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

Citation: *M. K. v. Minister of Employment and Social Development,* 2017 SSTADIS 179

Tribunal File Number: AD-16-512

BETWEEN:

**M. K.**

Applicant

and

**Minister of Employment and Social Development**

Respondent

# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: April 25, 2017

Canada

## REASONS AND DECISION

## INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated December 24, 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 did not become disabled between February 16, 2011[1] and December 31, 2013, the end of her minimum qualifying period.

## ISSUE

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

## SUBMISSIONS

[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 leave can be granted, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the

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[1] The Applicant made a previous application for a Canada Pension Plan disability pension. A Canada Pension Plan Review Tribunal heard her appeal on February 16, 2011. The Applicant did not appeal the Review Tribunal's decision. The Applicant made a second application for a Canada Pension Plan disability pension on February 17, 2012, which is the subject of this application requesting leave to appeal.

appeal has a reasonable chance of success. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[5] 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. The Applicant argues that the General Division failed to conduct a "real world" analysis and also failed to determine whether she was severely disabled by December 31, 2013. She submits, for one thing, that at paragraphs 28 to 30, the member focused on outdated medical reports from 2006. On another thing, she argues that the General Division decided that the Review Tribunal had already determined the capacity issue in 2011 and that, unless she was able to prove that there had been a "significant deterioration in her medical condition," she could not be severely disabled.

[6] Furthermore, she contends that 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, as the evidence was unequivocal that she had indeed seen a general deterioration in her condition and had also seen the onset of, and had been diagnosed with, new conditions within this window between February 16, 2011 and December 31, 2013. The Applicant asserts that these new conditions consist of carpal tunnel syndrome, plantar fasciitis and several mental health issues, including substance addiction, chronic anxiety and mood disorders. The Applicant notes that these conditions affect her physical capabilities; for instance, the plantar fasciitis affects her mobility. The Applicant primarily relies on the medical report dated March 12, 2015,[2] from her current family physician (GD5-4/ GD6-7).

[7] It should be noted that the Applicant made these same submissions before the General Division, and unless the Applicant can demonstrate that the member erred, these submissions will otherwise amount to a request for a reassessment. As the Federal Court held in *Tracey*, it is not the role of the Appeal Division to conduct a reassessment when determining whether leave to appeal should be granted or denied, as a reassessment does not fall within any of the grounds of appeal under subsection 58(1) of the DESDA.

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[2] The Applicant has erroneously referred to this report as May 12, 2015 (see AD1-11), but the report is in fact dated March 12, 2015 (GD5-4/ GD6-7).

[8] The Applicant argues that the member failed to consider whether she was severely disabled by December 31, 2013. The member outlined the issue before him. At paragraphs 12 and 40, he stated that the issue was whether the Applicant had a severe and prolonged disability on or before the end of her minimum qualifying period of December 31, 2013 (though it is apparent from his analysis that the member considered that the issue was whether the Applicant became disabled within the window of February 16, 2011 to December 31, 2013). The member alluded to this test and this timeframe throughout his analysis. Accordingly, I am not satisfied that the appeal has a reasonable chance of success on this ground.

[9] The Applicant suggests that the member focused on her 2006 medical condition. While it is true that there are three paragraphs summarizing 2006 assessments and reports, in fact the member adopted the Review Tribunal's summary as his own. This does not necessarily suggest that he focused on the Applicant's 2006 medical condition. The test that the member was required to address was whether the Applicant became disabled after February 2011, and up to December 31, 2013. In this regard, it was critical for the member to review and address the medical records after February 2011. The member identified two post-February 2011 records that he found to be of particular relevance to his determination. They consisted of the March 26, 2013 diagnostic examination of both feet (GD2-195/ GD5-26) and the medical report dated March 12, 2015, from the Applicant's family physician (GD5-4/ GD6-7).

[10] Apart from the family physician's medical report, the Applicant argues that the letter dated December 11, 2013 from the physiotherapist (GD5-8) and the letter dated January 15, 2014 from the chiropodist (GD5-7) were critical to establishing the Applicant's deteriorating condition. The physiotherapist advised that the Applicant had undergone physiotherapy treatments in November and December 2013. This suggested that the Applicant began developing issues with carpal tunnel syndrome at or around that time. A review of the medical file also indicates that on November 10, 2013, the family physician also referred the Applicant to a neurologist for further investigations and treatment.

[11] The chiropodist indicated that the Applicant had been receiving foot care on a regular basis since July 2008 and that she had been recently treated for plantar fasciitis. She would require ongoing periodic treatments for callous reduction and foot orthoses to ensure she remains mobile and healthy.

[12] The Applicant also argues that after 2011, she developed a substance addiction that has significantly impacted how her conditions are managed and her ability to work. She noted that she had attended a rehabilitation clinic on an emergency basis and, following that, has been under the care of her family physician as a recovering addict. She did not, however, provide a copy of the records of the rehabilitation clinic and the March 2012 report from her family physician did not address her addiction issues.

[13] In the hearing before the General Division, the Applicant reportedly acknowledged that her chronic back pain continued to be her primary problem. The General Division found that there was no material change in her back condition. The member noted that the Applicant had failed to attend a pain clinic, as had been recommended to her. The member also noted that as of 2013, the Applicant's activities of daily living were not "greatly different" from what they had been in 2011. The member also noted that the Applicant had not seen any back specialists since May 2008, when she received a steroid injection.

[14] I also note that the Applicant had diagnostic examinations of her thoracic and lumbar spine. An MRI done on September 30, 2011 showed a disc bulge at the L5-S1 level with evidence of disc desiccation but no definite nerve root impingement or spinal canal stenosis. This did not appear to be materially different from the results of a 2006 MRI, to suggest any advancement of the Applicant's condition.

[15] The General Division was mindful that the Applicant had been diagnosed with plantar fasciitis; the member addressed this condition in his analysis. He accepted the fact that she is encountering problems, but found that the problems involving her feet could not have been that disabling, as there were no reports "on the outcome or the effect on her functionality" and because there was nothing to suggest any serious pathology or treatment relating to her plantar fasciitis. Although the member did not summarize the chiropodist's

report in his evidence section, clearly he had considered it. The member referred to the chiropodist's report and noted the Applicant's treatment in 2013.

[16] The member also noted that since 2013, the Applicant had been diagnosed with carpal tunnel syndrome. Clearly, he found that the carpal tunnel syndrome could not have been that disabling or severe, as there was no evidence before him to indicate that future treatment had been suggested. Indeed, in my own review of the hearing file, I note that although the Applicant was to be seen by a neurologist on April 2, 2014, the hearing file before the General Division did not include any consultation reports from any neurologists, or the results of any further testing or investigation regarding the Applicant's carpal tunnel syndrome. There is no indication, for instance, whether she required a carpal tunnel release or any ongoing physiotherapy, or whether the Applicant discontinued or was discharged from physiotherapy in December 2013.

[17] The Applicant claims that the General Division overlooked her mental health issues, but the member specifically noted that the Applicant has never seen a psychiatrist, psychologist or counsellor for treatment of any mental disorder. He noted that no one has prescribed any medication for any such disorder "until very recently." Although the family physician indicated in his medical report of March 12, 2015 that the Applicant has progressed to a chronic pain syndrome and that she suffers recurrent sleep pattern disturbances, chronic anxiety, mood disorders, headaches and social isolation as a result of her chronic condition, there is no indication in either the report or his clinical notes as to when the Applicant might have developed these issues.

[18] The member also addressed other medical issues that have confronted the Applicant. For instance, at paragraph 48, he noted that she had been diagnosed with a pulmonary embolism and thrombosis, but he ruled out any recurring issues.

[19] Finally, the member concluded that the family physician had not offered any new investigations, consultation reports or functional evaluation assessments to show any serious pathology. The member also found that there was no evidence to suggest that the Applicant required consultations or aggressive therapy.

[20] The member considered and addressed the medical conditions and the medical evidence— particularly the March 2015 report from the family physician— that the Applicant claims are critical to establishing that she became severely disabled after February 16, 2011 and before December 31, 2013. Essentially, the Applicant is seeking a reassessment and an outcome that is more favourable to her, but as I have indicated, subsection 58(1) of the DESDA does not permit a reassessment, as the grounds of appeal are very limited.

[21] Finally, the Applicant argues that the General Division failed to conduct a "real world" analysis. In *Villani v. Canada (Attorney General)*, 2001 FCA 248, the Federal Court of Appeal set out guiding principles as to how disability under the *Canada Pension Plan* should be defined, and how to conduct a disability assessment. The Federal Court of Appeal indicated that the particular circumstances of an applicant, such as her age, education level, language proficiency, and past work and life experience must also be considered in assessing the severity of an applicant's disability. The Federal Court of Appeal also stated that the assessment of an applicant's circumstances is a question of judgment with which one should be reluctant to interfere.

[22] At paragraph 43, the General Division acknowledged that the severe criterion must be assessed in a "real world" context, and that when deciding whether a person's disability is severe, one had to consider an applicant's personal circumstances such as those enumerated by the Federal Court of Appeal. Although the member did not conduct an extensive analysis, it is clear that he considered the Applicant's personal circumstances. For instance, at paragraph 44, he noted that she is relatively young and that she has English-language skills. He also noted that she has relatively little work and life skills experience. Overall, he found that she had the capacity to upgrade her skills and undergo retraining, although neither upgrading nor retraining were essential, as a vocational evaluation and transferable skills analysis had identified suitable occupations. It is clear that the member found that the Applicant's personal circumstances did not preclude her from regularly pursuing any substantially gainful occupation. Given these considerations, I see no reason to interfere with the member's *Villani* assessment.

## CONCLUSION

[23] The application for leave to appeal is refused.

Janet Lew
Member, Appeal Division