once the Department of Employment and Social Development Canada has made the reconsideration decision, you will have 90 days, after the day the reconsideration decision is communicated to you, to file a complete Notice of Appeal with the Tribunal.

[7] On May 27, 2014, the Applicant forwarded to the GD a copy of the reconsideration decision from her first application. On June 17, 2014, GD staff (relying on the February 23, 2012 date of the reconsideration letter it had just received) notified the Applicant that her appeal appeared to have been perfected more than 90 days after the date the reconsideration was communicated to her. She was asked to supply reasons for her late appeal.

[8] In a letter dated July 8, 2014, the Applicant wrote that she was relieved to learn that an extension of time to appeal was now possible, as she had earlier been shocked to learn that her file was closed and the GD's decision final. She had always intended to pursue an appeal.

[9] On March 4, 2015 the Applicant filed with the AD an application to rescind or amend the decision of the RT pursuant to her first application dated January 5, 2011. She also submitted two recent medical reports. In its decision dated May 7, 2015, the AD refused the Applicant's request because the application to rescind or amend was not made within the applicable time limitation. It also assessed the two medical reports and concluded that, even if the Applicant had filed her application to rescind or amend on time, they would not have met the test for new material facts under the *Department of Employment and Social Development Act* (DESDA).

[10] In its decision of April 12, 2016, the GD determined that the appeal filed by the Applicant on March 21, 2014 could not proceed because she had never requested or obtained a reconsideration letter from the Respondent for her second application. As per section 82 of the CPP, this was a prerequisite for filing an appeal with the GD. Moreover, the deadline to request such a letter was long past, as section 81 imposed a 90-day time limitation, and the Respondent's initial denial letter for the second application was dated March 3, 2014. Although the Applicant did submit a reconsideration letter, it emanated from her first application and could not be considered in the current appeal. The first application had been fully adjudicated and was closed.

THE LAW CPP

[11] Once the Respondent has made an initial determination of disability, subsection 81(1) of the CPP imposes a 90-day time limit on applicants to request reconsideration. Under subsection 81(2), the Respondent must reconsider the initial determination without delay and communicate its reasons for either varying or upholding it in writing.

[12] Under section 82, a party who is dissatisfied with a decision of the Respondent made under section 81 may appeal the decision to the SST.

SST Regulations

[13] According to subsection 24(1) of the SST Regulations, an appeal to the GD must be in the form set out by the SST on its website. Among the various items required with the form is a copy of the decision that was made under subsection 81(2) of the CPP.

DESDA

[14] Pursuant to paragraph 52(1)(b) of the DESDA, an appeal must be brought to the GD within 90 days after the day on which the decision was communicated to the appellant. Under subsection 52(2), the GD may allow further time within which an appeal may be brought, but in no case may an appeal be brought more than one year after the day on which the decision is communicated to the appellant.

[15] 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.

[16] 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.

[17] 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.

[18] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada(MHRD)*.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(A.G.)*.²

[19] 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

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

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

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

SUBMISSIONS

[21] In her application requesting leave to appeal, the Applicant submitted that she has a reasonable chance to successfully appeal the denial of her application for CPP disability benefits because:

- (a) She has been approved for the receipt of the Disability Tax Credit as of March 2016 and therefore been deemed disabled by a department of the Federal Government.
- (b) Both a psychiatrist and a general practitioner have repeatedly confirmed her diagnoses of post-traumatic stress disorder, depression and anxiety. They have supported her disability claim.
- (c) She continues to struggle with the symptoms that accompany the above-mentioned diagnoses, among them flashbacks, anxiety, depression, mood swings, paranoia, feelings of isolation and difficulties with motivation.
- (d) As a result of the length of time spent appealing her CPP disability denial, she has had to endure financial hardship and marital strain.
- (e) She feels that she has been treated unjustly. She feels that all of the information included in her initial application was ignored, with no consideration of her diagnoses and the symptoms that accompany them.
- (f) She has been given inaccurate guidance since the initial denial. For example, she was told to appeal to the Federal Court, but it returned all of her paperwork, advising her that her filing was premature.

ANALYSIS

[22] I have carefully examined the GD's decision in the context of the documentary record and applicable law and identified no plausible grounds of appeal under subsection 58(1) of the DESDA.

[23] The issue at hand is not whether the Applicant had a “severe and prolonged” disability at the time of her CPP applications, but whether she was eligible to bring an appeal to the GD in the first place, having missed the statutory deadline to request reconsideration on her second application for CPP disability benefits. The Applicant may or may not have fulfilled the criteria for disability under the CPP, but the GD’s dismissal was based on her failure to comply with subsection 81(1) of the CPP and subsection 24(1) of the SST Regulations. The GD was not obliged to consider the Applicant’s disability claim on its merits.

[24] In this case, the Applicant made two applications. The first was adjudicated and appealed as far as the AD and cannot be revisited here, as was correctly noted by the GD. The second was considered and rejected by the Respondent in the first instance and was not subject to a reconsideration request within 90-day deadline specified in subsection 81(1) of the CPP. Section 82 suggests that an appeal to the GD is permissible only if the Respondent has made a decision in response to a reconsideration request, and the GD found that had never occurred here. In the absence of any specific allegation of error on the part of the GD, I see no reason to interfere with that finding.

[25] This interpretation of the law has been reinforced by the Federal Court of Canada decision, *Canada (A.G.) v. Bannerman*,³ which held that there is no direct right of appeal from an original determination of the Minister without having first applied for redetermination and having received a decision flowing from that request. A request for reconsideration under subsection 81(1) and a decision on the request for reconsideration are conditions precedent to the right of appeal. Only a decision on a reconsideration can be appealed to a review tribunal, and that did not occur here.

[26] The Applicant suggests that she should be granted relief on compassionate grounds, but the GD was bound to follow the letter of the law, and so am I. If the Applicant is asking me to exercise fairness and reverse the GD’s decision, I lack the discretionary authority to do so and can only exercise such jurisdiction as granted by the AD’s enabling statute. Support for this position may be found in *Pincombe v. Canada*,⁴ among other cases, which have held that an

³ *Canada (Attorney General) v. Bannerman*, 2003 FCT 208.

⁴ *Pincombe v. Canada (A.G.)* [1995] FCJ No. 1320 (FCA).

administrative tribunal is not a court but a statutory decision-maker and therefore not empowered to provide any form of equitable relief.

[27] The remainder of the Applicant's submissions amount to a request that the AD consider and assess the evidence supporting her disability claim on its merits. This is beyond the parameters of the DESDA, which in subsection 58(1) sets out very limited grounds of appeal. The AD is only permitted to determine whether any of an applicant's reasons for appealing a decision of the GD fall within the specified grounds and whether any of them have a reasonable chance of success. I note that the Applicant has submitted documents that were not available to the GD, including a March 2016 notice from the Canada Revenue Agency approving her application for the Disability Tax Credit. The Applicant should be aware that the criteria for disability under the *Income Tax Act* differ from those of the CPP. In any event, 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 before the GD has concluded, there is a very limited basis upon which any new or additional information can be raised. The Applicant could consider making an application to the GD to rescind or amend its decision, as she did pursuant to her first application for CPP disability benefits, but she would have to comply with the requirements set out in section 66 of the DESDA and sections 45 and 46 of the SST Regulations. As she is aware, there are strict deadlines and requirements that must be met to succeed in an application to rescind or amend, and an applicant must also 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.

[28] I am satisfied that, in the absence of a reconsideration letter, the GD acted within its jurisdiction when it refused further consideration of the Applicant's CPP entitlement. For this reason, I am not persuaded that there is an arguable case here.

CONCLUSION

[29] As the Applicant has not identified grounds of appeal under subsection 58(1) of the DESDA that would have a reasonable chance of success on appeal, the application for leave is refused.



Member, Appeal Division