



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *L. W. v. Minister of Employment and Social Development*, 2017 SSTADIS 33

Tribunal File Number: AD-16-1059

BETWEEN:

**L. W.**

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: February 9, 2017

## **REASONS AND DECISION**

### **DECISION**

Leave to appeal is granted.

### **INTRODUCTION**

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal (Tribunal) dated June 22, 2016. The General Division had earlier conducted a hearing by teleconference and determined that the Applicant was not eligible for the disability benefit under the *Canada Pension Plan* (CPP), as it found that her disability was not “severe” during her minimum qualifying period (MQP), which ended on September 30, 2013, the date before the month she was approved to collect the CPP retirement pension.

[2] On August 26, 2016, within the specified time limitation, the Applicant’s representative submitted an application to the Appeal Division requesting leave to appeal. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

### **THE LAW DESDA**

[3] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Appeal Division may be brought only if leave to appeal is granted and the Appeal Division must either grant or refuse leave to appeal.

[4] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the Appeal Division 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 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 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*.<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>

[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.

## **CPP**

[8] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

- (a) Be under 65 years of age;
- (b) Not be in receipt of the CPP retirement pension;
- (c) Be disabled; and
- (d) Have made valid contributions to the CPP for not less than the MQP.

[9] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[10] 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

---

<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.

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.

## **ISSUE**

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

## **SUBMISSIONS**

[12] In a schedule to the application requesting leave to appeal, the Applicant's representative alleges that the presiding General Division member failed to observe a principle of natural justice when he declared during the hearing that the Applicant had satisfied the severe and prolonged criteria and therefore did not need to hear submissions on the issue of disability. The member then issued a written decision denying the Applicant entitlement to the CPP disability benefit, on the basis that the severe and prolonged criteria had not been met, in diametric contradiction to his statement at the hearing.

[13] The representative specifically alleges that, at the 48:00 minute mark of the audio recording of the hearing, following witness testimony, the General Division member can be heard asking for written submissions on the issue of whether the Applicant's post-MQP income was employment income that potentially disqualified her from CPP disability benefits. The member added:

I think I am going to be up front with you sir... I believe she has proved on the balance of probabilities that she suffered from a severe and prolonged disability on or before September 2013.

[14] The Applicant's representative states that the General Division member repeated, at the 57:00 mark, that he was looking for written submissions on the Applicant's employment income and confirmed that he did not want to hear any more on the issue of "severe and prolonged." After the recording device was turned off, the member allegedly advised the representative that he had decided to seek further written submissions only if he could not obtain the information he was seeking by other means. The next day, a member of the Tribunal's staff advised the representative that no further submissions would be required.

[15] The Applicant's representative submits that the General Division member led him to believe that the issue of his client's disability prior to September 30, 2013, was settled. He claims that he relied on the member's assurance in delivering his closing argument. When the member subsequently changed his mind and based his decision on a finding that the Applicant's disability fell short of "severe and prolonged," the General Division in effect denied her a full opportunity to be heard.

## **ANALYSIS**

[16] The grounds advanced by the Applicant turn, in large part, on what was said during the oral hearing. My preliminary review of the audio recording suggests that the Applicant's representative provided an essentially accurate account of the proceedings.

[17] In its decision, the General Division devoted the majority of its analysis to a consideration of whether the Applicant's disability was severe and prolonged according to the definition set out in paragraph 42(2)(a) of the CPP. It is obvious that the General Division still considered the issue alive, contrary to the member's assertion at the hearing, and his finding that the Applicant failed to meet the statutory definition, appears to have been directly at odds with what he told counsel.

[18] In my view, there is an arguable case that the General Division misdirected the Applicant when it assured her representative at the hearing that he had met the burden of proving his client's disability was severe and prolonged as of the MQP. If counsel relied on that assurance and accordingly tailored his closing submissions to de-emphasize the severe and prolonged issues, then the Applicant may have been deprived of her right to present her best case.

[19] This lapse in procedural fairness, if that is what it was, may have been aggravated by the General Division's withdrawal of its promise to allow counsel an opportunity to make post-hearing written submissions on the issue of the Applicant's post-MQP employment income. The member apparently resolved whatever outstanding questions he had about this issue by himself, but his decision to forego further written submissions may have again robbed the Applicant's representative of an opportunity to present a full argument on his client's behalf.

## CONCLUSION

[20] Leave to appeal is granted. I invite the parties to provide submissions on whether a further hearing is required and, if so, what type of hearing is appropriate.

[21] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.



---

Member, Appeal Divisio