



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. N. v. Minister of Employment and Social Development*, 2017 SSTADIS 210

Tribunal File Number: AD-16-1176

BETWEEN:

R. N.

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: May 5, 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 8, 2016. The General Division had earlier conducted a hearing by teleconference and determined that the Applicant was not eligible 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 December 31, 2013, the date before the month of commencement of his early CPP retirement pension.

[2] On October 4, 2016, the Applicant submitted an incomplete application requesting leave to appeal to the Appeal Division. Following a request for further information, the Applicant perfected his appeal on October 26, 2016, within the specified time limitation.

[3] For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

THE LAW

Department of Employment and Social Development Act

[4] 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.

[5] 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.

[6] 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.

[7] Some arguable ground upon which the proposed appeal might 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

[8] 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.

Canada Pension Plan

[9] 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.

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

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

[10] 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.

[11] 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.

[12] 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).

[13] 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.

ISSUE

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

SUBMISSIONS

[15] In his application requesting leave, the Applicant wrote that he did not think the General Division placed sufficient emphasis on his November 2014 stroke. He noted that his doctors had revoked his driver's licence and he was now dependent on a scooter for mobility. He required homecare to manage tasks related to personal care. He also suffered from diabetes, for which he took 14 pills and three injections per day.

[16] In a letter dated October 6, 2017, the Tribunal reminded the Applicant of the specific grounds of appeal permitted under subsection 58(1) of the DESDA and asked him to provide, within a reasonable timeframe, more detailed reasons for his request for leave. On October 26, 2017, the Applicant submitted an amended notice requesting leave, adding that he was only

employed after December 31, 2013, because he had a benevolent employer who retained him even though he was unable to do his job effectively.

[17] The Applicant also submitted a letter dated October 18, 2016, from Euseok Kim, his family physician.

ANALYSIS

[18] The thrust of the Applicant's submissions is that the General Division dismissed his appeal despite medical evidence indicating that his condition was "severe and prolonged" according to the criteria governing CPP disability.

[19] However, outside of this broad allegation, the Applicant does not specify how, in coming to its decision, the General Division failed to observe a principle of natural justice, committed an error in law or made an erroneous finding of fact. For the most part, the Applicant's submissions recapitulate evidence and arguments that, from what I can gather, were already presented to the General Division. Unfortunately, the Appeal Division has no mandate to re-hear disability claims on their merits. 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 correspond to the grounds of appeal set out in subsection 58(1) of the DESDA. It is not sufficient for an applicant to merely state their disagreement with the General Division's decision, nor is it enough to express their continued conviction that their health conditions render them disabled within the meaning of the CPP.

[20] The Applicant alleges that the General Division gave scant attention to his stroke, but my review of the decision indicates that the General Division was well aware of this particular health setback, but correctly gave it minimal weight because it occurred after his CPP disability coverage ended.

[21] The Applicant also suggests that the General Division overlooked the fact that his last employer was "benevolent" and presumably did not hold his work performance to a commercial standard. However, my review of the evidence indicates that the Applicant did not raise this point—either in writing or in testimony—before the General Division, even though he had ample opportunity to do so. The Appeal Division is not a forum in which fresh evidence can be

considered. For the same reason, I cannot consider Dr. Kim's October 2016 update, which was prepared after the General Division issued its decision.

[22] My review of the decision in this case indicates that the General Division analyzed in detail the Applicant's medical issues—primarily diabetes and a heart condition—and how they affected his capacity to regularly pursue substantially gainful employment. In doing so, the General Division took into account the Applicant's education and employment history before concluding there was insufficient evidence of incapacity prior to December 31, 2013. The General Division's decision closed with an analysis that suggests it meaningfully assessed the evidence and had defensible reasons supporting its conclusion. I see no indication that the General Division ignored, or gave inadequate consideration to, any significant component of the evidence that was before it.

[23] I see no arguable case for the grounds claimed by the Applicant.

CONCLUSION

[24] 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.



Member, Appeal Division