



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *Minister of Employment and Social Development v. L. F.*, 2017 SSTADIS 345

Tribunal File Number: AD-17-328

BETWEEN:

Minister of Employment and Social Development

Applicant

and

L. F.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shirley Netten

Date of Decision: July 19, 2017

REASONS AND DECISION

[1] On January 16, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* was payable to the Respondent. The Minister (Applicant) filed an application for leave to appeal to the Tribunal's Appeal Division.

[2] The only grounds of appeal to the Appeal Division are those provided for in subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA):

- 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 that it made in a perverse or capricious manner or without regard for the material before it.

[3] As stated in subsections 56(1) and 58(3) of the Act, "An appeal to the Appeal Division may only be brought 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 "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." I must therefore determine whether there is at least one admissible ground of appeal that could give the appeal a reasonable chance of success.

[5] The leave to appeal proceeding is a preliminary step to an appeal on the merits. It is an initial and appreciably lower hurdle to be met. The Applicant does not have to prove the case at the leave to appeal stage: *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC). Rather, the Applicant is required to establish that the appeal has a reasonable chance of success. This means having, at law, some arguable ground upon which the proposed appeal might succeed: *Osaj v. Canada (Attorney General)*, 2016 FC 115; *Canada (Minister of*

Human Resources Development) v. Hogervorst, 2007 FCA 41. At the leave to appeal stage, the Appeal Division does not have to weigh the evidence or decide on the merits of the case. Leave to appeal should be granted unless the Appeal Division concludes [translation] “that no one could reasonably believe in the appeal’s success:” *Canada (Attorney General) c. Bernier*, 2017 FC 120.

[6] One of the grounds of appeal that is provided for in subsection 58(1) of the DESDA is the following: “The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.” In this case, the Applicant argues that the General Division based its decision on erroneous findings of fact on two grounds:

The SST-GD determined the Respondent’s disability in the absence of objective medical evidence. In fact, the claims of fibromyalgia and chronic fatigue were not supported by any valid documentary evidence and were based on hearsay only.

Furthermore, the SST-GD did not account for evidence contrary to its finding and provided no justification for rejecting it. In fact, the Respondent received regular Employment Insurance benefits after the disability onset date, which presumes her capacity for work.

[7] At paragraph 24 of the decision, the General Division accepted the diagnoses of fibromyalgia and chronic fatigue, based on the nurse practitioner’s medical report, in the absence of earlier reports. The Applicant therefore raises the issue of the type of evidence that is valid to support the findings of fact concerning the state of health of an applicant.

[8] In paragraphs 30 and 31, the General Division then found that the Respondent was incapable of functioning in a professional atmosphere, to hold a substantially gainful occupation, but without mentioning the regular Employment Insurance benefits received by the Respondent. On this point, the Applicant raises the issue of the importance of these benefits in the employability analysis, given the circumstances of the appeal.

[9] I repeat that the Applicant does not have to prove its case at this stage. In this case, the Applicant has raised questions about errors in fact, the answer to which could lead to the setting side of the decision under review. As a result, I find that the appeal has a reasonable chance of success, and I grant leave to appeal.

CONCLUSION

[10] Leave to appeal is granted.

[11] This decision does not presume the result of the appeal on the merits of the case.

Shirley Netten
Member, Appeal Division