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

Citation: *B. I. v. Minister of Employment and Social Development*, 2017 SSTADIS 410

Tribunal File Number: AD-16-1355

BETWEEN:

B. I.

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: August 15, 2017

REASONS AND DECISION

[1] This is an appeal from the General Division decision rendered on September 12, 2016. The General Division determined that the Applicant had a severe and prolonged disability before the end of her minimum qualifying period on December 31, 2009. The Applicant had been involved in a motor vehicle accident in August 2009 and had sustained numerous injuries, including a traumatic brain injury and cognitive impairment. Based on the date of the Applicant's most recent application for a Canada Pension Plan disability pension, the General Division determined that the earliest the Applicant could be deemed disabled was November 2013 and, accordingly, also determined that payment of a disability pension would start as of March 2014. The Applicant seeks leave to appeal the decision of the General Division, arguing that the General Division failed to consider that she had been incapacitated following an initial application for a disability pension and therefore failed to appreciate that she was entitled to greater retroactive payments.

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 granting leave, 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.

[5] The Applicant claims that she was incapacitated after initially applying for a Canada Pension Plan disability pension in November 2010. The Applicant submits that the General Division failed to observe a principle of natural justice and also 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, as it failed to consider the possibility that she had been incapacitated.

[6] An appellant may be able to rely on subsections 60(8) to 60(11) of the *Canada Pension Plan* to assert greater retroactivity of payment of benefits. These sections provide that, if a claimant had been incapable of forming or expressing an intention to make an application on his or her own behalf on the day on which the application was actually made, the application can be deemed to have been made in the month preceding the first month in which the relevant benefit could have been commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later. In other words, if the Applicant can establish that she was incapacitated, her application could be deemed to have been made earlier than it actually was under subsection 60(8) of the *Canada Pension Plan*. The General Division did not directly address whether the Applicant in this case might have been incapacitated. The Applicant argues that the General Division erred in this regard.

[7] The Applicant submits that the effective date of payment should be calculated on the basis of her initial application for a disability pension in November 2010 (GD2-46 to 48). She argues the following in her application requesting leave to appeal:

> 7. The [Applicant] clearly expressed her intention to apply for the CPP disability benefit in 2010. Unfortunately, [the Applicant] or her spouse … were unable to discover the income tax errors at this time and this that [*sic*] prevented the approval of her application. At the time, they did not understand the

> complexity of the system nor could they afford to pay someone to act on [the Applicant's] behalf.
>
> 14. It is clear based on the medical records already possessed by the SST that [the Applicant] did not have the capacity to deal with her legal affairs on her own in 2010 or anytime afterwards. To further explain this point, a letter from Dr. Kennedy is included that indicates that she did not have the capacity to deal with her legal affairs in the doctor's medical opinion. [The Applicant's spouse] has also included an Affidavit explaining what he was struggling with from 2010 up until 2015. It was not until 2015 when [the Applicant's spouse] had the mental capacity and time to focus his energy on making applications.

[8] For the Appellant to be continuously incapacitated, she would have to establish that she had been incapable of forming or expressing an intention to make an application for benefits continuously from 2010 to the date of her second application. This goes well beyond establishing that she was severely disabled.

[9] In both *Canada (Attorney General) v. Danielson*, 2008 FCA 78, and *Slater v. Canada (Attorney General)*, 2008 FCA 375, the Federal Court of Appeal held that one is required to look at the medical evidence as well as the scope of activities in which an appellant may have been involved.

[10] In *Hussein v. Canada (Attorney General)*, 2016 FC 1417 (CanLII), the Federal Court noted that one of the key findings made by the General Division in that case was that Mr. Hussein's mental state was "in a state of flux," i.e. that his mental condition changed from time to time over the period in question. The Federal Court indicated that had Mr. Hussein's mental state been continuous, he might have been found to have been incapacitated.

[11] I have perused some of the medical records. The Applicant's family physician prepared a medical-legal report dated December 31, 2013 (GD8-2). The Applicant clearly continued to experience cognitive problems. For instance, she experienced ongoing

headaches, dizziness and nausea in late 2010 and into early 2011. She continued to have difficulty with concentration and impaired memory, such that sometimes she could not recall what she had just read. In January 2011, the Applicant reported that there had been "further cognitive improvement." During the same visit, the Applicant was reportedly "now driving, sometimes without supervision." When seen on March 2, 2011, the Applicant's ability to recall articles from the newspaper she had read was significantly improved. Her coordination was improved enough that she felt she could drive with some confidence.

[12] In a visit to her family physician on November 10, 2011, the Applicant reported a "miraculous resolution of all of her symptoms" including her cognitive dysfunction. She had returned to work in November 2011. However, the cognitive impairment returned weeks later. She resumed working – at four-hour shifts – albeit continued to encounter difficulties with concentration and memory. The family physician noted that the Applicant continued driving throughout 2012.

[13] In 2013, the family physician noted that the Applicant did some nominal work for her spouse, although he found that she was unable to complete other mental challenges for a day or two afterwards. The family physician noted that the Applicant was doing some household chores, such as meal preparation.

[14] Given the medical evidence and the scope of activities in which the Applicant was involved after 2010, and the fact that, in November 2011, the Applicant had reported that she had a "miraculous resolution of all of her symptoms," which enabled her to return to work, there was no basis upon which the General Division could have determined that the Applicant had been continuously incapable of forming or expressing an intention to make an application for benefits, from 2010 to the date of her second application. I am therefore not satisfied that the appeal has a reasonable chance of success.

[15] The Applicant further submits that the General Division failed to observe a principle of natural justice. Natural justice is concerned with ensuring that an applicant has a fair and reasonable opportunity to make his or her case, that he or she has a fair hearing and that the decision rendered is free of any bias or the reasonable apprehension or appearance of bias. The Applicant's allegations do not fall into this category and there is no suggestion

that she has been deprived of a fair opportunity or of a fair and reasonable opportunity to present her case, or that there has been any bias exhibited. These allegations do not raise an arguable case, either.

CONCLUSION

[16] Given the foregoing considerations, the application for leave to appeal is denied.

Janet Lew
Member, Appeal Division