Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *D. P. v. Minister of Employment and Social Development,* 2016 SSTADIS 124

Tribunal File Number: AD-16-115

BETWEEN:

D. P.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: March 29, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated December 9, 2015. After a videoconference hearing, the General Division 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, which it calculated to be December 31, 2006. The Applicant filed an application requesting leave to appeal on January 18, 2016, alleging that the General Division made a number of errors. 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 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.

[4] The Applicant submits that the General Division provided her with erroneous advice regarding the case which she had to meet to establish disability. She alleges that the General Division advised her to provide more documentation showing that her disease was present in 2006, but ultimately dismissed the appeal as the Applicant did not prove that she was disabled on or before December 31, 2006. The Applicant submits that "the burden lies on [the General Division] to provide proper and clear instructions during the time of the hearing which specifically states what [is required]". The Applicant submits that she cannot be held accountable for information which she did not receive and that her case should be judged "solely on what information [she received from the Member]". The Applicant submits that she complied with the General Division's initial requirements that she provide

evidence that her disease was present in 2006. As such, the Applicant requests the Appeal Division to reconsider the decision of the General Division.

[5] The Social Security Tribunal provided a copy of the leave materials to the Respondent, but the Respondent did not file any submissions.

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 approved this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

[8] To qualify as an erroneous finding of fact under subsection 58(1) of the DESDA, the General Division had to have based its decision on that erroneous finding of fact, and the erroneous finding of fact had to have been made in either a perverse or capricious manner or without regard for the material before it.

[9] The Applicant alleges that the General Division misinformed her about the requirements she had to meet under the *Canada Pension Plan.* She alleges that the General Division led her to believe that it would be sufficient if she provided evidence that her

disease existed in 2006, as opposed to proving that she had a severe and prolonged disability on or before December 31, 2006.

[10] The Applicant did not refer me to any portions of the recorded hearing before the General Division. I have listened to the preliminary remarks of the General Division Member on the recorded hearing. The Member stated in part:

> to be considered to be a person with a disability, there's two parts to it: … the law stipulates that there is a deadline and in your case, the deadline is December 2006, so when I write my decision, when I'm considering the evidence before me the question I have to consider or the period of time I have to consider is up to and including December 2006 and what the evidence has to show is that there was a severe and prolonged disability on or before December 2006 so what that means is that the evidence has to show that you were incapable of working on a regular basis at substantially gainful employment at that time. (6:50 to 7:56 of the recorded hearing)

[11] The Applicant questioned the significance of the minimum qualifying period (10:30 of the recorded hearing). The General Division responded that the minimum qualifying period represented the latest possible date by which she had to be found to "have a severe and prolonged disability and that it existed in 2006" (12:15 of the recorded hearing).

[12] At 13:00 of the recorded hearing, the General Division indicated that she would be asking the Applicant "what her condition was like in 2006".

[13] From these portions of the recording, I am not persuaded that the General Division Member misdirected or misled the Applicant. The General Division Member's preliminary and subsequent remarks indicate that she properly set out the requirements which the Applicant had to meet, namely, that the Applicant had to prove that she had a severe and prolonged disability on or before her minimum qualifying period of December 31, 2006.

[14] As well, the Applicant had to have been aware of the requirements under the *Canada Pension Plan* by as early as July 2014, when the Respondent initially denied her application (GD1A-2 to GD1A-4), or as recently as July 10, 2015, when the Respondent requested a dismissal of the appeal. In its letter of July 10, 2015, counsel for the Respondent wrote:

> 2. Subsection 44(2) of the CPP provides that the MQP is calculated based on the years during which an applicant has made valid contributions to the *Plan.* This is an extremely important date as it is the last date by which the Appellant must demonstrate that they are disabled within the meaning of the *Plan.*
>
> (GD7-2 of the hearing file)

[15] I am not satisfied that the appeal has a reasonable chance of success on the ground cited by the Applicant.

CONCLUSION

[16] The application for leave to appeal is dismissed.

Janet Lew

Member, Appeal Division