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

Citation: *L. G. v. Minister of Employment and Social Development*, 2016 SSTADIS 427

Tribunal File Number: AD-16-1137

BETWEEN:

L. G.

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

Leave to Appeal Decision by: Janet Lew

Date of Decision: November 2, 2016

Canada

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division dated July 4, 2016, which 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" on or before the end of her minimum qualifying period on December 31, 2013. The Applicant filed an application requesting leave to appeal on September 16, 2016, on the basis of two grounds.

ISSUE

[2] Does the appeal have a reasonable chance of success?

ANALYSIS

[3] 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.

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

(a) Natural justice

[5] The Applicant submits that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, although did not stipulate how the General Division may have done so. Absent such explanation, I am not satisfied that the appeal has a reasonable chance of success.

(b) Erroneous findings of fact

[6] The Applicant submits that the General Division based its decision on several erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it, as follows, that:

i. she had worked in 2013 and therefore could not be found disabled by the end of the minimum qualifying period. The Applicant suggests that the General Division failed to consider the fact that she had taken "lots of time off during working hours to rest";

ii. she had been hired or was paid by the hour. Rather, payment was based on a "piece rate" basis, i.e. based on the number of berries that a worker picked;

iii. her employer stated the Applicant was able to pick 300 pounds of blueberries per day in 2013. The Applicant denies that the employer made this statement, and claims that in fact he stated that one, she was unable to meet her past years' productivity levels, and two, that she had to rely on the employer's assistance to weigh berries;

iv. she had earned $5,187 for 2013, despite the fact it is impossible to achieve these earnings levels for berry picking in such a short period of time, and despite the employer's evidence and her own evidence that the Applicant earned between $25 and $30 per day;

v. she had no earnings for 2012 because she chose to raise her children. She claims that she never testified that she wished to remain at home to care for the children. She claims that she did not work in 2012 due to disability.

[7] The Applicant acknowledges that she worked in 2013 but argues that the General Division should have considered the fact that she rested throughout the workday. The Applicant has not directed me to the timestamps on the audio recording to indicate what evidence she might have given in this regard. Nonetheless, the General Division referred to the Applicant's evidence regarding her work hours, and at paragraph 16, wrote that the Applicant stated that her medications made her anxious and upset and "she would have to rest for a while during the day that she was picking blueberries". Given that it had set out this evidence, there is a general presumption that the General Division considered it in its overall analysis. As the Federal Court of Appeal in *Simpson v. Canada (Attorney General),* 2012 FCA 82 determined, "… a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence". Without establishing that the evidence was of such probative value that the decision-maker ought to have analyzed it, I am not satisfied that the presumption is displaced. The Applicant's evidence regarding the frequency and duration of any rests she might have taken appears to have been vague and problematically lacking in any documentary support. And, in any event, the nature of the employment was such that payment was based on volume of berries picked, rather than tied to actual time worked.

[8] The General Division noted the employer's evidence that "picking blueberries is on a piece rate". The member did not make any specific findings as to whether the Applicant was paid on an hourly basis or on a volume basis. Hence, it was immaterial how the Applicant was paid, as the General Division did not base its decision on this issue.

[9] The Applicant claims that the employer testified that her productivity levels had fallen from previous years when she was able to pick 300 pounds of blueberries per day and that she required assistance to have her berries placed on a weight scale. The employer described the Applicant as a "very good" berry worker (tape 3 – 7:00) and that she had picked close to 300 to 350 pounds of berries in past (tape 3 – 7:20). Although the employer did not give any evidence regarding the volume of blueberries which the Applicant picked in 2013, he agreed under direct examination that her medical condition affected her work, as she appeared confused or depressed. He did not explicitly indicate whether her productivity had fallen from previous years (tape 3 – 11:09 to 11:37), but this could have been inferred

from the employer's comments regarding his observations that the Applicant received assistance from both her mother and son (tape 3 – 7:45 to 7:56) and by what he perceived as her confused and depressed state. As well, the Applicant did not weigh her own flat of berries, as she only picked berries. Instead, the employer or others weighed the Applicant's flats of berries (tape 3 – 7:40, 8:25 to 8:40).

[10] At paragraph 63, the General Division found that the employer stated that the Applicant was an average picker and picked 300 pounds of blueberries per day. This was one of the factual bases upon which the General Division determined that the Applicant demonstrated a capacity to work within her functional limitations and medical conditions. Given that the employer did not give any evidence regarding the volume of blueberries which the Applicant might have picked on a daily basis in 2013, and given that he implied that her productivity could have declined from previous years, the General Division's findings that she was an average worker and picked 300 pounds of blueberries per day represents an erroneous finding of fact made without regard for the material before it.

[11] The Applicant submits that the General Division erred in finding that she had earnings of $5,187 for 2013, despite the fact that her mother assisted her in making these earnings, and despite the evidence of her employer that she earned between $25 and $30 per day.

[12] The General Division indicates that it relied on the Record of Earnings, which shows earnings of $5,187.00 for 2013 (GD2-77 to GD2-79). I note that there is also a T4 statement of remuneration paid for 2013, issued by the employer, which also indicates employment earnings of $5,187.00 (GD2-46). Apart from the fact that a record of earnings is presumed to be accurate under section 97 of the *Canada Pension Plan* (and may not be called into question after four years have elapsed from the end of the year in which the entry was made), the General Division indicated that the Applicant verified that she earned $5,187 over two months in 2013. Her evidence in this regard is from 27:00 to 28:30 of tape 2 of the audio recording of the hearing. The audio recording indicates that another witness (presumably the daughter) inappropriately interjected (tape 2 - 30:05 to 30:14) and indicated

that the Applicant's mother helped, although the member did not seek further clarification regarding the earnings.

[13] Notwithstanding the Applicant's submissions, I note that the employer does not appear to have given any evidence regarding any daily earnings. The employer did not refute the earnings of approximately $5,000, although indicated that the Applicant shared a timecard with her mother and occasionally her son (9:03 to 10:30); in other words, some of the earnings for 2013 are attributable to the mother's contributions.

[14] Regrettably, there was no evidence adduced regarding the extent of the mother's contributions towards the earnings. As a result, although the General Division acknowledged the mother's assistance (at paragraph 63), it was open for the member to conclude that the earnings were largely those of the Applicant. Given that the General Division acknowledged the mother's contributions towards the 2013 employment earnings, I do not find that the General Division made an erroneous finding of fact on this issue.

[15] The Applicant claims that she did not work in 2012 because of her disability. She maintains that the General Division erred in finding that she did not work in 2012 because she chose to care for her children. The General Division however did not base its decision on why she did not work in 2012. I am not satisfied that the appeal has a reasonable chance of success on this particular ground.

CONCLUSION

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

[17] 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.

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

Janet Lew
Member, Appeal Division