



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *B. W. v. Minister of Employment and Social Development*, 2017 SSTADIS 162

Tribunal File Number: AD-16-1209

BETWEEN:

B. W.

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 13, 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 of Canada (Tribunal) dated September 15, 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 his disability was not severe during his minimum qualifying period (MQP), which ended on October 31, 2013, the date before the month he was approved to collect the CPP retirement pension.

[2] On October 13, 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 a schedule accompanying the application requesting leave to appeal, the Applicant's representative made the following submissions:

- (a) The Applicant saw his family doctor about shortness of breath in March 2012 and was laid off from his job in November 2013, because he was no longer able to carry out his duties. In the same month, he was approved for the CPP retirement pension. He was diagnosed with emphysema and chronic obstructive pulmonary disease (COPD) in December 2013 and with lung cancer in February 2014. He applied for CPP disability benefits in March 2014.
- (b) The Applicant has done everything possible to follow the rules governing the CPP. He has not been told specifically why he was denied a CPP disability pension.
- (c) He applied for CPP disability benefits because his ability to breathe was becoming increasingly impaired. He felt that if he had CPP disability benefits it

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

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

would supplement his income if he had to miss work due to illness. He was not paid for sick days and had bills that had to be paid monthly. He needed income in order to survive. Since he had paid into the CPP his entire working life and was now 62 years old, he was eligible to take early retirement benefits.

- (d) In paragraph 10 of its decision, the General Division stated that the Applicant “quit his job.” In fact, he was laid off from his full-time position due to medical reasons stated on his separation form. He could not breathe well enough to jump in and out of a semi and tarp 53-foot trailers numerous times per day. The Applicant had no way of knowing that he had cancer when he applied for CPP disability benefits.

[10] Enclosed with the notice requesting leave were the following documents:

- Lung function testing results dated December 17, 2013;
- Consultation report (two of three pages) by Dr. Scott Johnson dated April 7, 2014.

ANALYSIS

Alleged Failure to Consider Evidence

[11] 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 argues that the General Division gave inadequate consideration to evidence that he felt proved he was suffering from a severe and prolonged disability prior to the end of the MQP ending on October 31, 2013.

[12] I note that both of the medical reports submitted with the Applicant’s request for leave were made available to the General Division at the time of the hearing and were addressed in its reasons. 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—primarily physical weakness and shortness of breath arising from

emphysema, COPD, and lung cancer—and how they affected his capacity to regularly pursue substantially gainful employment as of October 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 he was last eligible for CPP disability benefits. I see no indication that the General Division misapplied the law regarding the intersection of CPP retirement and disability benefits and find that it correctly determined the MQP date.

[13] If the Applicant is submitting that I should reconsider and reassess the evidence and decide in his 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 have 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 Insufficiency of Reasons

[14] The Applicant suggests that he has never been told why his application for CPP disability benefits was refused.

[15] It is a principle of natural justice that a claimant must be given comprehensible reasons for an adverse outcome, but I see no reasonable chance of success for this ground of appeal. In my view, the General Division’s decision contains an analysis of the relevant facts and applicable law that clearly explains why the Applicant did not qualify for CPP disability benefits:

[30] The Tribunal does not doubt that the Appellant suffers from a severe disability now. However, sufficient evidence has to be found to prove that he suffered from this disability prior to his MQP. The Tribunal notes that the Appellant continued to work past October 31, 2013, was diagnosed with lung cancer in February 2014 and underwent surgery for its treatment in April 2014. The severity of his medical condition is evident, but only after the expiry of his MQP and not prior to.

This passage also indicates that the General Division correctly applied the provisions of the CPP, led by subsection 70(3), that effectively bar a contributor from receiving a retirement pension and a disability pension at the same time.

Alleged Error Regarding Circumstances of Termination

[16] As noted above, the General Division placed considerable weight on the fact that the Applicant was not terminated from his job until after the end of the MQP. I see no reason to interfere with this finding unless it rested on a material error and, contrary to the Applicant's allegation, I see no indication of that here.

[17] The Applicant submits that the General Division falsely characterized his departure from Royal Delivery Services Ltd. as "quitting." In fact, it is clear from its decision that the General Division understood that the Applicant did not leave voluntarily, noting in paragraph 8, "He was unable to do his job due to illness and was laid off by the employer on November 27, 2013." In paragraph 23, the General Division noted the Applicant's testimony that his increasing health problems led him and his employer to mutually agree that he could not continue working. Even paragraph 10, the passage cited by the Applicant as factually incorrect, stated that he "had to quit his job because of shortness of breath," suggesting that the General Division was well aware that his failing health led to the end of his employment.

[18] I am not convinced that this ground would have a reasonable chance of success on appeal.

CONCLUSION

[19] 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