



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. P. v. Minister of Employment and Social Development*, 2016 SSTADIS 499

Tribunal File Number: AD-16-1198

BETWEEN:

J. P.

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: Janet Lew

Date of decision: December 22, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated July 29, 2016, which determined that the Applicant had a severe and prolonged disability in December 2014, when her family physician concluded that her condition was unlikely to improve and would remain the same with future progression. The General Division determined that payment of a Canada Pension Plan disability pension would commence as of April 2015. The Applicant filed an application requesting leave to appeal on October 2, 2016, without setting out any grounds of appeal. She provided submissions on November 21, 2016. The Applicant submits that the date of disability is when she ceased working in July 2014.

ISSUES

[2] The two issues before me are as follows:

- (1) is the application requesting leave to appeal late? If so, should I exercise my discretion and extend the time for filing the leave application, and
- (2) does the appeal have a reasonable chance of success?

ANALYSIS

(a) Late application

[3] The Applicant did not set out any grounds of appeal in her October 2, 2016 application requesting leave to appeal. She therefore did not fully comply with the requirements under paragraph 57(1)(b) of the *Department of Employment and Social Development Act* (DESDA) that the application requesting leave to appeal be filed in the prescribed form and manner and within 90 days after the day on which the decision of the General Division had been communicated to her. Nonetheless, I am prepared to extend the time for filing the application as it is in the interests of justice to do so. There is no prejudice

to the Respondent in granting an extension, and although the Applicant has not provided any reasonable explanation why she could not have provided grounds in the application, she clearly had a continuing intention to pursue her appeal. More importantly, as will be set out below, the Applicant raises an arguable ground.

(a) Application requesting leave to appeal

[4] Subsection 58(1) of the *Department of Employment and Development Act* (DESDA) sets out the grounds of appeal as being limited to 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.

[5] Before granting leave, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[6] Recently, the Federal Court of Appeal in *Mette v. Canada (Attorney General)*, 2016 FCA 276 indicated that it is unnecessary for the Appeal Division address all of the grounds of appeal raised by an applicant. In response to the Respondent's arguments that the Appeal Division was required to deny leave on any ground it found to be without merit, Dawson J.A. stated that subsection 58(2) of the DESDA "does not require that individual grounds be dismissed ... individual grounds may be so inter-related that it is impossible to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave".

[7] The Applicant submits that the General Division erred in law and that it also based its decision on several erroneous findings of fact that it made in a perverse or capricious

manner or without regard for the material before it. The Applicant argues that there was no evidence to support a finding that the Applicant's medical condition changed after she stopped working in July 2014 and that it was an error for the General Division to have relied on the medical opinion of her family physician of December 2014 that the Applicant's condition was unlikely to improve, to find that she became disabled at that time. The Applicant cited *Law v. Minister of Employment and Social Development* (October 18, 2006), CP 24517 (PAB) in support of this proposition. I note that the Federal Court addressed the same issue, in *Osaj v. Canada (Attorney General)*, 2016 FC 115. The Federal Court dismissed any notion that the statements that Mr. Osaj had reached "maximal recovery" and was "permanently disabled" were evidence of a severe disability, as neither represented the correct test under the *Canada Pension Plan*.

[8] The family physician's medical opinion that the Applicant's prognosis for improvement "likely remains the same with future progression" is set out at page GD1- 17, in the form of responses to a questionnaire. The opinion was made in response to the questions, "What is the prognosis for improvement regarding [the Applicant's] medical condition and health status? When is it anticipated that maximum medical recovery would be achieved?" It appears that the General Division may have determined that the Applicant's disability was severe as she had essentially attained "maximum medical recovery" and her "condition was unlikely to improve". There is no indication in the same report that the Applicant's disability had changed or deteriorated since the family physician had provided her last opinions in October 2014 (GD2-57 to GD2-58). As it is unclear whether the General Division considered whether the Applicant's disability rendered her incapable regularly of pursuing any substantially gainful occupation either in December 2014 or earlier, I am satisfied that the appeal has a reasonable chance of success.

[9] As I have noted, the Applicant has cited other grounds, which may be inter-related to the ground on which I am prepared to grant leave to appeal. For the reasons which I have set out above, it is unnecessary for me to address each of them.

CONCLUSION

[10] The application for leave to appeal is allowed.

[11] This decision granting leave to appeal does not, in any way, prejudice the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division