



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *D. P. v. Minister of Employment and Social Development*, 2017 SSTADIS 217

Tribunal File Number: AD-16-1294

BETWEEN:

**D. P.**

Applicant

and

**Minister of Employment and Social 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: May 9, 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 August 29, 2016. The General Division had earlier conducted a hearing by videoconference 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.

[2] On November 16, 2016, within the specified time limitation, the Applicant submitted an application requesting leave to appeal to the Appeal Division, detailing alleged errors on the part of the General Division. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

### **THE LAW**

#### ***Canada Pension Plan***

[3] 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 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.

[4] 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.

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.

***Department of Employment and Social Development Act***

[5] 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.

[6] 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.

[7] 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.

[8] 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>

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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.

[9] 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**

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

## **SUBMISSIONS**

[11] The Applicant submitted that his disability is both severe and prolonged. In his application requesting leave to appeal, the Applicant alleged that the General Division disregarded numerous medical reports indicating that reduced mobility had left him disabled since at least 2011. Contrary to the General Division's findings, his disability did result in his death, as noted in the April 24, 2012 report from the Humber River Hospital, which found that he had zero pulse for 30 seconds. It was later discovered that his heart had stopped due to numerous muscle spasms.

[12] The Applicant also submitted that the General Division failed to provide him with a fair and impartial hearing, alleging that the member presiding over his hearing told him that his application would be turned down.

## **ANALYSIS**

[13] 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 during his MQP, according to the criteria governing CPP disability.

[14] I see no arguable case on this broadly argued ground. In merely reiterating that he was disabled, the Applicant's submissions recapitulate what was 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.

[15] The Applicant claimed that he "died" during an emergency room admission in April 2012, a fact that the General Division disregarded. However, I note that the General Division devoted two paragraphs (13 and 14) to summarizing the Applicant's testimony about this episode and then went on to discuss it in its analysis:

[45] The Appellant testified that he was hospitalized because of a spasm that he had in his chest on April 24, 2012 that stopped his heart from beating for thirty seconds. The Appellant testified that he has not had a spasm that intense again and that the laser surgery that he was receiving in his chest has reduced the frequency of his chest spasms. The Tribunal did not find any documentary evidence on file to substantiate the Appellant's testimony about the spasm in his chest on April 24, 2012. The Tribunal relies on the evidence of Dr. Tiong, Cardiologist, who examined the Appellant's musculoskeletal system and the effects it had on his cardiovascular system...

[16] I see no indication that the General Division ignored, or gave inadequate consideration to, any significant component of the evidence that was before it. The Applicant apparently seeks to link his "death" to a finding that his disability was "prolonged," but the latter is a legal, not medical, term as defined by paragraph 42(2)(a) of the CPP. In any event, I note that the Humber River Hospital emergency report on which the Applicant relies did not refer to him as having "died." I might add that death is commonly understood to be a permanent condition.

[17] The Applicant also alleges that the General Division member prejudged his case by telling him during the hearing that his appeal would fail. An allegation of bias is serious and must usually be substantiated by specific evidence. I agree that, had the General Division member indicated at the outset of the proceedings, before he had heard any testimony, that he had already decided the case, then the Applicant would have had an arguable case that he was denied a fair hearing. However, I have reviewed the entirety of the audio recording of the hearing and heard nothing to suggest that the General Division member had made up his mind prematurely. Indeed, the member took pains to reassure the Applicant on more than one occasion that no decision would be rendered until one week had elapsed, to allow him an opportunity to submit late medical reports.

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

**CONCLUSION**

[19] 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