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

Citation: *H. P. v. Minister of Employment and Social Development*, 2017 SSTADIS 456

Tribunal File Number: AD-16-1313

BETWEEN:

**H. P.**

Applicant

and

**Minister of Employment and Social Development**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division

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Leave to Appeal Decision by: Janet Lew

Date of Decision: September 19, 2017

## OVERVIEW

[1] The Applicant seeks leave to appeal the General Division's decision dated August 31, 2016, which determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it had found that her disability had neither been "severe" by the end of her minimum qualifying period on December 31, 1997, nor become "severe" within a prorated period, which, in this case, was from January 1, 2007 to April 30, 2007. The Applicant submits that the General Division had erred in law and that it had also based its decision on several erroneous findings of fact.

## ISSUE

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

## HISTORY OF PROCEEDINGS

[3] The Applicant initially applied for a Canada Pension Plan disability pension in February 1995. The Respondent denied this initial application. A Canada Pension Plan Review Tribunal denied her appeal of the Respondent's decision. The Applicant did not appeal the Review Tribunal's decision to the Pension Appeals Board.

[4] The Applicant applied for a Canada Pension Plan disability pension a second time, in March 2000. The Respondent denied this second application. The Applicant did not seek a reconsideration decision.

[5] The Applicant applied for a Canada Pension Plan disability pension a third time, in July 2012. The Respondent denied this third application. The Applicant appealed the Respondent's decision to the General Division.

[6] The General Division heard the matter by teleconference on June 23, 2015. The Applicant and her daughter both testified. On June 24, 2015, the General Division allowed the Applicant's appeal and granted her a disability pension, having found that the Applicant had a severe and prolonged disability in November 2003. However, the General Division also determined that the Applicant's minimum qualifying period had ended on

December 31, 1997 and that she also had a prorated period of January 1, 2007 to April 30, 2007. The Respondent appealed this decision to the Appeal Division.

[7] On May 9, 2016, the Appeal Division allowed the Respondent's appeal, having found that the General Division had erred in law when it misapplied the proration provisions under paragraph 42(2)(*b*) of the *Canada Pension Plan*. The Appeal Division determined that the Applicant had to have become disabled in the prorated period, i.e. between January 1, 2007 and April 30, 2007. The Appeal Division referred the matter back to the General Division for a redetermination.

[8] The General Division heard the appeal by teleconference. The Applicant was represented by her power of attorney. She did not attend the proceedings and accordingly did not give any oral evidence.

**ANALYSIS**

[9] 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;
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> **(b)** the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> **(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.

[10] 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.

### (a) Testimony from the 2015 General Division hearing

[11] The Applicant argues that the General Division based its decision on several erroneous findings of fact that it made in a perverse and capricious manner, without regard for the material before it. For instance, she claims that the General Division ignored oral evidence that she had given during the first General Division hearing that took place on June 23, 2015.

[12] In its decision of June 24, 2015, the General Division noted the Applicant's evidence relating to her employment, as follows:

> [28] The Appellant testified that she has always wanted to work and in an effort to remain employed, she did not disclose her condition to her employer, the X RCMP. She stated that she felt the job as a night jail guard would be with her limitations and she commenced working for the RCMP on an on-call, casual basis in May 2007. The Appellant advised the Tribunal that she worked an average of 10 hours per month. She stated that she could not have worked more hours as at least once a week, she would not answer the phone when her employer called her to work as she was not able to due to her medical condition . . .
>
> (My emphasis)

[13] The Applicant argues that the General Division should have referred to and relied on the evidence she gave at the 2015 hearing, rather than dismissing it out of hand as "hearsay evidence." In fact, it was the Applicant's brother's evidence that the General Division considered hearsay, and the General Division did not dismiss the evidence simply because it considered it to be hearsay, but rather, because it was seen to be less reliable than information contained in the questionnaire accompanying the Applicant's application for a disability pension.

[14] At paragraph 35, the General Division wrote that the Applicant's representative, her brother, "indicated that the [Applicant] would let the phone ring and not answer it in order to avoid working at the RCMP when she did not feel well." The General Division found that the brother's evidence constituted hearsay as he did not observe this behaviour and was not present when the telephone rang. The General Division indicated that it preferred the

information contained in the questionnaire. The General Division accepted that the Applicant had completed the questionnaire, as "it was in the hand of the [Applicant]." The General Division also found that a record of a telephone conversation that took place on September 14, 2012 corroborated the information set out in the questionnaire. The telephone record indicates that the Applicant reportedly stated that she had not declined any shifts that the employer had offered to her. The information in the questionnaire and the Applicant's purported telephone statement contrasts with her oral testimony before the General Division in June 2015, where she stated that she would not answer the phone when her employer called her to work because of her medical condition.

[15] The General Division had accepted that the Applicant had not declined any shifts that the employer had offered to her and, as a result, found that she was capable regularly of pursuing any substantially gainful occupation. Clearly this evidence regarding the extent of the Applicant's willingness to accept any on-call shifts was material to the General Division's decision as to whether the Applicant was incapable regularly of pursuing any substantially gainful occupation.

[16] While the General Division was correct in describing the brother's evidence as hearsay, the Applicant argues that the General Division held a duty to consider all the evidence, including her oral testimony from the 2015 hearing, and that had the General Division considered her 2015 oral evidence, it necessarily would have arrived at a different conclusion altogether, namely, that she was incapable regularly of pursuing any substantially gainful occupation.

[17] I am therefore prepared to find that there is an arguable case relating to the issue of whether the General Division was required to consider evidence from earlier proceedings, i.e. whether the prior evidence is admissible in a *de novo* hearing. However, this raises questions as to whether it was incumbent upon the Applicant to adduce evidence of her prior testimony and to specifically refer to it in the course of submissions, or whether that evidence is even admissible, given that there was a *de novo* hearing.

### (b) Other Issues

Alleged error of law—proration

[18] The Applicant has also raised other issues. The Applicant submits that the General Division erred in law as it "refused to entertain a finding of disability under the provisions of 44(2)(b) for lack of a triggering event during her qualifying period." The Applicant essentially argues that the General Division erred in finding that her disability had to have arisen between January 1, 2007 and April 30, 2007, in order for her to be found disabled. The Applicant argues that it was unnecessary for the General Division to apply the proration provisions, given that she was severely disabled by December 31, 1997.

[19] The proration provisions are available when an appellant is not found disabled by the end of his minimum qualifying period. However, the appellant's disability, i.e. the triggering event, must be found to have arisen within the proration period. Typically, a tribunal would determine whether an appellant became disabled by the end of his minimum qualifying period before determining whether the proration provisions might be available to him.

[20] In this case, the General Division found that because the Applicant had worked after December 31, 1997, she could not have been severely disabled by the end of her minimum qualifying period. It was on this basis that the General Division proceeded to determine whether the Applicant's disability arose between January 1, 2017 and April 30, 2007, and therefore could benefit from the proration provisions.

[21] At paragraph 44, the General Division wrote that:

> There was not any real issue that the Appellant suffered from a severe disability on or before December 31, 1997. The Appellant worked in a number of occupations after that date...

[22] While it is true that the Applicant worked after December 31, 1997, the earnings history suggests that she had relatively nominal earnings after this date (though there were several years prior to this date when her earnings were also relatively nominal). The General Division noted that the Applicant had commenced working in May 2007 and had indicated

that she was no longer able to work as of September 2009. However, the earnings history suggests that the Applicant had only nominal earnings after 1997. It suggests that the General Division concluded that the Applicant was necessarily engaged in a substantially gainful occupation, by virtue of the fact that she was employed. This may constitute an error of law, if the General Division determined that the Applicant could not have been severely disabled, simply because she was employed, without assessing, to begin with, whether that employment could even constitute a substantially gainful occupation. I am satisfied that the appeal has a reasonable chance of success on the issue that the General Division may have erred in failing to properly assess whether the Applicant could be found to have been severely disabled by the end of her minimum qualifying period on December 31, 1997.

Alleged erroneous findings of fact

[23] She argues that the General Division based its decision on several other erroneous findings of fact made without regard for the material before it, including the following:

a. In 1991, she was involved in a motor vehicle accident in which she sustained several injuries, including seizures, migraine headaches, dizziness, vertigo, and an undiagnosed brain disorder. The Applicant argues that the cumulative effect of these injuries should have resulted in a finding that she was severely disabled by the end of her minimum qualifying period.

b. Her family physician was of the opinion that the Applicant's condition in 2000 was largely unchanged since her motor vehicle accident and that she had been rendered disabled indefinitely.

c. She felt compelled to work because of financial constraints, yet, efforts to work jeopardized her life.

d. She had fallen twice when she was working at the Toy Library in 2002 and 2003.

[24] The fact that the Applicant sustained injuries from a motor vehicle accident in 1991, or fell twice in 2002 and 2003, is irrelevant to the issue of whether the Applicant had a severe and prolonged disability by the end of her minimum qualifying period, or whether she had developed a severe disability within a prorated period. Similarly, it is irrelevant what triggered her seizures. The General Division was required to examine the issue of whether the Applicant was incapable regularly of pursuing any substantially gainful occupation, and none of these facts addressed this issue.

[25] The Applicant argues that the cumulative effect of injuries from the motor vehicle accident resulted in a severe disability. Essentially, this calls for a reassessment. However, a review or reassessment of the evidence does not fall within any of the grounds of appeal under subsection 58(1) of the DESDA. As the Federal Court held in *Tracey*, it is not the Appeal Division's role to reassess the evidence or to reweigh the factors that the General Division considered in assessing whether the Applicant is severely disabled under the *Canada Pension Plan*.

[26] The Applicant's family physician prepared a medical opinion dated June 2, 2000. He indicated that he had examined the Applicant on October 27, 1997, for a follow-up reassessment regarding her constant dizziness. He was of the opinion that it was "much the same as it had been since her accident." He concluded that she continued to be disabled because of constant balance problems and headaches.

[27] Having seemingly accepted that the Applicant was engaged in a substantially gainful occupation after 1997, the General Division did not examine any of the medical evidence (including the June 2, 2000 opinion from the family physician), for the purposes of determining whether she was incapable regularly of pursuing any substantially gainful occupation by the end of her minimum qualifying period. For this reason, I am satisfied that there is an arguable case that the General Division may not have properly conducted an assessment as to whether the Applicant could be found severely disabled by the end of her minimum qualifying period.

[28] The Applicant returned to the workforce in 2002 and 2003 and again in 2007, 2008 and 2009. She alleges that these efforts jeopardized her life. However, the effect of any employment on her medical status does not address the central issue of whether she could be found severely disabled by the end of her minimum qualifying period or within the proration period. They might have been relevant to the issue of whether her efforts to obtain or maintain employment had failed because of her health condition, but this issue did not arise and the General Division did not address it.

**CONCLUSION**

[29] I am prepared to grant leave to appeal, although this decision of course is not determinative of whether the appeal itself will succeed.

[30] In accordance with subsection 58(5) of the DESDA, the application for leave to appeal hereby becomes the notice of appeal. Within 45 days after the date of this decision, the parties may: (a) file submissions with the Appeal Division; or (b) file a notice with the Appeal Division stating that they have no submissions to file. The parties may make submissions regarding the form the hearing of the appeal should take (e.g. by teleconference, videoconference, in person or on the basis of the parties' written submissions), together with submissions on the merits of the appeal.

Janet Lew
Member, Appeal Division