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

Citation: *T. P. v. Minister of Employment and Social Development,* 2017 SSTADIS 701

Tribunal File Number: AD-17-94

BETWEEN:

**T. 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: December 1, 2017

## DECISION AND REASONS

## DECISION

[1] The application requesting leave to appeal is granted.

## OVERVIEW

[2] The Applicant, T. P., worked as a supervisor/light-duty cleaner for close to two years, between January 2006 and April 2008,[1] when he stopped working due to increasing pain in his neck, shoulder, arm and hand. The Applicant had previously injured his back, left arm and wrist in 2004, from which he had never fully recovered. He has not returned to the workforce since 2008.

[3] The Applicant underwent a C5-C6 anterior cervical discectomy and fusion in February 2010, relating to his back and neck, but he purports to have been left with limited strength in his left arm and pain with use. He also reports being unable to sit or stand for prolonged periods. A transferable skills analysis undertaken in 2014 was unable to identify any suitable occupations for the Applicant and the Nova Scotia Workers' Compensation Appeals Tribunal awarded him a full extended earnings replacement benefit retroactive to August 2013.

[4] The Applicant applied for a Canada Pension Plan disability pension in April 2014, but the Respondent denied his application. He appealed the Respondent's decision to the General Division but it also determined that he was ineligible for a Canada Pension Plan disability pension, as it found that his disability was neither "severe" by the end of his minimum qualifying period on December 31, 2005, nor that it had become "severe" within the prorated period from January 1, 2006 to October 31, 2006. (The minimum qualifying period is the date by which an applicant is required to be disabled, to qualify for a Canada Pension Plan disability pension.)

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[1] The General Division did not specify the dates when the Applicant worked, but the Nova Scotia Workers' Compensation Appeals Tribunal found that the Applicant had worked from January 2006 to April 2008.

[5] The Applicant now seeks leave to appeal the General Division's decision. He claims that the General Division overlooked critical evidence, although he did not identify that evidence. He also claims that it failed to consider whether his disability is prolonged.

**ISSUE**

[6] Does the appeal have a reasonable chance of success on the issues of whether the General Division overlooked critical evidence, or failed to consider whether the Applicant's disability is prolonged?

**GROUNDS OF APPEAL**

[7] 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.

[8] 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*.[2]

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[2] *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

## ANALYSIS

### Review of medical records by the General Division

[9] In his initial submissions, the Applicant argued that the General Division failed to consider the "big picture" and that it should have recognized that "every person is not the same when they have an injury."

[10] In response to a request from the Social Security Tribunal for further information, the Applicant provided further submissions. This time, he indicated that the General Division overlooked all of his documents from doctors and specialists. However, he failed to identify which records the General Division is alleged to have overlooked, other than to say "all of his documents." The General Division noted some specific records, so it is inaccurate to suggest that it overlooked "all of his documents" (my emphasis).

[11] There was extensive medical documentation before the General Division, much of it originating with or relating to his claim with the Workers' Compensation Board. The General Division reviewed the 2004 and 2005 medical records and concluded that they failed to establish that the Applicant lacked the capacity regularly of pursuing any substantially gainful occupation by the end of his minimum qualifying period.

[12] The General Division noted that a registered physiotherapist prepared a functional assessment dated November 16, 2005 — close to the end of the minimum qualifying period. The physiotherapist had recommended that the Applicant's workday tolerance was eight hours, based upon his current demonstrated tolerance for sitting, standing and walking. This tolerance was contingent upon the job requirements not exceeding certain "functional parameters" (GD2-118 to 126). The General Division found that, although the Applicant had limitations, particularly with overhead reaching, he nevertheless retained the capacity to work and had in fact been encouraged to return to work and resume his activities.

[13] After reviewing the 2004 and 2005 medical records, the General Division largely concluded its analysis.

[14] I agree with the Applicant that the General Division appears to have overlooked some of the medical records. For instance, I do not see any review or analysis for the medical records for 2006, even if, in this case, there was only a solitary opinion that had been prepared within this timeframe. A review of any 2006 records was relevant because they could have addressed the issue of whether a severe disability had arisen sometime within the prorated period between January 1, 2006 and October 31, 2006.

[15] The only medical record for this timeframe was a permanent medical impairment assessment conducted in November 2006. This assessment concluded that the Applicant had a 2% permanent medical impairment relating to his upper extremity. It noted that the Applicant had been working in January 2006 but was presently unemployed. It indicated that he had difficulty with tasks requiring the use of excess grip, such as washing dishes or lifting heavy items (GD2-222 to 228).

[16] Despite his limitations, the Applicant returned to the workforce in January 2006[3] and resumed working until April 2008. He reportedly worked on a full-time basis as a supervisor/light-duty cleaner, until he began experiencing increasing neck and left arm pain. Had the General Division determined that the Applicant had been working on a full-time basis at a substantially gainful occupation — without any need for accommodation — from 2006 to April 2008, this would have been fatal to his claim to a disability pension, because he would have thereby demonstrated that he had the capacity regularly of pursuing a substantially gainful occupation. However, although the General Division observed that the Applicant managed to work full-time from 2006 to 2008 "well past his [minimum qualifying period]," it did not make any explicit findings as to whether this employment represented a substantially gainful occupation.

[17] The Applicant's earnings for 2006 and 2007, while relatively nominal at approximately $3,500 and $9,000, respectively, were marginally below his average earnings

[3] The records also suggest that the Applicant may have worked in this capacity for approximately three years (see GD2-50, which indicates that he worked from 2005 to 2008).

from 1999 to 2003 (when his annual earnings fluctuated from a low of $4,076 to $15,195). This, however, is not to suggest that these earnings necessarily reflected a substantially gainful occupation simply because they were only marginally below his earnings from 1999 to 2003. Indeed, the nominal nature of the Applicant's earnings for 2006 and 2007 belies any sense of full-time employment.

[18] It is unclear whether the General Division examined the evidence to determine whether the Applicant had been engaged in a substantially gainful occupation from 2006 to 2007, or whether his employment during this timeframe represented a failed work attempt.

[19] The Applicant's earnings of approximately $9,000 for January to April 2008 were significantly higher than in previous years, but it is unclear whether the General Division examined the evidence and analyzed the source or nature of those earnings to determine whether the Applicant's employment in 2008 could constitute a substantially gainful occupation. Without such an analysis, it would be difficult to conclusively determine that the Applicant was engaged in a substantially gainful occupation.

[20] The General Division ultimately determined that the Applicant exhibited capacity regularly of pursuing a substantially gainful occupation on the basis of two functional capacity evaluations that were prepared in 2013 and in 2014. One occupational therapist was of the opinion that the Applicant was "capable of 8 hours of work activity that is at the **Medium to Heavy** level in terms of the degree of strenuous." The occupational therapist recognized that the Applicant could not return to his former occupation but found that he was capable of work with an alternate employer as long as it was within the Applicant's current abilities, i.e. minor left above shoulder reaching and up to a maximum of occasional level left simple and fine handling (GD2-149).

[21] In the January 2014 functional assessment, a registered physiotherapist found light duty cleaning unsuitable for the Applicant because it would require significant repetitive use of his upper extremities. The physiotherapist recommended that "occasional left arm usage at any future work would certainly be a reasonable recommendation" (GD2-186).

[22] The registered physiotherapist addressed the issue of the suitability of employment as a light duty cleaner, but did not otherwise address the conclusions of the occupational therapist that the Applicant was capable of working with an alternate employer for eight hours at the medium to heavy level. He did not rule out alternate employment nor specifically rebut the overall conclusions from the 2013 report regarding the Applicant's capability. Indeed, in his 2014 report, the physiotherapist concluded that the Applicant demonstrated physical abilities "consistent with medium level weighted activities" (GD2-187).

[23] I agree with the Applicant that the General Division did not address the 2014 functional capacity evaluation. The registered physiotherapist concluded in his 2014 report that the Applicant was capable of at least medium level weighted activities, but it is unclear whether the General Division considered and accepted that this meant that the Applicant was capable regularly of pursuing a substantially gainful occupation. In other words, simply because he demonstrated that he was capable of performing medium level weighted activities did not thereby establish that he was necessarily capable regularly of pursuing a substantially gainful occupation.

[24] Further, the General Division did not address the transferable skills analysis prepared in August 2014. The transferable skills analysis took into account the Applicant's employment history, an academic assessment and physical limitations. Considering these factors, the assessor was unable to identify any realistic potential employment for the applicant to consider. While this analysis would not have established whether the Applicant was severely disabled by the end of his minimum qualifying period or whether he had become disabled within the prorated period (given that it was prepared so long after these dates), it remained relevant because the General Division relied on post-2008 medical records to establish that he had the capacity regularly of pursuing a substantially gainful occupation.

[25] In particular, the General Division relied on the July 2013 functional capacity evaluation to show that the Applicant was capable of eight hours of medium to heavy level work. The General Division was certainly entitled to rely on the July 2013 functional

capacity evaluation, but in the light of subsequent opinions that purported to rebut the findings made in the July 2013 opinion, the General Division should have addressed any conflicting opinions between the reports. It is not readily apparent that the General Division undertook this analysis.

[26] In summary, the General Division was obligated to examine the medical records and the Applicant's employment history for at least 2006, if not also for 2007 and 2008, in a "real world" context. It is not readily apparent that the General Division did so. Having accepted that the Applicant was working full-time between 2006 and 2008, it should have also determined whether any work in which the Applicant was engaged after December 2005 constituted a substantially gainful occupation. The General Division relied on medical records that were prepared after the minimum qualifying period, perhaps without addressing somewhat discrepant opinions that were prepared at about the same time or shortly thereafter. For these reasons, I am satisfied that the Applicant has raised an arguable case and that the appeal has a reasonable chance of success.

**Prolonged disability**

[27] The Applicant also suggests that the General Division failed to consider whether his disability is prolonged. The Applicant explained that he mistakenly believed that he would eventually recover from his injury. He also explained that he returned to work at the suggestion of the Workers' Compensation Board, but that he ended up reinjuring his arm and, six months later, had to undergo a spinal fusion. Although the surgery helped to alleviate some of his symptoms, he remains functionally impaired as he is unable to reach overhead and has limited use of his arm. Any use results in pain for three or more days.

[28] The test for disability is two-part and if a claimant does not meet one aspect of this two-part test, then they will not meet the disability requirements under the *Canada Pension Plan.* As the General Division indicated, it is unnecessary to undertake an analysis of the

prolonged criterion when the appellant has not established that they are severely disabled. In *Klabouch*[4] at para. 10, the Federal Court of Appeal stated the following:

> [...] The two requirements of paragraph 42(2)(*a*) of the [*Canada Pension Plan*] are cumulative, so that if an applicant does not meet one or the other condition, his application for a disability pension under the [*Canada Pension Plan*] fails.

[29] In *McCann*,[5] the Federal Court stated that "the fact of concentrating on one feature of the test and of not making any findings regarding the other […] does not constitute an error." The Federal Court determined that Mr. McCann's argument that the Appeal Division should have granted leave to appeal on the basis of the General Division's failure to consider the "prolonged" part of the disability test was bound to fail.

[30] Even if the General Division had determined that the Applicant's disability was prolonged, this would not have established entitlement to a Canada Pension Plan disability pension, as the Applicant was still required to prove that his disability was severe by the end of his minimum qualifying period or that it had arisen during the prorated period.

[31] I am not satisfied that the appeal has a reasonable chance of success on this issue.

**CONCLUSION**

[32] For the reasons I have set out above, I am satisfied that the appeal has a reasonable chance of success. Accordingly, the application for leave to appeal is granted.

[33] In accordance with subsection 58(5) of the DESDA, the application for leave to appeal becomes the notice of appeal. Within 45 days after the date of this decision, the parties may either file submissions or file a notice stating that they have no submissions to file. The parties may make submissions regarding the form the hearing of the appeal should

[4] *Klabouch v. Canada (Social Development)*, 2008 FCA 33.
[5] *McCann v. Canada (Attorney General)*, 2016 FC 878.

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