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

Citation: *R. H. v. Minister of Employment and Social Development*, 2017 SSTADIS 173

Tribunal File Number: AD-16-873

BETWEEN:

R. H.

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 24, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated August 29, 2015, which determined that the Applicant was ineligible 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 (MQP) on December 31, 2002. The Applicant filed an application requesting leave to appeal on June 28, 2016.

ISSUES

[2] The two issues before me are as follows:

(1) Is the application requesting leave to appeal late? If so, should I exercise my discretion and extend the time for filing the application for leave to appeal?

(2) If an extension is permitted, will the appeal have a reasonable chance of success?

ANALYSIS

(a) Late Application

[3] Paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA) requires that an application for leave to appeal be made to the Appeal Division within 90 days after the day on which the decision is communicated to an appellant. Subsection 57(2) of the DESDA stipulates that "[t]he Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the appellant."

[4] The Applicant disclosed that the General Division's decision had been communicated to her on August 31, 2015. Although her leave application was filed more than 90 days after the day on which the decision had been communicated to her, it was filed

within one year, and under such circumstances, the Appeal Division may extend the time for filing.

[5] There is no prejudice to the Respondent in granting an extension, and clearly the Applicant exhibited a continuing intention to pursue her appeal. In January 2016, she contacted the Social Security Tribunal and requested another copy of the General Division's decision, as she had misplaced her copy. The Applicant also explained that she had filed her application for leave to appeal late because she had been in the process of changing representatives. More importantly, for the reasons set out below, I find that the Applicant has an arguable case. Given these considerations, it is in the interests of justice to extend the time for filing.

(a) Application Requesting Leave to Appeal

[6] 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;
>
> (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.

[7] Before granting leave to appeal, 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 appeal has a reasonable chance of success. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[8] The Applicant claimed that the General Division had erred in concluding that she was engaged in a substantially gainful occupation, on account of the fact that she had had earnings in 2006, 2009 and 2010 as a part-time taxi driver. The Applicant relied on

information that the Respondent had provided that indicated that the average employment income in 2010 was $13,369 for part-time taxi drivers and $20,667 for full-time taxi drivers. The Applicant noted that her earnings for 2006, 2009 and 2010 had fallen well below these thresholds and had never exceeded $7,000.

[9] The Applicant argued that her low levels of annual income indicated the "persistence of severe medical conditions" and suggested that they should be treated as failed efforts to obtain and maintain employment. The Applicant further argued that the member had erred in concluding that the earnings had demonstrated the Applicant's capacity to work with consistency and predictability. These submissions, which the General Division had considered, amount to a request for a reassessment. As the Federal Court held in *Tracey*, it is not the Appeal Division's role to conduct a reassessment when determining whether leave to appeal should be granted or refused, as a reassessment does not fall within any of the grounds of appeal under subsection 58(1) of the DESDA.

[10] In any event, nominal earnings should not be determinative of incapacity regularly of pursuing any "substantially gainful occupation." In *Rochford v. Canada (Minister of Human Resources Development*), 2004 FCA 294, the Federal Court of Appeal rejected Ms. Rochford's suggestion that her earnings of $1,504 in 1997, $1,745 in 1998 and $412 in 1999 were conclusive that she did not have the capacity to pursue any substantially gainful occupation.

[11] On that point, the General Division wrote the following in paragraph 33 of its decision:

> […] They [The earnings for 2006, 2009 and 2010] amount to approximately one-half of what the Appellant made when, prior to 1999, she worked full-time. On this basis the Tribunal finds these earnings to be substantial. They are not nominal, token or illusory. Where the Tribunal finds that these earnings are substantial it must also find that they are further evidence of a capacity to work on the Appellant's part well after her MQP date. The Tribunal also accepts the information from the Appellant's employer indicating that the Appellant worked full-time between 2007 and 2010. […]

[12] The member concluded that the earnings in each of the years 2006, 2009 and 2010 had been substantial, as they were half the amount she had earned when she worked on a

full-time basis. The member appeared to suggest that the Applicant was therefore engaged in a substantially gainful occupation. Additionally, the member suggested that these earnings indicated that the Applicant had the capacity to work. I draw this conclusion because, in considering whether she worked full-time, the member indicated that that information was further evidence of her capacity. I am therefore prepared to find that there is an arguable case that the General Division may have erred in finding that the Applicant's earnings necessarily established that she had the capacity regularly of pursuing any substantially gainful occupation.

[13] I am also prepared to find that there is an arguable case that the member may have erred in finding that the Applicant's earnings had established that she was engaged in a substantially gainful occupation. This is not to suggest, however, that a reassessment is appropriate. That said, in some cases, it may be entirely appropriate to rely on earnings as evidence of a substantially gainful occupation.

[14] I note that the General Division also concluded that the Applicant had worked on a full-time basis between 2007 and 2010, though, as the member noted, this had not been reflected in the record of earnings, which showed that the Applicant's earnings for 2009 and 2010 were approximately half of what she had earned before 1999. The member indicated that he had relied on information from the Applicant's employer in concluding that she had worked full-time between 2007 and 2010, yet, the evidence from Co-op Taxi was that she had held a full-time lease. Co-op Taxi did not say anything about the extent to which the Applicant had worked during this time frame. The member also noted the Applicant's testimony that she had not worked on a full-time basis and that her father had driven some shifts.

[15] Holding a full-time lease is generally not the equivalent of working on a full-time basis. The General Division found, in part, that the Applicant had the capacity regularly of pursuing any substantially gainful occupation, because it found that she had worked full-time between 2007 and 2010. Given the evidence, I am prepared to find that the General Division may have based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it.

[16] Even if I determine that the General Division erred in finding that her employment after the end of the MQP had constituted a "substantially gainful occupation," the Applicant should address the member's undisputed findings that there was no corroborating medical evidence establishing that the Applicant had been severely disabled by the end of her MQP. Indeed, the member found that there had been "no objective medical evidence upon which can serve as a basis […] to find a severe disability." The member noted that Dr. Drover, who had treated the Applicant from 2003, expressed the opinion that the Applicant was capable of working and was in fact working. The member did not address whether the Applicant had been working at a substantially gainful occupation at that time, but, in reviewing Dr. Drover's medical report, one can infer that the Applicant had to have been working on a full-time basis. According to Dr. Drover's review of a medical note from the Applicant's previous family physician, the Applicant had not stopped working, despite having been involved in a motor vehicle accident.

CONCLUSION

[17] Both the application for an extension of time to file the appeal and the application requesting leave to appeal are granted. 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