



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 464

Tribunal File Number: AD-16-595

BETWEEN:

K. S.

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 30, 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 February 12, 2016. The GD had conducted a hearing on the record 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, 2009.

[2] On April 18, 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] In her application requesting leave to appeal and in a follow-up letter dated May 25, 2016, the Applicant made the following submissions:

- Her disability, which is indefinite, prevents her from engaging in a substantially gainful occupation;
- Her disability occurred before the end of the MQP, although there was not a complete diagnosis until after her appeal, when her doctors discovered she had a non-functioning vestibular system.

[10] In a letter dated October 18, 2016, the AD reminded the Applicant of the specific grounds of appeal permitted under subsection 58(1) and asked her to provide more detailed

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

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

reasons for her request for leave. By way of reply dated November 29, 2016, the Applicant wrote:

- The GD made the wrong decision, as her medical conditions are severe and prolonged. The motor vehicle accident in which she was involved caused whiplash along with her other health issues, including fibromyalgia.
- She earlier submitted a report from Dr. Korkis, an ENT specialist, who diagnosed her with a non-functioning vestibular system undetected by other specialists. There is more than enough medical evidence to support her disability claim.

ANALYSIS

[11] 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.

[12] 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. The decision indicates that the GD reviewed the Applicant’s submissions and determined that the doctrine of *res judicata* prevented consideration of her application for CPP disability benefits. The GD concluded—properly, in my view—that the issue of whether the Applicant was disabled as of her MQP of December 31, 2009 had already been adjudicated by a Review Tribunal in a hearing held on August 11, 2011 and could therefore not be revisited.

[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. 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.

[14] In the absence of a specific allegation of error, it would appear the Applicant’s claimed grounds of appeal amount to a request to retry her disability claim on its merits. This I cannot

do, as 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 an arguable case.

CONCLUSION

[15] 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