



Citation: *SD v Minister of Employment and Social Development*, 2022 SST 808

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant (Claimant): S. D.
Representative: Rajinder Johal

Respondent: Minister of Employment and Social Development

Decision under appeal: General Division decision dated March 31, 2022
(GP-21-117)

Tribunal member: Kate Sellar

Decision date: August 16, 2022
File number: AD-22-401

Decision

[1] I am refusing the application for leave (permission) to appeal. The appeal will not go ahead. These reasons explain why.

Overview

[2] S. D. (Claimant) worked on an assembly line until her job ended in October 2017. She was diagnosed with POEMS syndrome in about December 2018. She applied for Canada Pension Plan (CPP) disability pension in March 2019. The Claimant had to show that her disability was severe and prolonged by December 2015 or between January 2016 and November 2016.

[3] The Minister of Employment and Social Development (Minister) denied the application in June 2019.

[4] The Claimant asked the Minister to reconsider the decision in September 2020. The Minister explained that the Claimant's request was late, and invited the Claimant to make arguments about why the Minister should reconsider anyway.¹ The Claimant provided those arguments in October 2020. The Minister denied the request for a late reconsideration.

[5] The Claimant appealed to this Tribunal. The General Division decided that:

- the Claimant's request for reconsideration to the Minister was late
- the Minister did not act "judicially" when it decided to refuse to reconsider the late request because the Minister did not make a clear finding about whether the Claimant's request had a reasonable chance of success²

¹ Claimants have 90 days from when they receive the Minister's decision to ask for reconsideration, see section 81(1) of the *Canada Pension Plan*.

² Refusing to reconsider the late request is a discretionary decision so the Minister has to make that decision judicially, see the Federal Court's decision in *Canada (Attorney General) v Uppal*, 2008 FCA 388. The test for deciding whether to decide a late request for reconsideration is in section 70.1 of the *Canada Pension Plan Regulations*.

- the Minister ignored the Claimant's argument about the impact her English language skills had on her ability to communicate with the Minister

[6] The General Division decided that the request for the late reconsideration should not be granted for two reasons. First, the Claimant did not provide a reasonable explanation for the delay. Second, the Claimant did not show a continuing intention to request a reconsideration.

[7] The Claimant asks for permission (leave) to appeal the General Division's decision. I must decide whether there is an arguable case that the General Division made an error under the *Department of Employment and Social Development Act (Act)* that would justify granting the Claimant permission to appeal.

[8] The Claimant has not raised an argument that would justify granting her leave to appeal. The appeal will not go ahead.

Issue

[9] Could the General Division have made an error that would justify granting permission to appeal?

Analysis

[10] First, I will describe my role at the Appeal Division in terms of reviewing General Division decisions. Second, I will explain how I concluded that the General Division couldn't have made any error that would justify granting permission to appeal.

Reviewing General Division decisions

[11] The Appeal Division does not provide an opportunity for the parties to re-argue their case in full. Instead, I reviewed the Claimant's arguments and the General Division's decision to decide whether the General Division may have made any errors.

[12] That review is based on the wording of the Act, which sets out the "grounds of appeal." The grounds of appeal are the reasons for the appeal. To grant leave to

appeal, I must find that it is arguable that the General Division made at least one of the following errors:

- It acted unfairly.
- It failed to decide an issue that it should have, or decided an issue that it should not have.
- It based its decision on an important error regarding the facts in the file.
- It misinterpreted or misapplied the law.³

[13] At the leave to appeal stage, the Claimant must show that the appeal has reasonable chance of success.⁴ To do this, a claimant needs to show only that there is some arguable ground on which the appeal might succeed.⁵

No possible error that justifies granting permission to appeal

[14] The Claimant has not raised any argument about a possible error by the General Division that has a reasonable chance of success on appeal.

[15] The Claimant selected all of the boxes for possible reasons for appeal. That means that the Claimant argues that the General Division failed to provide a fair process (or acted beyond or refused its jurisdiction), made an error of fact, and made an error of law.

[16] The Claimant argues again that she showed a continuing intention to request reconsideration. She says that acting promptly once she hired a lawyer is enough to show a continuing intention to request reconsideration.

[17] The General Division decided that the Claimant didn't show that she would have been unable (even with help) to ask for a reconsideration at some time between June 2019 and September 2020.⁶

³ See section 58(1) of the *Department of Employment and Social Development Act* (Act).

⁴ See section 58(2) of the Act.

⁵ The Federal Court of Appeal confirmed this in a case called *Fancy v Canada (Attorney General)*, 2010 FCA 63.

⁶ See paragraph 31 in the General Division decision.

[18] The Claimant also argues that she provided a reasonable explanation for the delay. The Claimant argues that her lack of ability in English and her poor health provide a reasonable explanation for the delay in requesting reconsideration.

[19] The General Division decided that although the Claimant had a language barrier, that was not a reasonable explanation for the entire delay given that she had help reading the letter from her husband.⁷

[20] I see no possible argument for an error of fact here. The General Division considered the Claimant's evidence about why she was late, and decided that: (1) she did not show a continuing intention to appeal for the whole period; and (2) her explanation for the delay was not reasonable.

[21] I cannot give permission to appeal only because the Claimant didn't agree with the General Division's conclusion. The General Division reached its conclusion by applying the Claimant's facts to the law.⁸

[22] The law is clear that there needs to be a continuing intention to appeal for the whole period of the delay, and there needs to be a reasonable explanation for the delay.⁹ The General Division applied that law and found that the Claimant did not meet those requirements.

[23] The General Division did not ignore or misunderstand the evidence about why the Claimant was late. The General Division applied those facts to the law and concluded that the Claimant's late reconsideration did not need to be decided. This is not a possible error that I can fix on the Appeal Division.

[24] I have reviewed the record. The General Division did not ignore or misunderstand the evidence about the Claimant's delay in requesting reconsideration.¹⁰

⁷ See paragraph 29 in the General Division decision.

⁸ See *Garvey v Canada (Attorney General)*, 2018 FCA 118.

⁹ See paragraphs 13 and 14 in the General Division decision, which explain the rules about granting late requests for reconsideration as they are set out in section 74.1(3) and(4) in the *Canada Pension Plan Regulations*.

¹⁰ See *Karadeolian v Canada (Attorney General)*, 2016 FC 615.

I am satisfied that the Claimant had a fair chance to present the reasons why the Minister should have issued a reconsideration decision even though her application was late.

[25] A final note. Even if the Claimant was able to show that the General Division made an error, there is a bigger problem with the Claimant's appeal. To be eligible for a disability pension, the Claimant had to show that her disability was severe and prolonged by December 31, 2015 or in 2016 between January 1 and November 30.¹¹ There is not a lot of evidence about the Claimant's disability during that time, and she worked for a "lengthy period after those dates."¹²

[26] The Claimant's request for reconsideration was more than a year late, so she had to show that her appeal had a reasonable chance of success. This would be difficult for the Claimant to prove given the window of time in which she needed to show she was disabled.

Conclusion

[27] I refused permission to appeal. This means that the appeal will not go ahead.

Kate Sellar
Member, Appeal Division

¹¹ These dates form the basis for the Claimant's coverage period. The coverage period is calculated based on the Claimant's contributions to the *Canada Pension Plan*.

¹² See paragraph 36 in the General Division decision.