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

Citation: *E. W. v. Minister of Employment and Social Development*, 2016 SSTADIS 221

Tribunal File Number: AD-15-1262

BETWEEN:

**E. W.**

Appellant

and

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

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division

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DECISION BY: Janet Lew

DATE OF DECISION: June 20, 2016

## REASONS AND DECISION

## INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division rendered on August 17, 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 of December 31, 2007. The Applicant filed an application requesting leave to appeal on November 23, 2015 and supplemental submissions on February 5, 2016, the latter in response to a request from the Social Security Tribunal for clarification on the grounds of appeal. 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 on any of the grounds cited by the Applicant?

## SUBMISSIONS

[3] The Applicant submits that the General Division erred in law and that it based its decision on erroneous findings of fact that it made in a perverse and capricious manner without regard for the material before it.

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

## ANALYSIS

[5] The reasons for appeal must fall within any of the grounds of appeal under subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) and the appeal must have 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 and more recently in *Canada (Attorney General) v. O'Keefe*, 2016 FC 503. 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;
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> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

[6] The Applicant has identified two grounds of appeal.

**(a) Error of law**

[7] The Applicant submits that the General Division erred in its interpretation and application of the legal test for a "severe" disability under section 42 of the *Canada Pension Plan*, when it concluded that the Applicant was capable regularly of pursuing a substantially gainful occupation in the retail or service sector. The Applicant argues that the evidence before the General Division was that her various medical conditions forced her to resign from her retail/service job as a clerk and she was unable to return to work because of her pain. The Applicant indicates that she testified that she did not know when she would be well and could stick to a schedule, even if she were only working a few days a week, because of the unpredictable nature of her disability. The Applicant submits that the jurisprudence has established that predictability of being able to report to work is the essence of "regularity" within the meaning of the *Canada Pension Plan*. She cites *Chandler v. MHRD* (November 25, 1996), CP4040, p. 6 and *Gallant v. MHRD* (June 25, 1998) CP00612, pp. 2 to 3.

[8] In essence, the Applicant suggests that the General Division failed to properly assess the severity of her disability, as it should have also considered whether she could predictably report to work. She submits that, if she could not predictably report to work in

the retail or service sectors, then she would not meet the regularity component of the severity test, that she be capable regularly of pursuing a substantially gainful occupation. The Applicant cited two decisions of the former Pension Appeals Board. She did not cite any authorities of greater persuasive value or any authorities which are binding on me.

[9] In *Chandler*, the Pension Appeals Board wrote:

> Only where there is to be found a credible evidentiary foundation which clearly, in the mindset of the Board, establishes that degree of predictable interruption to a work schedule established by a reasonable and understanding employer, as would render the individual unemployable in the circumstances, might the qualification be considered applicable.

[10] The Applicant alleges that she testified that she was forced to resign from her employment and was unable to return to work because of the unpredictable nature of her pain. The General Division noted her evidence in this regard, at paragraph 33, when it wrote:

> [33] She doesn't think that she would be able to meet the demands of even a part-time job. Some days are better than others, but the bad days are unpredictable. She wouldn't be able to follow a schedule. She doesn't have any good days—only "good moments, perhaps." She can no longer finish tasks or commit herself to anything.

[11] The General Division indicated that the Applicant's pain started gradually around 2005, but it is unclear whether the pain became progressively worse such that, by the end of her minimum qualifying period, she felt or was unable to follow a schedule.
While the General Division accepted that the Applicant experiences some measure of pain and depression, it found that the primary reason the Applicant left her last employment in March 2007 was for reasons unrelated to her pain and was because her husband had decided to relocate. Up until that point, she had been experiencing increasing back pain, but the General Division found that she did not quit her employment for that particular reason. It appears that the General Division was unconvinced, based on the evidence before it, that there was a sufficient "credible evidentiary foundation" which established that "degree of predictable interruption to a work schedule established by a reasonable and understanding

employer, as would render the individual unemployable in the circumstances". Had there been perhaps other evidence, such as corroborating testimony from work colleagues or her employer, or documentary evidence showing sporadic absences from her employment, this might have provided a sufficient credible evidentiary foundation. I am not satisfied that the appeal has a reasonable chance of success on this ground.

**(b) Erroneous finding of fact**

[12] To fall within the definition of 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.

[13] The Applicant submits that the General Division based its decision on an erroneous finding of fact that she had left her job as a clerk because her family moved and that she did not return because she did not feel well. The Applicant submits that the evidence was that her move "was not a reason that she quit and did not return to work". She claims that her move was completely unrelated, and that in fact her employer had a policy which allowed employees to transfer to another location, provided that they returned to work within one year. The Applicant submits that she had testified that she had decided to take a few months off work because of her pain, and that she would later decide whether to return to work. The Applicant further argues that there was no evidence in the record that could reasonably support the Tribunal's finding that she could have returned to work.

[14] The General Division set out part of the Applicant's testimony at paragraph 31. The General Division noted that the Applicant had been thinking about quitting her employment at a X Superstore due to increasing back pain. She considered her employer's request that she transfer to its X location, but "was disappointed to learn that her supervisor was not going to be transferred as originally planned. Moreover, she was in so much pain, that she felt she couldn't take up their offer". The General Division's summary, that she considered quitting her employment due to increasing back pain and could not consider her employer's request that she transfer locations due to her pain levels, seems to be consistent with what the Applicant claims was her evidence.

[15] In its analysis, the General Division made no mention of the Applicant's pain levels, in describing why she left her employment. In regards to this issue, the General Division wrote:

> . . . A major reason the Respondent turned down her disability application was because it appeared she left job [*sic*] at Superstore, not primarily because of pain or depression, but because her husband decided to relocate to X. C. G. history makes it clear that the move from X, where she had a social support network, left the [Applicant] feeling isolated, but her depression was situational, the result of external factors partly in her own control. In her testimony, she suggested that she might have taken a job at the X Superstore, had her supervisor in X followed through with his original plan of transferring to the smaller community.

[16] The reference to the Applicant's husband's decision to relocate to X appears to represent the General Division's understanding as to why the Respondent had denied the Applicant's application for a disability pension, rather than the General Division's own findings. However, neither the Respondent's initial nor reconsideration decision (GT1-18 to GT1-20 and GT1-05 to GT1-07) discussed why the Applicant might have left her employment at the Superstore.

[17] It appears that the General Division did not make any specific findings as to why the Applicant left her employment with the Superstore. At most, the General Division examined how the move impacted the Applicant's mental health. However, to the extent that the General Division might have adopted what it perceived as the Respondent's reason for dismissing the Applicant's disability application, neither the move nor her departure from the X Superstore appears to have been a basis upon which the General Division made its decision, and therefore, this particular ground does not fall within subsection 58(1) of the DESDA.

[18] The second alleged erroneous finding of fact could be seen as addressing the issue of whether the Applicant met her obligations under *Inclima v. Canada (Attorney General),* 2003 FCA 117, i.e. whether the Applicant showed that efforts at obtaining and maintain employment had been unsuccessful by reason of her health condition. The General Division suggested that the Applicant had not met her obligations in this regard, when it wrote that, "in her testimony, she suggested that she might have taken a job at the X Superstore, had her

supervisor in X followed through with his original plan of transferring to the smaller community".

[19] I have listened to large segments of the audio recording of the hearing before the General Division. The General Division Member asked the Applicant why she quit working at the Superstore. The Applicant responded as follows:

> The pain became pretty bad and I was also moving, not by choice, but I didn't have to stop working because of the moving. Umm. Superstore they also in X where I moved to in 2007 and they did ask me not to quit. They asked me to transfer. I was thinking about it and, at that time, they had a policy that even if I quit, and go back within a year, I still get to keep my seniority and the wages. And because I was so much in pain umm when I moved, well I said take a couple of months to see how I'm feeling and see how things are going and then decide if I go back or not, which that, that is what I did.
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> And also, my favourite person, manager, that I was working with in X, he also shortly after was transferred to X and I was happy about it. I say if I go back, I know I have a nice person there. He also transferred to, I guess, he got a promotion in X. He was assistant manager and then he got promoted to a manager and moved to X.
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> . . .
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> I was visiting him often and talked to him afterwards in X and I was happy about that. I just slowly, slowly couldn't figure out to get back to work because of my condition. (1:01:00 to 1:03:36 of recording)

[20] The General Division's findings as to why the Applicant might not have pursued employment at the X Superstore do not seem to comport with the evidence before it. The General Division appears to have based its decision on an erroneous finding of fact, in suggesting that she did not pursue employment for reasons unrelated to her medical condition. On that basis, I am satisfied that the appeal has a reasonable chance of success.

[21] The Applicant further alleges that there was no evidence before the General Division that could reasonably support its finding that she could have returned to work. The General Division did not make any finding that she could have returned to work. Rather, it determined that there was "simply not enough evidence to show that her disability was

‘severe’“. I am not satisfied that the appeal has a reasonable chance of success on this ground.

**CONCLUSION**

[22] The application for leave to appeal is granted.

[23] I invite the parties to make submissions as to whether a hearing is required or whether the appeal can be done on the record. If they advocate for a hearing, the parties should make submissions in respect of the form that the hearing should take (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.

[24] 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