



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. C. v. Minister of Employment and Social Development*, 2018 SST 266

Tribunal File Number: AD-18-154

BETWEEN:

L. C.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Valerie Hazlett Parker

Date of Decision: March 23, 2018

DECISION AND REASONS

DECISION

[1] Time to file the application for leave to appeal is extended.

[2] Leave to appeal is granted.

OVERVIEW

[3] L. C. (Claimant) completed high school as well as some college and university courses. She worked until 1995 when she was laid off because she could not complete her work, even light duties. She applied for a Canada Pension Plan disability pension in 2014, and claimed that she was disabled by extreme fatigue, chronic pain due to spinal injuries, nausea, dizziness, cognitive challenges, rage, head injury and post-traumatic stress disorder. The Minister of Employment and Social Development (Minister) refused the application. The Claimant appealed this decision to the Social Security Tribunal. The Tribunal's General Division dismissed her appeal. The Claimant then requested leave to appeal beyond the time permitted to do so.

[4] Time to apply for leave to appeal is extended and leave to appeal to the Tribunal's Appeal Division is granted because the General Division may have based its decision on an erroneous finding of fact under the *Department of Employment and Social Development Act* (DESD Act) when it found that Dr. Potashner's opinion was based on the Claimant's lack of education.

ISSUES

[5] Should the Appeal Division extend the time for the Claimant to apply for leave to appeal?

[6] If so, might the General Division have erred in one or more of the following ways?

a) by basing its decision on an erroneous finding of fact that Dr. Potashner's opinion was based on the Claimant's lack of education;

b) by concluding that the Claimant's condition improved after the minimum qualifying period (the date by which a claimant must be found to be disabled to be eligible to receive the disability pension);

c) by placing too much weight on the Claimant providing care for her parents; or

d) by overlooking that the Claimant may have downplayed her condition prior to the car accidents in 2003 and 2009 so as to benefit in the car accident litigation.

ANALYSIS

Issue 1: Should the time for filing the application for leave to appeal be extended?

[7] The DESD Act governs the Tribunal's operation. It provides that an application for leave to appeal must be brought to the Tribunal within 90 days after the decision was communicated to an appellant.¹ However, the Appeal Division may extend the time to bring an application for leave to appeal.² The Federal Court has established that a number of factors must be considered when deciding whether to do so, including:

- a) whether the claimant had a continuing intention to pursue the application;
- b) whether there is a reasonable explanation for the delay;
- c) whether there is any prejudice to the other party in allowing the extension; and
- d) whether the matter discloses an arguable case.³

The weight to be given to each of these factors may differ in each case, and in some cases, different factors will be relevant. The overriding consideration is that the interests of justice be served.⁴ The Claimant filed the application for leave to appeal approximately five months late. She explains that the application was late because she had difficulty finding a representative and her health issues make it difficult for her to organize and prepare documents.

¹ Subsection 57(1) of the DESD Act

² Subsection 57(2) of the DESD Act

³ *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883

⁴ *Canada (Attorney General) v. Larkman*, 2012 FCA 204

I am satisfied that the Claimant had a continuing intention to appeal and a reasonable explanation for the delay. She set about finding a new representative and retained him approximately one month after the time to file the application expired. I accept that she had difficulty retaining counsel and providing all of the necessary documents to him so that he could prepare the application. I am also satisfied, given the relatively short delay involved in this matter and that the appeal is based on documents that the Minister already has, that there would be no prejudice to the Minister if this matter were to proceed. For the reasons below, I am also satisfied that the appeal may have a reasonable chance of success⁵. It is therefore in the interests of justice to extend the time to file the application.

Issue 2: Might the General Division have erred by basing its decision on an erroneous finding of fact?

[8] The DESD Act sets out only three grounds of appeal that can be considered: the General Division failed to observe a principle of natural justice or made a jurisdictional error; made an error in law; or 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 In addition, leave to appeal is to be refused if the appeal has no reasonable chance of success.⁷

[9] The Claimant argues that the General Division based its decision on an erroneous finding of fact under the DESD Act when it concluded that Dr. Potashner's opinion that it would be difficult for the Claimant to compete in the marketplace for any type of gainful employment was based solely on her limited education.⁸ She contends that Dr. Potashner's opinion was also based on her difficulties with concentration and other limitations, which the General Division may not have considered. When Dr. Potashner's report is read as a whole, it appears that his conclusion that the Claimant would have difficulty with any type of gainful employment was based on more than just her education. Therefore, the General Division's finding of fact may have been erroneous and made without regard for all of the material that was before it. The General Division decision was based on this finding of fact, at least in part. Therefore, the appeal may

⁵ In law, a reasonable chance of success is akin to an arguable case: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41

⁶ Subsection 58(1) of the DESD Act

⁷ Subsection 58(2) of the DESD Act

⁸ Paragraph 41 of the decision

have a reasonable chance of success.

Other issues

[10] The Claimant has presented other grounds of appeal. However, because I have found that the appeal may have a reasonable chance of success based on the ground of appeal examined above, I need not consider the other grounds of appeal that were presented.⁹

CONCLUSION

[11] Leave to appeal is granted.

[12] The parties are not restricted to the ground of appeal considered in this decision.

[13] The parties are requested to refer to specific time stamps on the hearing recording if they base their submissions on what was said at the General Division hearing.

[14] This decision to grant leave to appeal does not presume the result of the appeal on the merits of the case.

Valerie Hazlett Parker
Member, Appeal Division

REPRESENTATIVES:	Kenneth Wise, for the Applicant
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⁹ *Mette v. Canada (Attorney General)*, 2016 FCA 276