



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *S. R. v. Minister of Employment and Social Development*, 2016 SSTADIS 505

Tribunal File Number: AD-16-926

BETWEEN:

**S. R.**

Applicant

and

**Minister of Employment and Social Development  
(formerly 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: December 23, 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 April 10, 2016. The GD had earlier conducted an in-person hearing and determined that the Applicant was not eligible for the disability benefit under the *Canada Pension Plan* (CPP), as it found that his disability was not “severe” prior to January 31, 2012, the last date before the month he began receiving his CPP retirement pension.

[2] On July 15, 2016, within the specified time limitation, the Applicant submitted an application to the Appeal Division (AD) requesting leave to appeal. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

### **THE LAW**

[3] The requirement that an applicant not be in receipt of the CPP retirement pension is also set out in subsection 70(3) of the CPP, which states that once a person starts to receive a CPP retirement pension, that person cannot apply or re-apply at any time for a disability pension. There is an exception to this provision, and it is found in section 66.1 of the CPP.

[4] Section 66.1 of the CPP and section 46.2 of the CPP Regulations allow a beneficiary to cancel a benefit after it has started if the request to cancel the benefit is made, in writing, within six months after payment of the benefit has started.

[5] If a person does not cancel a benefit within six months after payment of the benefit has started, the only way a retirement pension can be cancelled in favour of a disability benefit is if the person is deemed to be disabled *before* the month the retirement pension first became payable (subsection 66.1(1.1) of the CPP).

[6] Subsection 66.1(1.1) of the CPP must be read with paragraph 42(2)(b) of the CPP, which states that the earliest a person can be deemed to be disabled is fifteen months before the date the disability application is received by the Respondent. According to section 69 of the CPP, payments start four months after the deemed date of disability.

[7] 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.

[8] 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.

[9] 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.

[10] 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>

[11] 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.

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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.

## **ISSUE**

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

## **SUBMISSIONS**

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

- (a) He was two months late in submitting his application because he was sick.
- (b) He does not understand the GD's decision. His family doctor and gastroenterologist agree that his disease is debilitating. The symptoms of hepatitis C and late stage liver disease are well documented, and death is a real possibility.
- (c) He does not understand why the GD called for testimony from his wife when her only reason for being present was to drive him to the hearing venue. She knew nothing about his claim except the end result. "It was an easy thing for a trained interrogator to break her down, which you did very efficiently."
- (d) He has already been certified by the federal government as disabled—a finding contradicted by the GD's decision.

[14] In a letter dated November 28, 2016, the AD reminded the Applicant of the specific grounds of appeal permitted under subsection 58(1) and asked him to provide more detailed reasons for his request for leave. The Applicant did not reply to this request by the specified deadline.

## **ANALYSIS**

[15] The Applicant suggests that the GD dismissed his appeal despite medical evidence indicating that his condition was "severe and prolonged" according to the criteria governing CPP disability.

[16] However, outside of 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. My review of the decision indicates that the GD considered the available evidence before arriving at the conclusion that the Applicant was not incapacitated from forming or expressing an intention to apply for CPP disability benefits earlier than July 2013.

[17] 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 enough to merely express their conviction that they were incapacitated or disabled.

[18] In his submissions, the Applicant pointed to evidence from his family physician and gastroenterologist, which he evidently believes the GD overlooked, but 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.<sup>3</sup> That said, I have reviewed the GD's decision and see no indication that it ignored, or gave inadequate consideration to, any significant component of the Applicant's evidence.

[19] The GD's decision contains a detailed overview of the available medical reports, as well as testimony given by the Applicant and his wife. The decision closes with an analysis that suggests the GD meaningfully assessed the evidence and had defensible reasons supporting its conclusion that there was insufficient evidence of incapacity. The Applicant suggests that the GD coerced his wife into testifying and then "broke her down," but my review of the audio recording of the hearing indicates that Mrs. R. voluntarily offered to give evidence and, for the most part, answered the GD's questions in a calm and measured manner.

[20] The Applicant also argues that the Respondent's (and by extension, the GD's) decision went against an earlier federal government declaration that he was disabled. First, I see no indication that evidence to this effect was before the GD at the time of hearing. Second, even if such evidence was presented to the GD, it would have had extremely limited relevance, as other disability schemes—for example, the *Income Tax Act's* Disability Tax Credit—operate under legislative criteria that differ significantly from those of the CPP.

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<sup>3</sup> *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

[21] While the GD's analysis did not arrive at the conclusion the Applicant would have preferred, it is not my role to reassess the evidence but to determine whether the decision is defensible on the facts and the law. An appeal to the AD is not an opportunity for an applicant to re-argue their case and ask for a different outcome. My authority permits me only 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.

[22] I see no arguable case for any of the grounds claimed by the Applicant.

### **CONCLUSION**

[23] 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.



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Member, Appeal Division