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

Citation: *A. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 194

Tribunal File Number: AD-16-610

BETWEEN:

A. S.

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 28, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the General Division's decision, which determined that she ceased to be disabled within the meaning of the *Canada Pension Plan* on May 1, 2009.

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

(a) Employment earnings

[5] The Applicant submits that the General Division based its decision on an erroneous finding of fact, despite the evidence before it, as it found that she had employment earnings

and therefore held the capacity to sustain regular and gainful employment. The Applicant claims that the evidence showed that, although her employer provided her with a T4 slip, she did not perform any work. Essentially, she accepted funds from the employer which, in turn, she took to pay workers. The Applicant asserts that the issuance of a T4 slip is not evidence of income. In her case, she professes that she merely acted as a conduit or distributor for paying workers who she hired to replace or assist her. In this regard, she argues that the General Division failed to consider the definition of income and, by so doing, erred in finding that she had the capacity regularly of pursuing a substantially gainful occupation.

[6] The Applicant states that, as she did not have legal representation at the hearing before the General Division, she did not provide all of her evidence that demonstrates that she deposited funds from the employer and then used those same funds to pay workers. She indicates that she will be providing additional documentation to demonstrate this.

[7] In a leave to appeal application, any new facts should relate to the grounds of appeal. In *Canada (Attorney General) v. O'Keefe*, 2016 FC 503 at para. 28, the Federal Court held that an appeal to the Appeal Division does not allow for new evidence and is limited to the three grounds of appeal listed in section 58. There is no basis whereby I can consider any new evidence, unless it specifically addresses the grounds of appeal, even if it corroborates the Applicant's oral testimony. The fact that the Applicant did not have any legal representation at her hearing before the General Division is of no relevance or assistance, and does not allow the Appeal Division to consider any new evidence. As the Federal Court stated in *McCann v. Canada (Attorney General)*, 2016 FC 878, "the law is the same for all and does not vary depending on whether a litigant chooses to be represented or to represent himself or herself."

[8] As the Applicant maintains, there was some evidence before the General Division that suggested others did the work in her place. The General Division largely addressed this evidence.

[9] The General Division noted that the Applicant's employer had completed two questionnaires regarding the Applicant's work history. In the first questionnaire, completed

on March 7, 2013 (GD3-98 to GD3-100/ GD3-103 to 105), the employer responded that the Applicant worked as a salesperson, beginning in January 2009. He documented that there were no absences for medical reasons, her work was satisfactory, she worked independently, she required no help from co-workers and she did not require any supervision.

[10] In the second questionnaire, which the Respondent received on July 31, 2013, the employer depicted a different employment scenario (GD3-70 to 72). This time, he documented that the Applicant had been absent for medical reasons, did not work independently and required assistance from co-workers. In the accompanying covering letter, the employer noted that the Applicant hired her own helpers, a practice with which he agreed. He also noted that the Applicant "ensured the money was appropriately distributed to these workers" (GD3-69). The employer failed to explain why he provided conflicting responses in the questionnaires.

[11] The Applicant contends that the General Division should have placed more weight on the employer's second questionnaire, as it corroborates her oral evidence that others performed the work for which she was paid. She claims that had the member done so, she would have readily found her disabled for the purposes of the *Canada Pension Plan*. The General Division member addressed these same submissions. At paragraph 41, the member explained that she preferred the employer's responses to the first questionnaire.

[12] The issue of the weight to be ascribed to evidence does not fall within any of the enumerated grounds of appeal under subsection 58(1) of the DESDA. The Federal Court of Appeal has declined to interfere with a decision-maker's assignment of weight to the evidence, holding that such an exercise is a matter for "the province of the trier of fact": *Simpson v. Canada (Attorney General)*, 2012 FCA 82. Similarly, I would defer to the General Division's assessment of the evidence. The member was entitled to assign more weight to one questionnaire over the other. As the trier of fact, it was in the best position to assess the evidence before it and to determine the appropriate weight to assign. The Appeal Division does not hear appeals on a *de novo* basis and is not in a position to assess the matter of weight. I cannot conclude that the General Division should have placed more weight on or given greater consideration to the second questionnaire.

[13] The Applicant argues that the General Division should have unequivocally accepted the employer's letter dated September 16, 2013. In it, the employer confirmed that the Applicant took the funds that he gave her, to pay others. The Applicant argues that this letter is material to her claim. Yet, it does not appear as if the General Division referred to the letter in its decision. Even so, the contents of the letter appear to be substantially similar to the responses in the second questionnaire, and the General Division rejected the second questionnaire, given the lapse in time between the first and second questionnaire. On top of that, the General Division found the Applicant lacking in credibility, because Canada Revenue Agency information revealed that one of the workers received employment income of $8,640 in 2009 from the same employer.

[14] Given these considerations, I am not satisfied that the letter of September 16, 2013 was of such probative value that the General Division should have referred to and considered it. There was similar fact evidence that had been prepared more contemporaneously in time. In any event, it is clear from its analysis that the letter would not have swayed the General Division into accepting the Applicant's evidence.

(b) Attendance of employer

[15] The Applicant argues that the General Division failed to require her employer to attend the hearing to give evidence. I am not satisfied that the appeal has a reasonable chance of success on the basis of this argument. A party bears the burden of proving his or her case, and it is incumbent on that party to adduce whatever evidence he or she considers appropriate to prove his or her case. The Applicant could have called her employer to give evidence. The Social Security Tribunal's Hearing Information Form alludes to this, asking parties how many witnesses they anticipate calling. There is no duty or obligation on the General Division to identify and call any material witnesses on behalf of any party to the proceedings. Indeed, the General Division acts as and must remain a wholly independent and impartial body.

[16] The General Division is required to afford the parties a fair hearing. Had the Applicant produced her employer as a witness and the General Division arbitrarily refused to hear from him, that might have constituted a breach of the principles of natural justice, but otherwise, there was no failure on the General Division's part in not calling the employer.

(c) Substantially gainful employment

[17] The Applicant asserts that what little work she performed "was insufficient and cannot constitute her as able to work as this was not substantially gainful earnings." From this, I understand that the Applicant is essentially arguing that the General Division improperly equated her earnings for 2009 and 2010 with a "substantially gainful occupation."

[18] At paragraph 35, the General Division wrote, "The Tribunal finds that the Appellant had demonstrated a residual capacity to work within her functional limitations and medical conditions and was employed with earnings starting in January 2009 and worked until December 2010 at Folk Crafts N Art Import." The General Division then noted that the Applicant had gross employment earnings of $12,889 and $12,480 for the years 2009 and 2010, respectively.

[19] Although the General Division did not expressly turn its mind to whether the 2009 and 2010 earnings alone represented a substantially gainful occupation, ultimately its decision as to whether she had a severe disability was not based on the amount of the Applicant's earnings *per se*. Instead, the General Division focused on the fact that she exhibited a residual capacity to work within her functional limitations and medical conditions. The member noted the Applicant's evidence that initially she earned $8.25 hourly until this was increased to $8.75 hourly, and that during the summer months she worked three to four days per week and that this decreased to generally two days per week during the winter months. The Applicant's representative acknowledged that the Applicant was paid a full year's wage (though claims that this showed that the employer was intoxicated), but claimed that the Applicant worked only half of the year in 2010.

The member rejected this assertion, finding that the Applicant continued to work until December 2010, as there was inventory that had to be packed. Given the amount of the earnings and the Applicant's nominal hourly wage, it was implicit that the General Division found that the Applicant worked a sufficiently substantial number of hours in 2009 and 2010 to demonstrate that she had some residual capacity.

[20] Had the General Division found that the Applicant had some residual capacity solely on the basis of her earnings, this might have constituted an error, but the General Division considered other factors, such as the number of days she worked, the duration and the nature of her employment, in concluding that she exhibited some residual capacity.

(d) Medical reports

[21] The Applicant argues that the General Division erred in relying on the medical report dated June 4, 2009 by Dr. Gibson, a neurologist, who stated that the Applicant had been working full-time since February 2009. The Applicant contends that the neurologist's report is flawed for the following reasons:

- The Applicant did not see any improvement in her condition in 2008 and she never worked on a full-time basis in 2009.

- Her family physician, Dr. Peter Smith (now retired), "at all material times noted her to be incapable of gainful employment." The Applicant produced a copy of his report dated November 18, 2013 (AD1-11).

- Her current family physician, Dr. Lindsay McCaffrey, who took over Dr. Smith's practice in January 2014, wrote in September 2015 (AD1-10) that the Applicant has suffered from reflex sympathetic dystrophy since 1991 and has been unable to work in any capacity since then.

[22] Essentially, the Applicant is requesting that the Appeal Division reweigh and reassess the evidence in order to reach a different conclusion regarding her eligibility for a disability pension. However, as the Federal Court held in *Tracey*, it is not the Appeal Division's role to conduct a reassessment when determining whether leave 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. As the Federal Court also held in *Hussein v. Canada (Attorney General)*, 2016 FC 1417, the "weighing and assessment of evidence lies at the heart of the [General Division's] mandate and jurisdiction. Its decisions are entitled to significant deference."

CONCLUSION

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

Janet Lew
Member, Appeal Division