



Citation: *DT v Minister of Employment and Social Development*, 2023 SST 282

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: D. T.
Representative: F. B.

Respondent: Minister of Employment and Social Development

Decision under appeal: General Division decision dated November 9, 2022
(GP-22-1730)

Tribunal member: Kate Sellar

Decision date: **March 15, 2023**

File number: AD-23-149

Decision

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

Overview

[2] D. T. (Claimant) applied for a *Canada Pension Plan* (CPP) disability pension. The Minister of Employment and Social Development (Minister) refused the application initially and on reconsideration. The reconsideration letter was dated June 6, 2022. The Claimant appealed to the General Division of this Tribunal on October 24, 2022.

[3] The General Division decided that the Claimant's appeal was late. The General Division refused to give the Claimant an extension of time to appeal because the appeal had no reasonable chance of success.

[4] The General Division explained that if the Claimant had received an extension of time, her appeal would still not succeed because the General Division cannot decide a case that has already been decided. The legal rule against deciding something that has already been decided is called *res judicata*.

[5] I must decide whether it can be argued that the General Division made an error under the *Department of Employment and Social Development Act* (Act) that would justify giving the Claimant permission to appeal.

Issues

[6] The issues in this appeal are as follows:

- a) Did the Claimant raise an arguable case that the General Division made an error that would justify granting leave to appeal?
- b) Did the Claimant set out evidence that wasn't presented to the General Division that would justify granting leave to appeal?

I'm not giving the Claimant permission to appeal

[7] I can give the Claimant permission to appeal if their application raises an arguable case that the General Division:

- didn't follow a fair process;
- acted beyond its powers or refused to exercise those powers;
- interpreted or applied the law incorrectly; or
- got the facts wrong.¹

[8] I can also give the Claimant permission to appeal if their application sets out evidence that wasn't presented to the General Division.²

[9] Since the Claimant hasn't raised an arguable case and hasn't set out evidence that would justify granting leave to appeal, I must refuse permission to appeal.

The Claimant hasn't raised an arguable case

[10] The Claimant argues that she has a severe and prolonged disability within the meaning of the CPP, so she should be entitled to a disability pension. She hasn't made any arguments that show that she meets the criteria for permission to appeal the General Division's decision about her extension of time.

[11] I do not see any plausible arguments that the General Division may have failed to provide a fair process, acted beyond or refused to exercise its powers, interpreted or applied the law incorrectly, or got the facts wrong.

[12] The Claimant doesn't dispute when she received the reconsideration decision or when she filed her appeal. There's no argument here about whether the Claimant was late.

¹ See section 58.1(a) and (b) in the *Department of Employment and Social Development Act* (the Act).

² See section 58.1(c) of the Act.

[13] Given that the Claimant was late, the General Division had to apply the legal test for an extension of time. The General Division had to consider a four-part test.³ The General Division found the following:

1. The Claimant showed a continuing intention to appeal.
2. The Claimant had a reasonable explanation for the delay.
3. There was no prejudice to the Minister because of the delay.
4. The Claimant had not shown she had an arguable case.⁴

[14] The General Division found that the fourth part of the test was the most important factor to consider. That factor wasn't met. The Claimant didn't show that she had an arguable case on appeal.

[15] The Review Tribunal (RT) already decided the question of the Claimant's eligibility for the disability pension. The RT dismissed the Claimant's appeal in March 2001. The Claimant applied a second time for a disability pension but a second RT dismissed her appeal in July 2007 because the matter had already been decided by a previous RT.

[16] The Claimant tried to re-open the 2007 RT decision based on new facts but was not successful. She pursued the matter before the Pension Appeals Board and the Federal Court of Canada, but she lost. The Claimant applied again for a disability pension and she appealed to this Tribunal. In November 2016, this Tribunal dismissed the appeal as *res judicata* because the RT already finally decided the issue of the Claimant's disability in March 2001. As a result, the Claimant didn't have a reasonable chance of success in having the appeal heard on the same issue again.⁵

³ The test comes from a case called *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883.

⁴ See paragraphs 7-8 and 12-14 in the General Division decision.

⁵ See paragraph 10 in the General Division decision.

[17] I cannot conclude that the General Division may have made an error in applying the test for an extension of time. Showing an arguable case is an important part of that test. I see no possible error made by the General Division in concluding that even if an extension were granted, the Claimant's eligibility for the disability pension would not be considered over again because a previous RT already decided the issue.

[18] The Claimant hasn't provided any reason why or how she meets the criteria for permission to appeal.

Claimant hasn't set out new evidence that I can consider

[19] In her appeal form, the Claimant checked the box stating that she has evidence that the General Division didn't have. In the space to provide more information, she stated "physiotherapy documentation." In the section about additional documents, she stated that if she got permission to appeal, she would submit new documents at a time "to be determined." She attached some arguments about how she is entitled to the disability pension, as well as a list of treatments she received starting in 1996, including physiotherapy treatments.

[20] The law says that I can give a claimant permission to appeal if their application sets out evidence that wasn't presented to the General Division.⁶

[21] However, in my view, I cannot give the claimant permission to appeal based on evidence about her physiotherapy that the General Division didn't have when it made its decision on the extension of time.

[22] The issue before me is whether the General Division made an error in its decision refusing the Claimant an extension of time to appeal. The key reason the General Division gave for refusing was that the Claimant didn't show she had an arguable case. The RT already decided in March 2001 that the Claimant wasn't disabled within in the meaning of the CPP (which means the issue to decide was *res judicata*).

⁶ *Department of Employment and Social Development Act*, section 58.1(c).

[23] There is nothing in the Claimant's documents that relate to that question. It is not in the interests of justice for me to grant permission to appeal when the Claimant sets out new evidence that has no meaningful connection or relationship to the issue under appeal.

Conclusion

[24] I have refused permission to appeal. This means that the appeal will not go ahead to the next step.

Kate Sellar
Member, Appeal Division