



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. D. v. Minister of Employment and Social Development*, 2017 SSTADIS 191

Tribunal File Number: AD-16-675

BETWEEN:

K. D.

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 was not eligible for a disability pension under the *Canada Pension Plan*, as the General Division found that the Applicant's disability had not been "severe" by the end of her minimum qualifying period on December 31, 2010.

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 grant leave to appeal, 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. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

(a) Oral Testimony

[5] The Applicant submits that the General Division failed to consider her testimony regarding the nature and extent of her functional limitations, particularly with sitting, associated with the chronic pain in her right leg. The Applicant claims that she testified that she had stopped working, in part, due to an inability to sit for longer than 20 minutes, and that she experiences severe leg pain that causes cramping when she sits or sleeps. The Applicant contends that the General Division wrongly found that there had been insufficient evidence that she was “so compromised that she was unable to attempt unskilled sedentary work ...”

[6] The General Division set out the Applicant’s oral evidence regarding her right leg. The member noted that the Applicant had testified that she has not applied for any work since 1995 or 1996 because she is unable to sit or stand, that she had not considered upgrading her English skills because she thought it would be hard to sit for long periods of time and that she spends most of the day massaging her leg, resting, trying to accomplish a few things and watching television. The member also noted that the Applicant had testified that, following surgery, the pain and swelling were not severe, but, over time, her condition progressively deteriorated and “changed significantly four or five years ago.” She testified that she feels pain in her leg and foot, as well as cramping and numbness at the surgical site, all of which keep her awake at night and make it difficult for her to get up or to change positions during the day. She goes upstairs slowly because of her pain, and she walks 15 to 20 minutes each day, but then she has to stop because of the onset of pain.

[7] In its analysis, the General Division immediately noted the Applicant’s testimony that she has problems sleeping and that she finds it painful to sit, stand and walk. The General Division also noted that these complaints had generally not been well-documented, but it accepted that the Applicant might not have discussed them with her health caregivers, perhaps because she had accepted that there was little that could be done to alleviate her condition. The General Division also noted the Applicant’s testimony mentioning the worsening of her condition a few years ago, after the minimum qualifying period had passed. The member accepted that this estimate of when her condition deteriorated

represented an approximation, and that the painful swelling in the Applicant's right leg is a longstanding issue.

[8] Given that the General Division specifically alluded to the Applicant's testimony regarding her pain and functional limitations, it cannot be said that the General Division failed to consider this testimony. It is clear that, although the General Division was cognizant of the Applicant's oral testimony, the member required corroborating documentary evidence. In this regard, neither the family physician nor the surgeon had ruled out sedentary employment. They advised that she avoid any employment that involved prolonged standing and, in the case of the family physician, that she keep her leg raised as much as possible.

[9] Essentially, the Applicant is requesting that the Appeal Division reweigh and reassess the evidence regarding her pain and limitations 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 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. 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."

(b) Villani

[10] The Applicant submits that the General Division failed to properly conduct a "real world" analysis and, in particular, that it failed to give "due consideration" to her functional limitations when it determined whether she was capable of unskilled, sedentary work, English-language training or educational upgrading. The Applicant argues that the General Division should have considered her evidence regarding the severity of the pain in her right leg and its effect on her functionality, particularly on her ability to sit for prolonged periods.

[11] The member referred to the "real world" analysis set out under *Villani v. Canada (Attorney General)*, [2002] 1 FCR 130, 2001 FCA 248, then she proceeded with her analysis

under paragraph 26. The member specifically referred to the swelling in the Applicant's right leg, as well as the resulting pain and discomfort. The member also noted that the pain and discomfort could prevent the Applicant from performing work standing up. The member also determined that, as no one had cautioned the Applicant to avoid sitting or changing positions, she was therefore likely able to pursue retraining, upgrading or sedentary work. Given that the member expressly acknowledged the Applicant's pain and limitations, I am not satisfied that the appeal has a reasonable chance of success on the basis of this particular submission.

[12] I note, in any event, that the Federal Court of Appeal cautioned against interfering with the assessment of an applicant's circumstances.

(c) Dr. Rai's Medical Opinion

[13] The Applicant asserts that the General Division erred in rejecting Dr. Rai's medical opinion on the basis that he had failed to provide any objective evidence to support his conclusion. The Applicant argues that Dr. Rai had in fact relied on objective findings in arriving at his conclusions. For instance, he noted that there was permanent swelling in the Applicant's right leg, which had been present and remained largely unchanged since her lymph node resection surgery in 1995.

[14] The General Division noted Dr. Rai's opinion dated February 3, 2015, in which he stated that the Applicant's surgery had resulted in abnormal drainage and constant swelling of her right leg. The swelling was noted to be worse after approximately

30 minutes of standing, walking or sitting in a chair without her leg being raised. Dr. Rai noted that, despite the Applicant's compliance with treatment and despite the management options, which consisted of avoiding standing for prolonged periods, keeping her leg raised as much as possible, and wearing compression stockings for most of the day, she had yet to regain function in her right leg. The member noted that Dr. Rai had been of the opinion that the Applicant was unable to be employed in any capacity since her surgery, and that her disability was likely to be indefinite.

[15] At paragraph 28, the General Division wrote:

The Tribunal does not accept Dr. Rai's opinion that the [Applicant] is unable to work at all. He has not provided objective evidence to indicate how he arrived at that opinion. The file indicates that he rarely saw the [Applicant] regarding her lymphedema or the pain or sleep difficulty resulting from it. While he may be sympathetic to the [Applicant's] plight, his opinion that she cannot work is not supported by the evidence.

[16] The General Division accepted that there is swelling in the Applicant's right leg and that it causes pain and discomfort, which, in turn, may prevent her from performing any work standing up. While the swelling represents objective evidence, it is clear that the General Division rejected that the swelling in her right leg, as well as the associated pain and discomfort, could account for a complete disability or for being incapable regularly of pursuing any substantially gainful occupation. The member determined that the Applicant has some residual capacity for sedentary work, provided that she is able to raise or lift her leg. After all, Dr. Rai had noted that the swelling in the Applicant's right leg was exacerbated only when she stood for prolonged periods or when she walked or sat in a chair without having her leg raised. The member also noted that no one had ever recommended to the Applicant that she avoid sitting or changing positions. It was on this basis (i.e. that the Applicant could perform sedentary work provided she could raise her leg or change positions) that the member determined that there had been a lack of objective medical evidence to show that the Applicant was severely disabled.

[17] I am not satisfied that the appeal has a reasonable chance of success on the basis of this particular submission.

CONCLUSION

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

Janet Lew
Member, Appeal Division