Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *J. P. v. Minister of Employment and Social Development*, 2017 SSTADIS 464

Tribunal File Number: AD-16-1156

BETWEEN:

**J. 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: Meredith Porter

Date of Decision: September 6, 2017

## REASONS AND DECISION

## INTRODUCTION

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated July 25, 2016, which determined that the Applicant was not entitled to a disability pension under the *Canada Pension Plan* (CPP). The General Division denied the Applicant's disability pension as she had failed to demonstrate that she suffered from a severe disability on or before her minimum qualifying period (MQP) date, the date by which a person must establish a severe and prolonged disability. In this case, the Applicant's MQP date was December 31, 2008, with a possible prorated MQP of January 1, 2009, until August 31, 2009.

[2] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on September 26, 2016.

## ISSUE

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

## THE LAW

[4] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), 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 DESD Act provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." The Applicant must establish that there is some arguable ground upon which the proposed appeal might succeed in order for leave to appeal to be granted (*Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630). An arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success (*Fancy v. Canada (Attorney General)*, 2010 FCA 63).

[6] According to subsection 58(1) of the DESD Act, 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 that it made in a perverse or capricious manner or without regard for the material before it.

**SUBMISSIONS**

[7] The Applicant submits that the General Division based its decision on evidence that the Applicant had been gainfully employed in 2011 and 2012, which is well beyond her MQP date of December 2008 and her possible prorated MQP date of August 31, 2009. The Applicant filed new evidence to dispute the General Division's findings and requested that a new *de novo* hearing be granted by the Appeal Division.

**ANALYSIS**

[8] The Applicant filed an application requesting leave to appeal the General Division decision and included the following attached documents with her application:

- A calendar of the Applicant's logs of work and absences from work during the period in question.
- A sworn statement of explanation from the Applicant for the same period in question.
- A handwritten sworn statement from the Applicant explaining her condition and reasons for leaving work.
- A sworn statement from the Applicant's neighbor, J. G., of what she witnessed from the Applicant on a regular basis.
- A sworn statement from R. M., the Applicant's co-worker.

[9] Hearings before the Appeal Division are not *de novo* hearings. The Appeal Division cannot consider evidence that was not in the record before the General Division. An appeal before the Appeal Division is not considered an opportunity for a new trial.

[10] I note that, for cases related to the CPP, paragraph 66(1)(*b*) sets out when the Tribunal may rescind or amend a decision. The Tribunal may rescind or amend a decision given by it in respect of any particular application if "a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence."

[11] A letter was sent to the Applicant's representative dated June 27, 2017, which reads as follows:

> Section 66 of the Department of Employment and Social Development Act (DESD Act) states:
>
> **Amendment of decision**
>
> **66. (1) The Tribunal may rescind or amend a decision given by it in respect of any particular application if**
>
> **(a) in the case of a decision relating to the Employment Insurance Act, new facts are presented to the Tribunal or the Tribunal is satisfied that the decision was made without knowledge of, or was based on a mistake as to, some material fact;**
>
> **or**
>
> **(b) in any other case, a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence.**
>
> **(2) An application to rescind or amend a decision must be made within one year after the day on which a decision is communicated to the appellant.**
>
> **(3) Each person who is the subject of a decision may make only one application to rescind or amend that decision.**
>
> **(4) A decision is rescinded or amended by the same Division that made it.**
>
> The application seeking leave to appeal was received by the Appeal Division of the Social Security Tribunal, along with various documents

> which were not included in the record before the General Division. Appeals before the Appeal Division are not *de novo* appeals, and as a result, the new evidence cannot be considered in the decision as to whether or not leave should be granted.
>
> Amendments to decisions of the Social Security Tribunal must be made by the division which rendered the decision. The Appeal Division cannot amend a decision of the General Division under section 66 of the DESD Act. The Appeal Division notes, however, that the one year deadline for filing an application seeking to amend the decision of the General Division has not yet expired.
>
> Please provide additional details regarding the following questions:
>
> 1) Has an application to amend the decision of the General Division, pursuant to section 66 of the DESD Act, been filed?
>
> 2) If the answer to question (1) is "no", please provide confirmation whether or not such an application will be filed prior to the expiration of the one year timeframe.

[12] What section 66 requires is that, if the Applicant wants to present evidence to rescind or amend the General Division decision, she must comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations*. This means that she must file an application to rescind or amend the decision with the General Division because according to subsection 66(4), only the division that made the decision is empowered to rescind or amend its decision based on new facts. In addition to filing an application, section 66 of the DESD Act requires the Applicant to demonstrate that the new fact is material and that it could not have been discovered at the time of the hearing with the exercise of reasonable diligence. The Appeal Division, in these circumstances, does not have jurisdiction to rescind or amend a decision based on new facts.

[13] The Tribunal did not receive a response to the June 27, 2017, letter. No further submissions were received either.

[14] The test for granting leave to appeal has been well developed. The test is whether there is some arguable ground on which the appeal might succeed (*Kerth*, supra; *Canada (Attorney General) v. St-Louis*, 2011 FC 492). The Federal Court of Appeal concluded that the question of whether a party has an arguable case at law is akin to determining whether that party, legally,

has a reasonable chance of success (*Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy*, supra.).

[15] The Applicant was also sent correspondence dated April 21, 2017, identifying missing information in the application requesting leave to appeal. In particular, the Applicant had filed the new evidence as discussed above, but had failed to identify any ground of appeal enumerated in subsection 58(1) of the DESD Act. The Appeal Division had determined that the Applicant should be notified of the deficiencies in her application and given an opportunity to provide necessary additional details regarding the grounds on which she was basing her application requesting leave. (see *Bosse v. Canada (Attorney General)* 2015 FC 1142)

[16] The Tribunal did not receive a response to the April 21, 2017, letter.

[17] In granting leave to appeal, I must be satisfied that the Applicant has demonstrated that the General Division failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction, made an error in law, or based its decision on an erroneous finding of fact that it may have made in a perverse or capricious manner or without regard for the material before it in coming to its decision. An applicant is not required to prove the grounds of appeal for the purposes of a leave to appeal application (*Kerth*); however, I am restricted to considering only those grounds of appeal that fall within subsection 58(1) of the DESD Act. The subsection does not permit me to reassess or reweigh the evidence, and I am not permitted to consider evidence that was not before the General Division for consideration, as the submission of new evidence is not one of the grounds for appeal enumerated in the DESD Act. Although the DESD Act permits me to consider whether the General Division committed an error of law, whether or not it appears on the face of the record, I am not permitted to grant leave to appeal on theoretical grounds (*Canada (Attorney General) v. Hines*, 2016 FC 112). On reading the General Division decision, I cannot find any suggestion that the General Division has made an error of law.

[18] I note that the initial hurdle to be met in requesting leave to appeal to the Appeal Division is lower than the hurdle at the merit stage (*Kerth*); however, at a minimum, applicants seeking leave to appeal a General Division decision ought to identify some details with regard to either an error committed by the General Division, or a failing on the part of the General

Division, that fall somewhere within the three grounds enumerated within subsection 58(1) of the DESD Act.

[19] In failing to do so, the application requesting leave to appeal does not permit a finding that the appeal has a reasonable chance of success and leave to appeal cannot be granted.

**CONCLUSION**

[20] The Application is refused.

Meredith Porter
Member, Appeal Division