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

Citation: *G. S. v. Minister of Employment and Social Development*, 2018 SST 2

Tribunal File Number: AD-17-924

BETWEEN:

G. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Valerie Hazlett Parker

Date of Decision: January 2, 2018

REASONS AND DECISION

DECISION

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

INTRODUCTION

[2] The Applicant applied for a Canada Pension Plan disability pension. The application was granted and she began to receive the pension in 2004. In 2015, the Respondent reviewed the matter and decided that the Applicant ceased to be disabled in 2009. It requested repayment of the amount of disability pension payments made since the Applicant ceased to be disabled. The Applicant appealed this decision to the Social Security Tribunal of Canada (Tribunal). On September 11, 2017, the Tribunal's General Division dismissed the appeal. The Applicant now requests leave to appeal that decision to the Tribunal's Appeal Division.

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, 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] Therefore, I must decide whether 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.

[6] The Applicant argues that leave to appeal should be granted on a number of grounds, including errors in law and factual errors under paragraph 58(1)(*c*) of the DESD Act.

[7] First, the Applicant argues that the General Division erred in law as it referred to substantially gainful benchmarks for earnings and concluded that her occupation was substantially gainful based on her earnings. She contends that prior to 2014 the *Canada Pension Plan* (CPP) did not define the term substantially gainful, so the General Division should not have concluded, based on her income alone, that any income she earned from 2008 to 2015 was substantially gainful. The Applicant is correct that section 68.1 of the *Canada Pension Plan Regulations* was not proclaimed until 2014. However, a number of court decisions had grappled with the issue of what a substantially gainful occupation is under the CPP and set out factors to be considered to decide this (see, for example, *Atkinson v. Canada (Attorney General)*, 2014 FCA 187). It does not appear that the General Division considered these factors when it decided that the Applicant was capable regularly of pursuing a substantially gainful occupation. This argument therefore points to an error of law, and leave to appeal should be granted on this basis.

[8] The Applicant also refers to subsection 66(3) of the CPP and argues that this should be relied on to rescind or reduce any overpayment owed to the Respondent. This argument does not point to any ground of appeal under the DESD Act. This Tribunal has no authority to rescind or reduce any overpayment; it is for the Minister of Employment and Social Development to do so if it decides this to be an appropriate remedy in a particular case.

[9] Additionally, the Applicant argues that the General Division erred as the Respondent had the onus to prove that the Applicant ceased to be disabled at the relevant time, but the General Division concluded that she had failed to prove that she continued to be disabled at the relevant time. However, 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 already found that one ground of appeal may have a reasonable chance of success, I need not also consider this ground of appeal.

[10] Similarly, I need not decide whether the Applicant's arguments based on erroneous findings of fact have a reasonable chance of success. These arguments include an alleged contradiction between paragraphs 39 and 16 of the decision, that the Respondent was aware of her return to work and earnings based on her 2008 disclosure of this and her discussions of tax withholdings, the medical report from her treating physician in 2015, the fact that she followed

advice to refuse to provide medical and other information regarding her employers, and that she did not delay in any of her communications with the Respondent.

[11] This decision does not restrict the appeal to only those grounds specifically considered.

[12] This decision also does not presume the result of the appeal on the merits of the case.

Valerie Hazlett Parker
Member, Appeal Division