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

Citation: *J. W. v. Minister of Employment and Social Development*, 2017 SSTADIS 200

Tribunal File Number: AD-16-629

BETWEEN:

J. W.

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: May 2, 2017

REASONS AND DECISION

INTRODUCTION

[1] At its root, this case is about whether the Applicant became ineligible for a disability pension under the *Canada Pension Plan* as of the end of September 2009. If so, this would require him to repay an overpayment.

[2] The Applicant seeks leave to appeal the General Division's decision dated January 22, 2016. The General Division determined that the Applicant had ceased to be eligible for a disability pension under the *Canada Pension Plan*, albeit it focused on whether the Applicant had complied with section 70.1 of the *Canada Pension Plan Regulations* and whether he had informed the Respondent of his return to work.

ISSUE

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

GROUNDS OF APPEAL

[4] Subsection 58(1) of the *Department of Employment and Social Development* (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.

[5] 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 endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[6] In his initial letter dated April 20, 2016, the Applicant wrote that he felt that he had been provided with a fair hearing, but he submitted that there was nevertheless a breach of the principles of natural justice in requiring him to repay an overpayment when he is of limited financial means. The Applicant seeks leniency and compassion. This does not represent a ground of appeal under subsection 58(1) of the DESDA.

[7] In further reasons for appeal provided on May 30, 2016, the Applicant argued that the General Division had erred in finding that his designation as a Certified Property Manager (C.P.M.) suggested that his medical condition was not preventing him from performing some type of work suited to his limitations. The Applicant notes that, as he had earned the designation long before he suffered his brain injury, it was no longer relevant to his current medical state. However, the General Division did not make any findings in regards to the Applicant's C.P.M. designation. Indeed, the suggestion that the C.P.M. designation enabled him to perform some type of work came from the Respondent. The General Division did not address the Respondent's submission in this regard.

[8] The Applicant also argued that his family was clearly a benevolent employer, as his family paid him so that he could be provided with "some dignity of life." The Applicant referred to some of the medical evidence. He claims that the medical evidence demonstrates that, despite taking pain-relief medication, he suffers from a severe brain injury, as well as debilitating pain and headaches.

[9] A review of the medical evidence at this juncture calls for a reassessment. As the Federal Court held in *Tracey*, there is no place under the DESDA for the Appeal Division to conduct a reassessment when determining whether leave to appeal should be granted or refused. The grounds of appeal are very specific and are limited to those under subsection 58(1) of the DESDA.

[10] At paragraph 18, the General Division addressed the issue of whether the Applicant was engaged in a substantially gainful occupation and whether he had a benevolent employer. The General Division acknowledged the Applicant's submissions that he worked in a "sheltered environment." Notwithstanding the Applicant's nominal earnings, the General Division member noted that the Applicant was working "nominal" 20 hours a week. The member also noted that there was no evidence to suggest that the Applicant had failed to carry out his assigned duties, or that his duties varied during nearly 27 months of work. The General Division also noted that, although the Applicant worked part-time for his family's business, he had testified that, from one to six months during 2012 and 2013, he otherwise worked on a full-time basis for different employers.

[11] I am, however, prepared to grant leave to appeal. The General Division identified the issue before it as whether the Applicant had duly complied with the reporting requirements under section 70.1 of the *Canada Pension Plan Regulations*. It is not readily apparent whether the General Division recognized that the underlying issue was whether the Applicant had ceased to be disabled. Although the General Division examined whether the Applicant was mentally or physically disabled, the member did this from the perspective of whether the Applicant was disabled to the point that he lacked the ability to decide on or determine the need to report under section 70.1 of the *Canada Pension Plan Regulations*. The member appears to have concluded that the failure to comply with section 70.1 of the *Canada Pension Plan Regulations* necessarily resulted in a cancellation of the Applicant's disability pension, although neither the *Canada Pension Plan* nor the *Canada Pension Plan Regulations* provides for such a result.

[12] I note that there was little in the way of medical evidence for the years 2009 to 2012, so the General Division resorted to reviewing the Applicant's activities and limitations during this timeframe, as they may have represented the "best evidence" of the Applicant's capacity. Although I recognize that the General Division found that the Applicant had worked on a full-time basis in 2012 and 2013, varying from one to six months in duration, there is no indication of what the nature of this employment had been and whether the Applicant might have had benevolent employers. Furthermore, it is neither readily apparent whether the General Division addressed the issue of whether the Applicant

was incapable regularly of pursuing any substantially gainful occupation, nor is it readily apparent whether his efforts to obtain and maintain employment were unsuccessful because of his health condition.

CONCLUSION

[13] For the reasons that I have set out above, I am satisfied that the appeal has a reasonable chance of success, and the application for leave to appeal is therefore 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