

Citation: *B. T. D. v. Minister of Employment and Social Development Canada*, 2014 SSTAD 173

Appeal No. AD-14-217

BETWEEN:

B. T. D.

Appellant

and

**Minister of Employment and Social Development Canada
(formerly Minister of Human Resources and Skills Development Canada)**

Respondent

**SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division**

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: July 8, 2014

BACKGROUND

[1] The Applicant applied for a *Canada Pension Plan* disability pension in May 2008. The Respondent denied her application on the basis that her disability was not severe or prolonged. The Respondent also denied her request for reconsideration of her application. The Appellant appealed the Minister's decision to the Commissioner of Review Tribunals on September 17, 2009. A Review Tribunal dismissed her appeal on December 14, 2010. The Applicant appealed the decision of the Review Tribunal to the Pension Appeals Board. The Pension Appeals Board (the "Board") in turn dismissed her appeal on November 14, 2012.

[2] The Applicant applied for judicial review to the Federal Court of Appeal.

DECISION OF THE FEDERAL COURT OF APPEAL

[3] The Federal Court of Appeal found the Board's decision to be unreasonable, on the basis that it did not apply the applicable legal standards and it lacked justification. The Court found that the decision did not allow it to understand why the Board arrived at the decision it did on the medical evidence before it.

[4] The Court determined that it was appropriate, in light of the delay involved and the further prejudice that would accrue by any further delay, as well as the circumstances of the case, to make its own assessment on the record before it, and to direct the result that should follow on the facts and the law.

[5] The Court allowed the application for judicial review, set aside the decision of the Board and directed that the appropriate division of the Social Security Tribunal grant Ms. B. T. D.'s appeal of the decision of the Review Tribunal and make an order granting her application for disability benefits dated April 30, 2008, "on the basis that she was disabled at that time".

[6] In arriving at its proposed disposition, the Court found that:

[24] On balance, the medical reports also support a finding that the disability is "prolonged" within the meaning of the legal test. Given the minimum qualifying period of December 31, 2009, the most relevant evidence is that of Dr. Barss in his medical report dated July 26, 2008. Dr. Barss opined that he did not anticipate any further improvement to Ms. D'Errico's already severe disability. While other reports

before the end of the minimum qualifying period guardedly suggest the possibility of her condition improving, they have a speculative tone.

[25] The record shows that despite numerous attempts to pursue work before the minimum qualifying period, Ms. D'Errico's disability prevented her from pursuing on a regular basis sedentary part-time work. The work she was able to pursue only recently- part-time yoga instruction at \$75 a week- was neither regular nor substantially gainful. Some other work she tried to do intermittently in the year leading up to her minimum qualifying period paid her \$50-\$160 per week for between 2-8 hours of work per week. The record also shows that when she tries to work, her condition worsens from its already poor state.

[26] Applying a real world perspective to the evidence around the time of her minimum qualifying period (December 31, 2009) - *i.e.*, Ms. D'Errico's employability based on education, employment background, daily activities, and, importantly in this case, her actual real world attempts to work- Ms. D'Errico was unable to pursue "with consistent frequency" or "regularly" any "truly remunerative occupation." Overall, she meets the test for disability benefits under the *Plan*. In my view, especially given Dr. Barss' July 26, 2008 medical report, Mr. (*sic*) D'Errico was "disabled" within the meaning of the *Plan* as of her application date, April 30, 2008.

CONCLUSION

[7] Given the directions from the Federal Court of Appeal, I allow the appeal of the decision of the Review Tribunal and grant the Applicant's application for disability benefits.

[8] The Court found that Ms. B. T. D. was "disabled" within the meaning of the *Plan* as of her application date, April 30, 2008. The *Canada Pension Plan* stipulates that the earliest date that disability benefits can be payable is generally the fourth month after an applicant became disabled. Section 69 of the *Canada Pension Plan* reads:

“Commencement of pension – ... where payment of a disability pension is approved, the pension is payable for each month commencing with the fourth month following the month in which the applicant became disabled, except that where the applicant was, at any time during the five-year period next before the month in which the applicant became disabled as a result of which the payment is approved, in receipt of a disability pension payable under this Act or under a provincial pension plan...”

[9] Payment of disability benefits therefore shall be effective as of August 2008.

Janet Lew

Member, Appeal Division