Citation: *D. B. v. Minister of Employment and Social Development*, 2015 SSTAD 1465

Appeal No. AD-15-1227

BETWEEN:

D. B.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: December 21, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated August 17, 2015. The General Division conducted an in-person hearing on August 14, 2015 and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that her disability was not "severe" at her minimum qualifying period of December 31, 1999. The Applicant filed an application requesting leave to appeal on November 16, 2015. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

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

SUBMISSIONS

[3] The Applicant submits that she was injured in 1997, before the minimum qualifying period. She submits that she has continued to seek treatment from various doctors since then. She submits that her injury has been continuous and severe enough to the point that she now requires a knee replacement.

[4] The Applicant submits that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction. She questioned the relevance of the General Division's finding that she is the primary caregiver of her son, when she has been financially supported by her son's father and her own family.

[5] The Respondent has not filed any written submissions in respect of this leave application.

ANALYSIS

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to 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.

[7] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted. The Federal Court of Canada recently affirmed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

(a) Onset of injury

[8] The fact that the Applicant's injury has been longstanding and severe to the point that she now requires a knee replacement alone does not speak to any of the grounds of appeal enumerated under subsection 58(1) of the DESDA. In this case however the General Division found that the Applicant's chief disabling medical complaint did not arise until approximately 2010 to 2011, well after the minimum qualifying period.

[9] The Applicant submits that the General Division erred in finding that her chief complaint did not arise until years after the injury. She indicates that her injury occurred in 1997, prior to the minimum qualifying period. This is when she first sought treatment. She alleges that she has seen various doctors on several occasions since then, and that there is supporting evidence of this. The Applicant however did not point to any evidence of this in her leave application, nor did she refute the findings by the General Division that the 2010 medical report of Dr. Lu, an orthopaedic surgeon, and 2012 medical report of Dr. Remer both detail ongoing bilateral knee pain for at least one year.

[10] I have reviewed the medical file to determine if there might be any references to the onset of early knee pain. In the consultation report dated August 23, 2012 of Dr. Lu the Applicant reported that she had sustained a hyperextension injury of her right knee 25 years ago and that two years ago, she developed gradual onset of bilateral knee pain (GD2-48). Dr. Sam Remer also referred to the injury 25 years ago, in his CPP medical report (GD2-65), but the handwritten portion of the same report (GD2-64) indicates that the Applicant had had one year of ongoing difficulties. Dr. Remer wrote "may be an old 25 year injury to the right knee has caused an ongoing episodes of events related to pain for joint right knee, right patella – causing decrease in balance, ROM, standing coordination".

[11] There are clinical records for September 1, 1997 that speak to a "bad right knee" and that the Applicant had had a similar incident in past (GD2-60 and GD3-3).

[12] Dr. Remer indicates in his letter of June 19, 2013 that the Applicant has been continuously seen at his clinic for ongoing right knee and that the condition has worsened over the years, but Dr. Remer indicates that he has been the Applicant's family physician for only the last three years, so his opinion in this regard is not particularly relevant as it does not address the material timeframe at the minimum qualifying period (GD3-4).

[13] While the Applicant experienced knee pain in and around September 1997, there are no medical reports or clinical records that discuss or relate to any knee issues or exacerbation in or around 1997, or any ongoing complaints involving her knee after 1997, other than the clinical records for September 1, 1997 (GD2-6). In its Evidence section, the General Division noted that there was a lack of medical information on file between 1997 and 2010. Certainly there were no records of any ongoing or continuous knee complaints after September 1, 1997, leading up to or at around the minimum qualifying period.

[14] While the Applicant may well have experienced severe knee in September 1997 and may have experienced some ongoing symptomology thereafter, a single reference in the clinical records to "a bad right knee" two years prior to the minimum qualifying period does not usually establish severity for the purposes of the *Canada Pension Plan*.

[15] There was an evidentiary basis for the General Division to have determined that the Applicant's onset of ongoing and continuous knee pain did not arise until well after her minimum qualifying period and therefore it cannot be said that it based its decision on an erroneous finding of fact made without regard for the material before it.

[16] Essentially the Applicant is seeking a reassessment on the issue of the onset of the severity of her knee. As the Federal Court recently held in *Tracey*, it is not the role of the Appeal Division to reassess the evidence or reweigh the factors considered by the General Division when determining whether leave should be granted or denied. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(b) Caregiving responsibilities

[17] The Applicant questions the relevance of the General Division's finding of fact that she was her son's primary caregiver. At paragraph 37, the General Division wrote:

> The Tribunal further notes and accords weight to the fact that the Appellant was the primary care-giver for her son until 2000. She stated that she was fully responsible for taking care of his daily needs and requirements. Given the nature of this requirement the Tribunal is satisfied that the Appellant had a residual capacity to pursue substantially gainful occupation beyond her MQP.

[18] The evidence, as presented, is somewhat thin regarding the Applicant's caregiving responsibilities. Despite that, the General Division was able to made findings of fact regarding the Applicant's caregiving responsibilities and what she may or may not have been able to perform, and the frequency and duration at which she was able to perform these duties. From this, the General Division clearly drew conclusions as to the Applicant's overall capacity and functionality, and tied this to her capacity regularly of pursuing any substantially gainful occupation. The General Division was entitled to determine if there was any relevance between the Applicant's responsibilities as the primary caregiver for her son, and her capacity regularly of pursuing any substantially gainful occupation. As such, I am not satisfied that the appeal has a reasonable chance of success on the ground that there is no relevance of the General Division's finding of fact that she was her son's primary caregiver.

[19] As an aside, I do not know if there was an evidentiary basis for the General Division to have found that the Applicant was her son's primary caregiver until 2000, when the evidence suggests she was the caregiver until 2010. At paragraph 19 in the Evidence section of its decision, the General Division indicated that the Applicant took care of her son until 2010 when he graduated from high school. This seems a more logical conclusion to draw, given the evidence and would have also made the findings more definitive.

[20] I do not know if there is a typographical error at paragraph 37, and that the Applicant in fact remained the primary care-giver for her son until 2010, approximately ten years after her minimum qualifying period, rather than until 2000, as paragraph 37 indicates. If the Applicant remained her son's primary caregiver until only about 2000, given the minimum qualifying period of December 31, 1999, this leaves me to question the finding that the Applicant had a residual capacity to pursue substantially gainful occupation "beyond her minimum qualifying period". Did the Applicant cease being the primary caregiver in 2000, because she no longer had the capacity to perform the duties of a caregiver? If the Applicant remained her son's primary caregiver until 2010, this would be much easier to reconcile with the finding that the Applicant had a residual capacity to pursue substantially gainful occupation beyond her minimum qualifying period. However, this may be a moot concern, as the General Division found that the Applicant's onset of ongoing and continuous knee pain did not arise until well after her minimum qualifying period.

CONCLUSION

[21] The application for leave to appeal is denied.

Janet Lew
Member, Appeal Division