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

Citation: *J. P. v. Minister of Employment and Social Development*, 2016 SSTADIS 271

Tribunal File Number: AD-15-1279

BETWEEN:

J. P.

Applicant

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: July 15, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated August 24, 2015. The General Division conducted a hearing by way of questions and answers on June 22, 2015 and found that the Applicant's minimum qualifying period ends on December 31, 2017. The General Division also 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" when it considered the appeal. The Applicant's representative filed an application requesting leave to appeal on November 30, 2015.
The representative made additional submissions on February 9, 2016. 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's representative submits that the General Division based its decision on two erroneous findings of fact, as follows:

a) it misinterpreted the words of the vocational coordinator; and

b) it incorrectly assessed the Applicant's occupation as a part-time hairdresser as being a substantially gainful occupation.

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

ANALYSIS

[5] 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.

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

[7] The representative submits that the General Division based its decision on two erroneous findings of fact. If the General Division based its decision on an erroneous finding of fact and the erroneous finding of fact was made in either a perverse or capricious manner or without regard for the material before it, the Applicant has a valid ground of appeal.

(a) Opinion of vocational coordinator

[8] The Applicant's representative submits that the General Division based its decision on erroneous findings of fact at paragraphs 84, 85 and 89 of its decision, when it interpreted the vocational coordinator's letters of January 26, 2012 and May 24, 2013, to imply that the Applicant had made a "conscious and intentional decision to work fewer hours than what she was capable of". According to the Applicant, this is not what the letters state. She contends that the vocational coordinator expressed an opinion that the Applicant's conditions impose certain emotional and mental limits and that she should accept and stay within those limits.

[9] Given the nature of these submissions, paragraphs 84, 85 and 89 are reproduced, in their entirety, as follows:

[84] In January 2012, the Vocational Coordinator at Frontenac Community Mental Health & Addition Services reported that the Appellant struggled in employment situations because of her inability to work with other people around and to communicate in a manner that will allow her to keep her job. The Appellant also discussed her interpersonal difficulties with several professionals. However, in January 2012, she was receiving mental health support and vocational rehabilitation services in a cognitive rehabilitation program to help her to be more successful in managing employment. The Coordinator felt that this program would increase the Appellant's ability to maintain employment. By May 2013, Ms. S., Vocational Coordinator, wrote that accommodation had been made so that the Appellant was working part-time as a hairdresser and getting along well with the owner. The Appellant's representative also confirmed in their submission dated June 2015 that the Appellant continues to work part-time as a hair dresser. Ms. S. noted that the Appellant had come to realize that it was better to accept her limitations and be happy. She no longer tried to match her employment expectations with just her education and training. Through counselling, the Appellant had learned to obtain and maintain employment by also matching her employment expectations with her emotional capacity. Ms. S. reported that while this would restrict her earning capacity, the Appellant accepted that it will help her to stay mentally well.

[85] The Tribunal accepts that, once the Appellant understood through counselling that she had to find employment that matched her emotional capacity and not just her education, she was able to obtain and maintain employment. Based on all the evidence, the Tribunal finds that although the Appellant has Meniere's disease, Asperger, depression and gastro-intestinal problems, she does have the capacity to work. To her credit, she has demonstrated that capacity by working as a hairdresser part-time since June 2012 (*Klabouch).*

. . .

[89] The Appellant's Record of Earnings (ROE) dated May 2015 and filed at GT13-4 shows that her earnings surpassed the year's basic exemption (YBE) in every year from 1988 to 2014. Her part-time earnings for 2011, 2012, 2013 and 2014 were $13,421, $5,174, $8,458, and $8,793 respectively. These are lower than the $23,715 to $37,279 she made between 2006 and 2010 when she worked full-time in one position as a clerk/office assistant. However, her 2011 - 2014 earnings are similar to her earnings between 2002 and 2005 when her earnings were $5,484, $9,566, $15,421 and $3,836 respectively. Capacity to work is based on all the evidence and profitability of a business venture is not necessarily an indicator of capacity (*Kiriakidis)*. The Tribunal accepts the evidence of Ms. S., her Vocational Coordinator, that after undergoing cognitive rehabilitation, the Appellant came to the decision that she would stay mentally well by matching the type of employment she undertakes to her emotional capacity. The Appellant is to be commended for gaining this insight. **However, the fact that she has chosen to limit herself to part-time work in her chosen occupation does not mean that she has proven that she has a severe disability. Based on a review of all the evidence, the Tribunal finds that the Appellant has made the personal decision to work the**

> **number of hours she is now working. This decision to suppress her working hours and, therefore, her earning capacity is not based on her current medical condition.** (My emphasis)

[10] The vocational coordinator's letter of January 26, 2012 is set out at page GT1-55 of the hearing file. The letter indicates that the Applicant was, at that time, receiving mental health support and vocational rehabilitation services to help her be more successful in managing employment. The coordinator wrote that, "we feel this will increase [the Applicant's] ability to maintain employment it will be important for her to gradually test these skills in the workplace … It is felt that being on ODSP Income Support and Employment Support at this time will increase her potential for successful integration into competitive employment".

[11] The vocational coordinator's letter of May 24, 2013 is at page GT1-117 and reads:

> [The Applicant] has struggled with employment for most of her adult life. Experiencing the challenges of mental illness as well as meniere [*sic*] disease. After a period of rehabilitation [the Applicant] has been doing well in her job as a hairdresser. She is working part-time and has been developing a clientele. She is getting along well with the owner and is beginning to realize that it is best for her to work in shorter sifts and work independently of other people. It makes her work day easier when she is not faced with too many people at once. [The Applicant] has realized that with her condition it is better to accept her limitations and be happy. For many years [the Applicant] struggled to accept this. She would try to match her employment expectations with her education and training, instead of with her emotional capacity. I feel that although this will restrict [the Applicant's] earning capacity in the jobs that she can accept it will help her to stay mentally well.

[12] The representative submits that there was no basis for the General Division to have found that the Applicant had suppressed her working hours and that her reduced work schedule was unrelated to her current medical condition. The Applicant contends that the General Division came to its conclusion based on an erroneous interpretation of the opinion of the vocational coordinator. However, the General Division determined that the Applicant had made the personal decision to work the number of hours she was now working, "[b]ased on a review of all the evidence".

[13] The General Division conducted a lengthy review of the medical evidence. There were several medical opinions and records before it. The General Division did not restrict itself to a consideration of the opinion of the vocational coordinator. The General Division also noted the opinions of Drs. McNevin, Hollins, De La Lis, Jones, Schramm and Jarrett. The General Division determined whether, after looking at the Applicant's background and all of her impairments, her multiple medical conditions rendered her incapable regularly of pursuing any substantially gainful occupation. The General Division concluded that the Applicant had not been rendered incapable regularly of pursuing any substantially gainful occupation, based on its analysis of the Applicant's testimony and the various medical opinions before it. On this basis, I am not satisfied that the appeal has a reasonable chance of success.

(b) Substantially gainful occupation

[14] The Applicant submits that the General Division based its decision on an erroneous finding of fact when it found that the Applicant's part-time employment as a hairdresser constituted a substantially gainful occupation. According to the Applicant, this represents a misapprehension of the facts, as her earnings from hairdressing were "extremely limited in the context of the cost of living in Kingston". The Applicant relies on the Pension Appeals Board (PAB) decision in *Minister of Social Development v. Nicholson* (January 31, 2007), CP24143 (PAB), in which the PAB held that determining what amounts to a substantially gainful occupation requires an assessment, "which could involve considering local income levels and cost of living, as well as other factors specific to the circumstances of the claimant".

[15] The Applicant's representative submits that when the Applicant's application was denied:

> … the Adjudication Framework (at 2.6) provided that "the substantially gainful amount is the maximum monthly CPP retirement pension. The annual amount is equal to twelve (12) times the maximum monthly CPP retirement pension. CPP payment rates are adjusted every January."

[16] The Applicant's representative submits that, in this case, the annual amount in 2012 was $11,840.04, and that the Applicant's income ranged from $5,174 in 2012 to $8,793 at its highest in 2014.

[17] The Applicant's representative further submits that, while *Nicholson* held that the framework was a "guideline" only, there were specific factors at play in that decision which do not apply to the case at hand. It is argued that the General Division's misapprehension of the evidence on the issue of whether the Applicant had the capacity to work longer hours may well have impacted on its decision to deviate from the guideline.

[18] The General Division set out the test by which it determined whether the Applicant's employment constituted a substantially gainful occupation, at paragraph 77. The General Division then asked itself whether the Applicant's part-time hairdressing job constituted a substantially gainful occupation. It dismissed the Applicant's submissions that it should be guided by subsection 68.1(1) of the *Canada Pension Plan Regulations*, as the subsection did not come into force and effect until May 29, 2014 and therefore had no applicability in the Applicant's employment situation up to that date.

[19] Although the General Division suggested that it would be examining whether the Applicant's part-time employment as a hairdresser could constitute a substantially gainful occupation, in part by reviewing the Applicant's earnings, ultimately it did not decide this question. Rather, the General Division determined whether the Applicant had the capacity to work.

[20] Although the General Division noted the Applicant's earnings, unlike *Nicholson* where the PAB drew a correlation between an applicant's income and whether it could be construed as substantially gainful, the General Division did not undertake that same exercise. At most, the General Division found that neither the Applicant's part-time work, nor reduced earnings, reflected a severe disability. The General Division set out its analysis regarding the Applicant's earnings at paragraph 89, but it did not say anything about whether the earnings might be an indication of a substantially gainful occupation. I am not satisfied that the appeal has a reasonable chance of success.

(c) *Klabouch*

[21] The Applicant further submits that the General Division erred in failing to follow *Klabouch v. Canada (Social Development),* 2008 FCA 33, as it did not consider whether her conditions prevent her from being able to earn a living for herself. The Federal Court of Appeal determined that it is an applicant's capacity to work and not the diagnosis of that applicant's disease that determines whether the disability can be considered severe, for the purposes of the *Canada Pension Plan*: *Klabouch,* para. 14. As I have set out above, the General Division examined whether the Applicant had the capacity regularly of pursuing a substantially gainful occupation. On this basis, I am not satisfied that this ground has a reasonable chance of success.

[22] Essentially the Applicant is seeking a reassessment on the issue of whether she can be found severely disabled. 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.

CONCLUSION

[23] The application for leave to appeal is dismissed. I note, however, that the Applicant still has the opportunity to reapply for a disability pension because the information that is available concerning her Canada Pension Plan contributions indicates that her minimum qualifying period is not scheduled to end before December 31, 2017.

Janet Lew
Member, Appeal Division