



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. I. v. Minister of Employment and Social Development*, 2016 SSTADIS 205

Tribunal File Number: AD-16-261

BETWEEN:

C. I.

Applicant

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: June 13, 2016

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division dated October 29, 2015. 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” by the end of her minimum qualifying period on December 31, 2011. The Applicant applied for leave to appeal on February 9, 2016, alleging that the General Division erred in law. For the Applicant 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 indicated that she suffers from several medical conditions, including arthritis, Scheurmann’s disease, degenerative disc disease, fibromyalgia, polycythemia, migraines and lesions of her brain. She stopped working in 2009. She was employed after her minimum qualifying period, with earnings of \$17,000 in 2013 and approximately \$11,000 in 2014. However, she worked through pain and through what the General Division characterized as “considerable cost” to her personal comfort and ability to pursue any of her normal activities of daily living.

[4] The Applicant notes that if the General Division were to assess her condition as of the end of her minimum qualifying period, “there would be little doubt that it was a severe disability that precluded her from continuing her job in 2008” (at paragraph 46 of the General Division decision). However, the General Division determined that the Applicant’s employment in 2013 and 2014 did not constitute failed work attempts and evidenced that she held the capacity to regularly pursue a substantially gainful occupation then, and into

2015 too. The General Division noted that the Applicant had had surgery on her arm in 2014 and was off work for periods of time, thus accounting for lower earnings that year.

[5] The Applicant argues that the General Division erred in law in relying exclusively on her earnings for those years and in failing to consider other relevant factors, such as her health. The Applicant relies on *St. Gelais v. The Minister of Employment and Immigration*, *CCH Canadian Employment Benefits and Pension Guide reports* (1994) CCH #8558 pp. 6047-6048, which stands for the proposition that an applicant's earnings "are only piece of evidence which must be weighed with all the other evidence respecting disability" and to *Constantinoff v. Canada (Minister of Social Development)* (November 25, 2004), CP22720 (PAB), where the appellant was found to be disabled for the purposes of the *Canada Pension Plan*, despite having earnings of \$27,000 following the end of his minimum qualifying period.

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

ANALYSIS

[7] Subsection 58(1) of the *Department of Employment and Social Development Act* 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.

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

[9] The Applicant argues that the General Division erred in law, in determining whether she was incapable regularly of pursuing any substantially gainful occupation, by relying exclusively on her earnings in the years following the end of her minimum qualifying period, instead of considering other relevant factors as well.

[10] The General Division's analysis with regards to the Applicant's employment after the minimum qualifying period is set out at paragraphs 47 to 52. It is clear that the General Division largely considered the Applicant's earnings for 2013 into 2015 in determining whether she was incapable regularly of pursuing any substantially gainful occupation, but it also turned its attention to examining the Applicant's functionality and employability. At paragraph 50, the General Division wrote:

[50] . . . There is clear evidence to show she has a significant abnormality and a constellation of other medical issues that affect her functionality and thus her employability. The Appellant has not only tried to work but generated gainful results following her MQP. She has been able reliably and physically capable of successfully completing tasks required of her at Tim Horton's notwithstanding some accommodation. It would seem that in 2013 and 2014 (and perhaps 2015) she has been a productive employee. Her unpredictable migraines have been managed and she has become an acceptable worker in this competitive workplace. In many ways, she has become too dependable as she has taken on overtime and worked shifts that others would not work to satisfy her monetary requirements.

[11] Given that the General Division did not focus exclusively on the Applicant's earnings and considered other factors in assessing the severity of her disability, I am not satisfied that the appeal has a reasonable chance of success.

CONCLUSION

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

Janet Lew

Member, Appeal Division