



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *A. T. v. Minister of Employment and Social Development*, 2018 SST 4

Tribunal File Number: AD-17-903

BETWEEN:

**A. T.**

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: January 2, 2018

## **DECISION AND REASONS**

### **DECISION**

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

### **OVERVIEW**

[2] The General Division determined that the Applicant, A. T., had a severe and prolonged disability in January 2017, when she could no longer work part time. The General Division also determined that payments would start as of May 2017.

[3] The Applicant is seeking greater retroactive payments of a Canada Pension Plan disability pension to as far back as December 2008. She developed fibromyalgia around this time.

[4] The Applicant seeks leave to appeal the General Division's decision on the issue of the commencement date of her disability pension. I must decide whether the appeal has a reasonable chance of success.

### **ISSUE**

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

### **GROUND OF APPEAL**

[6] 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.

[7] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the grounds of appeal enumerated 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*.<sup>1</sup>

## **ANALYSIS**

[8] The Applicant does not allege that the General Division erred under subsection 58(1) of the DESDA. The Applicant seeks payment of a disability pension back to December 2008, as she claims that her disability commenced at that time. Essentially, she is seeking a reassessment on the issue of when her disability commenced. However, subsection 58(1) of the DESDA provides for only limited grounds of appeal. It does not allow for a reassessment of the evidence: *Tracey, supra*.

[9] That said, in my own review of the hearing file, I do not see that there was any documentary medical evidence before the General Division dating back to December 2008. As the General Division noted, the earliest relevant medical record before it is dated December 30, 2013 (GD2-53).<sup>2</sup> Additionally, the Applicant reported to her health caregivers that she had begun experiencing widespread body pains only in 2009. There simply was no supporting medical evidence to establish that the Applicant was severely disabled in December 2008. There were no medical opinions that addressed the issue of the severity of the Applicant's disability before December 2013, and certainly nothing relating to the time frame in or around December 2008.

[10] The General Division considered the medical opinions before it. They included, for instance, Dr. Amanda Kleisinger's report of November 2, 2015. She was of the opinion that the Applicant could work part time while performing strength, stretching and aerobic

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<sup>1</sup> *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

<sup>2</sup> There is a consultation report dated April 16, 2007, from a neurologist, who assessed her for headaches (GD1-17 and GD2-52).

activities, and that the Applicant would not benefit from being on disability. Dr. Kleisinger made several recommendations for treatment (GD2-36 to 38). Similarly, in his report of April 20, 2016, Dr. Shane Wunder, a physiatrist, did not consider the Applicant permanently disabled at that time, although he was of the opinion that an extended period off work might be beneficial for her (GD2-33 to 35).

[11] The General Division also considered the fact that the Applicant had been operating her daycare business on a full-time and part-time basis until January 2017. The General Division also noted that the Applicant's earnings in 2014 and 2015 were similar to her earnings in 2011 and 2012.

[12] It is clear that the General Division determined, largely on the basis that the Applicant had been working, and having regard to the hours and days that she generally worked, and the nature of her employment, that she had the capacity regularly of pursuing a substantially gainful occupation until January 2017. Some measure of deference is owed to the General Division. As the primary trier of fact, it is best positioned to assess and make findings on the evidence, as well as to determine whether, after considering the evidence on a cumulative basis, it could lead to a finding that the Applicant was severely disabled prior to January 2017. There was evidence to support the General Division's findings and conclusion.

[13] Aside from these considerations, the earliest date that a claimant can be deemed disabled under the *Canada Pension Plan* is 15 months prior to the date that he or she makes an application. The Applicant filed her (second) application on November 16, 2015. Therefore, the earliest date that she could be deemed disabled was August 2014 and, under section 69 of the *Canada Pension Plan*, the earliest date that payments could have commenced was in December 2014. Because of the provisions under the *Canada Pension*, it was irrelevant, for the purposes of determining when payment of a disability pension would start, whether the Applicant had a severe disability before August 2014. The *Canada Pension Plan* set the maximum period for retroactive payments. Under the *Canada Pension Plan*, a disability pension could not have been paid retroactive to December 2008 or any

time before December 2014, unless the Applicant had been able to establish that she was continuously incapacitated. This clearly was not the case.

[14] I have also reviewed the hearing file and, after comparing it to the General Division's decision, am satisfied that the member did not overlook or possibly misconstrue any important evidence.

## **CONCLUSION**

[15] I am not satisfied that the appeal has a reasonable chance of success. Accordingly, the application requesting leave to appeal is refused.

Janet Lew  
Member, Appeal Division