



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. H. v. Minister of Employment and Social Development*, 2017 SSTADIS 166

Tribunal File Number: AD-16-1245

BETWEEN:

K. H.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: April 14, 2017

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal dated July 29, 2016. The General Division had earlier conducted a hearing by teleconference and determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP) because her disability was not severe during her minimum qualifying period (MQP), which ended on August 31, 2013, the date before the month she was approved for an early CPP retirement pension.

[2] On November 1, 2016, within the specified time limitation, the Applicant's authorized representative submitted an application requesting leave to appeal to the Appeal Division. 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 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 may 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 an initial hurdle for an 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 the application requesting leave to appeal, the Applicant's representative alleged that the General Division based its decision on the following erroneous findings of fact:

- (a) In paragraph 13 of its decision, the General Division referred to Dr. Gil Faclier as an anesthesiologist. In fact, he is a surgeon who specializes in chronic pain management.
- (b) In paragraph 18, the General Division wrote, "She should be referred to the Pelvic Pain Clinic at Mount Sinai Hospital." In fact, Dr. Deborah Robertson made the referral to pain management at St. Michael's Hospital on August 24, 2014.
- (c) The Applicant has significant functional limitations that prevent her from performing even light or highly accommodated work. She has participated in all treatment plans offered to her and put forth reasonable efforts to regain her

¹ *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC).

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

health. In paragraph 29, the General Division found that the Applicant was “optimistic that she would be able to return to work in the future, although she was not certain when this would be.” However, the medical evidence suggests that the Applicant does not have any residual work capacity and that her condition remains severe and prolonged. While the Applicant’s CPP disability application indicated that she regarded her illness as only temporary, one must keep in mind that it was completed in February 2014. Since then, she has attempted all available treatment options, including chronic pain management, yet she remains unable to return to gainful employment. Despite her earlier optimism, it is highly unlikely that the Applicant, at age 64, will be returning to work in the future.

[10] The Applicant’s representative also alleged that the General Division erred in law by failing to consider the totality of the evidence with regard to treatment. The Applicant abided by the recommendations of her treating physicians. The Applicant’s testimony about her activities of daily living, as relayed in paragraph 14 of the decision, demonstrates, if interpreted correctly, that she is incapacitated from all types of work.

[11] The notice requesting leave also included the following documents:

- A chronological record of treatment, prepared by the Applicant, for the period from May 2013 to August 2015;
- An undated note documenting the Applicant’s referral to Pain Management Services at St. Michael’s Hospital in Toronto;
- An MRI report of the lumbar spine dated March 3, 2015;
- A consultation note by Dr. Faclier dated April 30, 2015;
- A handwritten note by Christos Boulias, specialist in physical medicine, dated May 5, 2015;
- A whole body bone scan report dated June 2, 2015;
- Women’s College Hospital Ambulatory Operative Notes by Dr. Faclier dated May 4, 2015, June 15, 2015, July 20, 2015 and July 18, 2016.

ANALYSIS

Alleged Factual Errors

Dr. Faclier's Qualifications

[12] The Applicant's representative suggests that the General Division erred in describing Dr. Faclier as an anesthesiologist.

[13] I see no reasonable chance of success on this ground. First, it appears the General Division's information about Dr. Faclier came entirely from the Applicant's testimony, as the record at the time of the hearing contained no documentary evidence referring to him or his clinic. Second, reports submitted with the application for leave indicate that Dr. Faclier, whose only listed designation is "M.D.," is associated with the Department of Anesthesia and Pain Management at Women's College Hospital. Third, even if the General Division did commit an error on this point, I would hardly regard it as material, much less "perverse," "capricious" or "without regard for the material."

Referral to Pain Clinic

[14] The Applicant's representative alleges that the General Division named the wrong clinic to which his client was referred for her pelvic pain.

[15] I see no arguable case for this ground. The offending paragraph is merely the General Division's summary of a series of reports prepared by Dr. Boulias, one in which he did indeed recommend that the Applicant be referred to the Pelvic Pain Clinic at Mount Sinai Hospital (January 27, 2014). I have no way of knowing whether this referral occurred or whether the Applicant ever did attend the Mount Sinai clinic, but there is no question that the General Division accurately relayed her physiatrist's words, and it is beside the point whether she ultimately attended another pain clinic. As it happens, there was nothing in the evidence before the General Division to suggest that the Applicant saw a Dr. Robertson or attended St. Michael's Hospital; the General Division therefore cannot be faulted for failing to recognize facts that were never presented to it.

Applicant's Continuing Functional Limitations

[16] For the most part, the Applicant's submissions amount to a recapitulation of evidence and arguments that, from what I was able to determine, were already presented to the General Division. In essence, the Applicant's representative argues that the General Division gave inadequate consideration to evidence that he felt proved his client was suffering from a severe and prolonged disability prior to the end of the MQP ending on August 31, 2013.

[17] According to the Supreme Court of Canada in *Simpson v. Canada*,³ an administrative tribunal is presumed to have considered all the evidence before it and, in this case, the General Division made its decision after conducting what appears to be a thorough survey of the evidentiary record. My review indicates that it analyzed the Applicant's medical conditions—principally chronic pain in her pelvis, right hip and knees—and how they affected her capacity to regularly pursue substantially gainful employment as of August 31, 2013. In doing so, the General Division took into account the Applicant's age, education and employment history before concluding there was insufficient evidence of incapacity during the period in which she was last eligible for CPP disability benefits. Furthermore, I see no indication that the General Division misapplied the law regarding the intersection of CPP retirement and disability benefits.

[18] If the Applicant is submitting that I should reconsider and reassess the evidence and decide in her favour, I am unable to do so, as my authority permits me to determine only whether any of the Applicant's reasons for appealing fall within the enumerated grounds of subsection 58(1), and whether any of them has a reasonable chance of success. In this instance, I do not think there is an arguable case that the General Division gave insufficient consideration to the Applicant's evidence.

Alleged Error of Law Regarding Totality of Evidence

[19] The Applicant's representative emphasizes that his client followed all treatment recommendations, but I saw nothing to indicate that the General Division made a finding of non-compliance. It is true that there is a line of authority that obligates disability claimants to take all reasonable steps to regain their health and functionality, but my review of its reasons—

³ *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

particularly the analysis contained in paragraphs 23 to 31—indicates that the General Division did not base its decision on any lack of treatment mitigation, but on a range of other factors, including medical evidence of residual capacity, indications that the Applicant had responded to therapy and a finding that she made an inadequate effort to seek alternative work. The Applicant’s representative was at pains to explain and contextualize his client’s view of her condition as “temporary” at the time of her initial CPP application, but he was given an opportunity to make the same case before the General Division. As noted, the Appeal Division has no mandate to rehear evidence on its merits.

[20] I see no arguable case on this ground of appeal.

Submission of New Documents

[21] Accompanying the Applicant’s notice requesting leave were a number of medical documents, none of which were presented to the General Division, some of which were dated after the July 26, 2016 hearing. An appeal to the Appeal Division is not ordinarily an occasion on which new evidence can be considered, given the constraints of subsection 58(1) of the DESDA. Once a hearing is concluded, there is a very limited basis upon which any new or additional information can be raised. An applicant could consider making an application to the General Division to rescind or amend its decision. However, an applicant would need to comply with the requirements set out in section 66 of the DESDA, as well as sections 45 and 46 of the *Social Security Tribunal Regulations*. Not only are there strict deadlines and requirements that must be met to succeed in an application to rescind or amend, but an applicant would also need to 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.

CONCLUSION

[22] For the reasons set out above, I see no arguable case for any of the grounds of appeal advanced by the Applicant. The application for leave to appeal is therefore refused.



Member, Appeal Division