



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Minister of Employment and Social Development v. T. W.*, 2018 SST 31

Tribunal File Number: AD-17-939

BETWEEN:

Minister of Employment and Social Development

Applicant

and

T. W.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Valerie Hazlett Parker

Date of Decision: January 11, 2018

REASONS AND DECISION

DECISION

[1] Leave to appeal is granted.

INTRODUCTION

[2] The Respondent stopped working in 2002 when she was pregnant. She returned to work on a part-time/seasonal basis from 2011 to 2014. She applied for a Canada Pension Plan disability pension in July 2015 and claimed that she was disabled by fibromyalgia, irritable bowel syndrome, postural orthostatic tachycardia syndrome, and associated symptoms. The Applicant refused the application. The Respondent appealed this decision to the Social Security Tribunal of Canada (Tribunal). On September 11, 2017, the Tribunal's General Division allowed her appeal and concluded that the Respondent had a severe and prolonged disability under the *Canada Pension Plan (CPP)* in 2002. The Applicant filed an application for leave to appeal this decision to the Tribunal's Appeal Division on December 11, 2017.

ANALYSIS

[3] The *Department of Employment and Social Development Act (DESD Act)* governs the operation of this Tribunal. According to subsections 56(1) and 58(3) of the DESD Act, an appeal to the Appeal Division may be brought only if leave to appeal is granted, and the Appeal Division must either grant or refuse leave to appeal.

[4] The only grounds of appeal available under the DESD Act are set out in subsection 58(1), namely, that the General Division failed to observe a principle of natural justice or made a jurisdictional error, made an error of law, or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it. Subsection 58(2) states that leave to appeal is to be refused if the appeal has no reasonable chance of success.

[5] The Applicant contends that the General Division erred in law and in fact under subsection 58(1) of the DESD Act as follows:

- a) It erred in law in finding that the Respondent's work from November 2011 to April 2014 was not substantially gainful;
- b) It erred in law in finding that the Respondent worked for a benevolent employer without considering relevant case law; and
- c) It erred in fact and law as there was no evidence of a severe and prolonged disability prior to December 31, 2009 (the minimum qualifying period), as there was no objective medical evidence or evidence of regular incapacity to work at that time.

[6] I must decide whether any of these grounds of appeal fall under subsection 58(1) of the DESD Act and may have a reasonable chance of success.

[7] Paragraph 39 of the General Division decision considers the Respondent's return to work from 2011 to 2014. It acknowledges that she earned sufficient income to make valid contributions to the CPP, and states, "However, the mere fact that the [Respondent] returned to work and earned income does not, in and of itself, undermine her appeal. Evidence of income is just one factor to be considered." This is correct. However, the General Division did not examine other factors, such as work expectations or whether the Respondent was accommodated beyond what would be expected in a commercial setting, before deciding whether the Respondent was engaged in a substantially gainful occupation at that time. This may have been an error in law as the Federal Court and Federal Court of Appeal have set out a number of factors to be considered to make this determination (see, for example, *Atkinson v. Canada (Attorney General)*, 2014 FCA 187). The *Canada Pension Plan Regulations* also set out a mathematical formula for what is substantially gainful, which is not referred to in the General Division decision.

[8] In *Mette v. Canada (Attorney General)*, 2016 FCA 276, the Federal Court of Appeal indicated that it is not necessary for the Appeal Division to address all the grounds of appeal an applicant raises. Because I found that one ground of appeal has a reasonable chance of success, I have not considered the remaining grounds of appeal that the Applicant submitted.

CONCLUSION

[9] The Applicant has presented a ground of appeal under subsection 58(1) of the DESD Act that may have a reasonable chance of success on appeal, so leave to appeal is granted.

[10] The parties are not restricted to the ground of appeal considered in this decision at the hearing of the appeal.

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

Valerie Hazlett Parker
Member, Appeal Division