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

Citation: *J. H. v. Minister of Employment and Social Development*, 2017 SSTADIS 768

Tribunal File Number: AD-17-380

BETWEEN:

J. H.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: December 28, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is granted.

OVERVIEW

[1] The Applicant, J. H., was born in 1961 and attended school up to grade 10. She worked as a fleet administrator for many years until she was laid off in 2009. She then began a nail salon business, which she operated from her home.

[2] Over the years, her health declined, and she has been diagnosed with numerous medical conditions, including Cushing's disease, sciatica, chronic pain syndrome, depression, anxiety, shingles, rectovaginal fistula, breast cancer, obesity, renal stones and sleep apnea. She has undergone multiple surgeries and has sustained injuries from a motor vehicle accident in September 2014 and a fall in February 2015.

[3] Ms. J. H. closed her business in early 2015 and applied for disability benefits under the *Canada Pension Plan* (CPP) in July 2015. In addition to medical records, Ms. J. H. submitted copies of tax summaries indicating that she reported self-employment income from 2010 to 2014, inclusively, as well as CPP deductions for those years.

[4] The Respondent, the Minister of Employment and Social Development Canada (Minister), refused her application, finding that her condition did not amount to a severe and prolonged disability during her minimum qualifying period (MQP), which it determined ended on December 31, 2012.

[5] Ms. J. H. appealed the Minister's refusal to the General Division of the Social Security Tribunal of Canada (Tribunal). On January 16, 2017, the General Division convened a hearing by teleconference but ultimately found that Ms. J. H. had not demonstrated a severe and prolonged disability as of the MQP which, like the Minister, it determined ended on December

31, 2012. The General Division also placed weight on evidence that Ms. J. H. was able to continue working as a manicurist, with a full client list, until 2014.

[6] Ms. J. H. was previously self-represented but has now retained legal counsel. She seeks leave to appeal to the Tribunal's Appeal Division, alleging that the General Division erred by failing to recalculate her MQP in light of her self-employment earnings and CPP contributions from 2010 to 2014.

[7] Having reviewed the General Decision's decision against the record, I have concluded that this appeal stands a reasonable chance of success.

ISSUE

[8] Does Ms. J. H. have an arguable case that the General Division erred in disregarding evidence that she recorded valid CPP earning and contributions in the years 2010 to 2014, inclusive?

ANALYSIS

[9] This case raises doubt that Ms. J. H.'s Record of Employment (ROE), produced by the Minister, was accurate. It also raises a question of whether the General Division relied on the ROE despite indications that it may not have been up to date.

[10] According to section 58 of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: The General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact. An appeal may be brought to the Appeal Division only if it first grants leave to appeal,[1] but the Appeal Division must first be satisfied that at least one of the grounds advanced has a reasonable chance of success.[2] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[3]

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[1] DESDA at subsections 56(1) and 58(3).
[2] *Ibid*. at subsection 58(1).
[3] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[11] In January 2016, Ms. J. H. submitted copies of tax summaries for 2010-14 (GD2-107) that appeared to show she had recently reported self-employment income and authorized CPP deductions as follows:

Year	Net Earnings	CPP
2010	$6,505.55	$148.78
2011	$9,198.00	$282.05
2012	$8,065.31	$225.38
2013	$5,162.59	$82.30
2014	$3,640.00	$6.93

[12] The file indicates that the Minister generated an ROE at least three times: July 31, 2015 (GD2-49); May 20, 2016 (GD2-34); and September 21, 2016 (GD4-21). On each occasion, the printouts showed the same information—that Ms. J. H. had recorded valid earnings and contributions for more than 25 years, the last three in 2007, 2008 and 2009. All of the printouts had the following notation in the headings: "CPP contributor information as of 2013-01-26."

[13] The Minister based its MQP calculation on these ROEs and determined that Ms. J. H. was required to show that her disability became severe and prolonged prior to December 31, 2012. In none of its correspondence, adjudication summaries or submissions did it address Ms. J. H.'s evidence that she had made valid contributions to the CPP in the years 2010 to 2014, other than to note that her tax summaries indicated substantially gainful earnings after the nominal MQP. The Minister apparently did not entertain the possibility that Ms. J. H.'s earnings and contributions—provided they were validly reported—might have extended her MQP.

[14] In paragraph 28 of its decision, the General Division accepted the Minister's MQP calculation:

> The Respondent has calculated the Appellant's MPQ [*sic*] as December 31, 2012 based on her last three years of contributions from 2007 to 2009. The Tribunal has reviewed those calculations and agrees. The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2012.

[15] Much like the Minister, the General Division noted only that Ms. J. H. had "filed her income tax returns from 2010 to 2014" and reported self-employment income, although it made no mention of her claimed CPP contributions, nor did it address the question of why earnings and contributions supposedly reported after 2009 were not apparent on any of the three ROEs generated by the Minister.

[16] For this reason, I see an arguable case that the General Division may have based its decision on an erroneous finding of fact by disregarding evidence that might have extended Ms. J. H.'s MQP. I have also listened to a portion of the audio recording of the January 2017 teleconference and note that Ms. J. H. did make an attempt to raise this issue during her hearing before the General Division. At the 7:50 mark, this exchange is heard:

> Member: In your case, your premiums, they've calculated, cover you up to December 2012, which means that you have to show that you were disabled as of December 2012. Is that your understanding?
>
> Appellant: Yes… that is what they keep going back to. I don't think it's right, but that's what they keep [inaudible].
>
> Member: Uh, okay. So while it's also important, you know, what your condition is today, when we're talking, we'll be referring probably a lot to what was going on in 2012 and around that date in terms of your condition…

[17] This issue was not discussed again, and the presiding General Division member appears to have ignored, or glossed over, Ms. J. H.'s expression of disagreement with the Minister's determination of the MQP. Ms. J. H., who was without legal representation at the time, may have been intimidated by the proceedings and did not press the issue, but a case can be made that the General Division, out of fairness, should have made further inquiries about her concerns with the MQP.

CONCLUSION

[18] I am granting leave to appeal on the claimed grounds. Should the parties choose to make further submissions, they are free to offer their views on whether a further hearing is required and, if so, what format is appropriate.

[19] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Member, Appeal Division