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

Citation: *M. T. v. Minister of Employment and Social Development,* 2017 SSTADIS 333

Tribunal File Number: AD-16-949

BETWEEN:

M. T.

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: July 14, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the General Division decision dated April 20, 2016, which determined that the Applicant had ceased to be disabled on April 30, 2009, for the purposes of the *Canada Pension Plan*.

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 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.

[5] The Applicant submits that the General Division based its decision on three erroneous findings of fact that it made in a perverse and capricious manner or without regard for the material before it.

i. Accounting methods

[6] The General Division found that the gross income and gross profits for the Applicant's business were substantially gainful. The General Division questioned the business's accounting methods and how it could be that the net income "was so vastly lower than the gross," when the business did not have any employees, other than the Applicant, and when it did not pay him, employ any professionals or incur any administration costs. The General Division found that it would have been reasonable for the business to pay the Applicant from its "substantially gross earnings," given that he was the company's only employee. The General Division determined that the hours that the Appellant had worked in a week were unimportant, as "it is the income generated that must be considered as substantial or not. A part time job can be a substantially gainful occupation." Ultimately, the General Division determined that the Applicant was working at a substantially gainful occupation in 2009 and, therefore, that he was no longer eligible for the Canada Pension Plan disability pension.

[7] The Applicant argues that the General Division erred in finding that his business had questionable accounting methods.

[8] Although the General Division made several gratuitous remarks about the Applicant's business and accounting methods, ultimately, it did not base its decision on the business's accounting methods or on the fact that the net income "was so vastly lower than the gross." In assessing whether the Applicant was engaged in a substantially gainful occupation, the General Division relied on both the company's gross income and the Applicant's reported employment income for 2009 and 2010, which the member noted exceeded the Canada Pension Plan maximum allowable earnings. Given that the General Division did not base its decision on what it perceived as the company's questionable accounting methods, I am not satisfied that the appeal has a reasonable chance of success on this issue.

ii. Company’s gross income and gross profit from 2005 to 2011

[9] At paragraph 49, the General Division wrote that “[e]very year since 2005 the gross revenue has been substantially over the CPP allowable earnings. The Tribunal finds the gross income and the gross profit from 2005 until 2011 to be substantially gainful.”

[10] The Applicant explains that when he applied for a Canada Pension Plan disability pension, he had not only disclosed the existence of his business, but he had also informed the Respondent that he would continue to operate the business until he was no longer able to do so. When the Respondent subsequently approved his application for a Canada Pension Plan disability pension, he formed the belief that he could continue operating his business without jeopardizing his entitlement to the disability pension, particularly as he considered his business as merely a hobby and was earning what he considered was “little money from it.” He had been unaware that he could become disentitled to a disability pension by virtue of his business and suggests that the Respondent should have alerted him that it would no longer consider him disabled if his business’s income was deemed to be substantial. The Applicant does not otherwise contest the General Division’s findings regarding his company’s income and revenue or his own earnings.

[11] This issue does not fall within any of the enumerated grounds of appeal under subsection 58(1) of the DESDA. This issue does not point to any purported errors that the General Division may have committed.

iii. Applicant’s health

[12] The Applicant claims that the General Division based its decision on an erroneous finding of fact that it made without regard to the material before it, when it found that his health had improved since he had been granted a disability pension in 2005. Having determined that the Applicant’s health had improved, the General Division found that the Applicant ceased to be disabled. The Applicant steadfastly maintains that his condition has never improved.

[13] At paragraph 57, the General Division noted that, at that time, the Applicant was to undergo a lung transplant if his disease progression continued. The General Division noted that the Applicant explained that, due to his efforts at maintaining his health, including participating in lung physiotherapy, the lung transplant became unnecessary. From this, the General Division determined that the "fact that he has not required a lung transplant in over 10 years would indicate his disease progression, while still a permanent disease, did reverse in its severity of 2005.". At paragraph 60, the General Division also noted that, in 2013, Dr. Brown, a respirologist, indicated that he had previously formed the opinion that the Applicant would require a lung transplant, but that this was no longer the case, "due to advancement in drugs" (GD2-287).

[14] The Applicant advises that had he continued working, he would have been unable to maintain his health. He notes, for instance, that before he left his employment in 2004, he did 30 minutes of physiotherapy, twice a day, and that, after leaving his employment, he was able to perform three to four hours of physiotherapy per day. He notes that Dr. Brown also wrote in his letter of May 1, 2013 that the Applicant "has been able to maintain his health at a level comparable to 2005" (GD2-287) and that he "requires hours of treatment per day to maintain his current health." The Applicant denies that there has been any improvement in his health and claims that the only improvement has been in the time he has available to care for himself.

[15] The General Division based its findings largely on Dr. Brown's medical opinion of May 1, 2013. Dr. Brown wrote:

> Fortunately, due to continued advancement and access to drugs such as Pulmozyme, inhaled Tobramycin and inhaled Aztreonam [the Applicant] <u>has been able to maintain his health</u> at a level comparable to 2005. This was somewhat surprising to us in that I 10 years ago we had anticipated that [the Applicant] would show a decline as he is chronically infected with Burkholderia which normally infers a poor prognosis in Cystic Fibrosis and that he would likely progress to requiring lung transplantation. Fortunately that has not been the case.
>
> (my emphasis)

[16] The respirologist did not suggest that there had been any actual improvement in the Applicant's health. At most, he indicated that the Applicant had "been able to maintain his health at a level comparable to 2005." The General Division somehow determined that the maintenance of the Applicant's health translated into a "revers[al] in its severity." However, there is a marked difference between the reversed progression of a disease and the maintenance of a disease, as the latter suggests that any progression has been arrested and that the condition has plateaued. In this regard, the General Division may have misconstrued the medical evidence.

[17] Although I am prepared to grant leave to appeal in this matter, on the ground that the General Division based its decision on an erroneous finding of fact that the Applicant's health had improved, the Applicant should be prepared to address the General Division's finding that he was no longer incapable regularly of pursuing a substantially gainful occupation. The General Division came to this conclusion on the basis of the company's income and the Applicant's employment earnings. If an appellant is no longer incapable regularly of pursuing any substantially gainful occupation, then he cannot be considered to have a severe disability under the *Canada Pension Plan*.

CONCLUSION

[18] The application for leave to appeal is 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