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

Citation: *S. S. v. Minister of Employment and Social Development,* 2016 SSTADIS 129

Tribunal File Number: AD-16-401

BETWEEN:

S. S.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: April 4, 2016

Canada

REASONS AND DECISION

OVERVIEW

[1] At its core, this application is about whether the Applicant was engaged in or was capable regularly of pursuing any "*substantially gainful occupation*". The Applicant seeks leave to appeal the decision of the General Division dated November 23, 2015. The General Division determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan,* as it found that she was engaged in a substantially gainful occupation in 2015 and that her disability therefore could not have been severe by the end of her minimum qualifying period, on December 31, 2014.

[2] The Applicant filed an application requesting leave to appeal with the Social Security Tribunal on March 9, 2016, after having mistakenly filed it with her local Service Canada office in St. John's, Newfoundland on March 3, 2016. The Applicant alleges that the General Division erred in law in finding that she was working at a substantially gainful occupation after her minimum qualifying period and in failing to give greater consideration to one of her medical reports.

[3] Given that the leave application appears to have been filed late, I must first determine whether it is appropriate that I exercise my discretion to extend the time for filing the leave application. If I decide to extend the time for filing, I must be satisfied that the appeal has a reasonable chance of success.

ISSUES

[4] The two issues before me are as follows:

(1) should I exercise my discretion and extend the time for filing the leave application, and if so,

(2) does the appeal have a reasonable chance of success?

BRIEF HISTORY OF PROCEEDINGS

[5] For the purposes of this application, the key dates are as follows:

i. December 3, 2015 - the Applicant received the decision of the General Division;

ii. March 3, 2016 - the Applicant filed an application requesting leave to appeal to the Appeal Division; and

iii. March 9, 2016 - the Applicant re-filed the application requesting leave to appeal to the Appeal Division, with the Social Security Tribunal.

SUBMISSIONS

[6] The Applicant did not make any submissions regarding the possible lateness of her leave application. The Applicant readily acknowledges that she returned to part-time employment in 2015. She also acknowledges that she attempted a return to work in 2012, when she worked two to three days a week at four hours per day. She states that she failed a return to work effort, although it is unclear from her submissions if this is in reference to her attempt in 2012 only, or also includes the attempt in 2015.

[7] The Applicant submits that the General Division failed to give full consideration to her family physician's medical report. She argues that her family physician was in the best position to provide an opinion on her disability, as he has been following her for over 30 years and as he provided a more detailed report than did another medical practitioner.

[8] The Applicant states that she suffers from chronic pain on a daily basis and that she placed herself at greater risk for further injury by returning to work in 2015.

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

ANALYSIS

(a) Late Filing of Application

[10] The Applicant was approximately one week late in filing the leave application. Subsection 57(2) of the *Department of Employment and Social Development Act* (DESDA) stipulates that "the Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the appellant".

[11] In *Canada (Minister of Human Resources Development) v. Gattellaro,* 2005 FC 833, the Federal Court set out the four criteria which the Commissioner of the Canada Pension Plan/Old Age Security Act Review Tribunals should consider and weigh in determining whether to extend beyond 90 days the time period within which an appellant was entitled to file an appeal to a Review Tribunal, as follows:

1. A continuing intention to pursue the application or appeal;
2. The matter discloses an arguable case;
3. There is a reasonable explanation for the delay; and
4. There is no prejudice to the other party in allowing the extension.

[12] In *Canada (Attorney General) v. Larkman,* 2012 FCA 204 (CanLII), the Federal Court of Appeal held that the overriding consideration is that the interests of justice be served. Not all of the four questions relevant to the exercise of discretion to allow an extension of time needed to be resolved in favour of the applicant.

[13] In reviewing each of the four factors, there is no prejudice to the Respondent in allowing an extension. The Applicant initially filed her leave application with Service Canada; this indicates a continuing intention to pursue the application. The misfiling also reasonably explains the week's delay. In the context of deciding whether to extend the time for filing, I have not considered whether the matter discloses an arguable case. However, it is well established that an applicant need not satisfy all four factors set out in *Gattellaro*, or

that all four factors be assigned equal weight, given that the overriding consideration remains the interests of justice. In the interests of justice and the factual circumstances of this case, I am prepared to extend the time for filing the leave application.

(b) Does the appeal have a reasonable chance of success?

[14] Subsection 58(1) of the 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.

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

[16] 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.

i. Substantially gainful occupation

[17] The Applicant submits that the General Division erred in applying the test for "substantially gainful occupation". She states that "12 hours a week is not gainful employment according to *Canada Pension Disability* (*sic)*". It appears that the reference to 12 hours a week concerns a failed work attempt in 2012, rather than her employment in

2015. It is not entirely clear whether the Applicant disputes any findings in relation to her part-time work in 2015.

[18] The General Division appears to have determined whether the Applicant was engaged in substantially gainful occupation by relying on jurisprudence dating between 1994 and 2006.

[19] Section 68.1 of the *Canada Pension Plan Regulations,* which came into force on May 29, 2014, defines "substantially gainful" for the purpose of subparagraph 42(2)(a)(i) of the *Canada Pension Plan.* The subparagraph reads as follows:

> **68.1 (1)** For the purpose of subparagraph 42(2)(a)(i) of the Act, "substantially gainful", in respect of an occupation, describes an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension. The amount is determined by the formula.
>
> (A x B) + C
>
> Where
>
> A is .25 the Maximum Pensionable Earnings Average;
> B is .75; and
> C is the flat rate benefit, calculated as provided in subsection 56(2) of the Act, x 12

[20] The General Division appears not to have given any consideration to section 68.1 of the *Canada Pension Plan Regulations.* Despite the vague submissions of the Applicant as to whether she disputes the 2015 employment as a "*substantially gainful occupation*", I am satisfied that the General Division may have erred in law in identifying the appropriate test for a "*substantially gainful occupation*" and that as a result, it would then have erred in its analysis regarding whether the Applicant's ongoing part-time employment in 2015 constituted "*substantially gainful employment*".

ii. Weight of the evidence

[21] The Applicant contends that the General Division failed to give adequate consideration to her family physician's medical report. She argues that her family physician

was in the best position to provide an opinion on her disability, as he has been following her for over 30 years and as he provided a more detailed report than did another medical practitioner.

[22] Essentially, the Applicant alleges that the General Division ought to have placed more weight on her family physician's opinion. However, the issue of the weight to be ascribed to evidence does not fall within any of the enumerated grounds of appeal under subsection 58(1) of the DESDA. The Federal Court of Appeal has declined to interfere with a decision-maker's assignment of weight to the evidence, holding that that properly is a matter for "the province of the trier of fact": *Simpson v. Canada (Attorney General)*, 2012 FCA 82. Similarly, I would defer to the General Division's assessment of the evidence. As the trier of fact, it is in the best position to assess the evidence before it and to determine the appropriate amount of weight to assign. The Appeal Division does not hear appeals on a *de novo* basis and is not in a position to assess the matter of weight. I am therefore not satisfied that the appeal has a reasonable chance of success. I cannot conclude that the General Division should have placed more weight or given greater consideration to the medical report of the Applicant's family physician.

iii. Reassessment

[23] The Applicant further argues that she suffers from chronic pain on a daily basis and that she placed herself at greater risk for further injury by returning to work in 2015.

[24] Essentially, the Applicant is seeking a reassessment on this particular point. As the Federal Court held in *Tracey*, it is not appropriate for the Appeal Division, in determining whether leave should be granted or denied, to reassess the evidence or reweigh the factors considered by the General Division. Neither the leave nor the appeal provides opportunities to re-litigate or re-prosecute the claim. I am therefore not satisfied that the appeal has a reasonable chance of success. It is not appropriate that I conduct a reassessment of the evidence.

CONCLUSION

[25] The application for leave to appeal is granted on the sole ground that the General Division may have erred in identifying the appropriate test for a "*substantially gainful occupation*".

[26] I invite the parties to make submissions in respect of the form of hearing (i.e. whether it should be conducted by teleconference, videoconference or other means of telecommunication, whether it should be held in-person or conducted by exchange of written questions and answers). If a party requests a hearing other than by exchange of written questions and answers, I invite that party to provide an estimate of the time required to prepare oral submissions. It may also be of some assistance for the Respondent to produce a current earnings history.

[27] This decision granting leave does not in any way prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division