



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. G. v. Minister of Employment and Social Development*, 2018 SST 182

Tribunal File Number: AD-17-630

BETWEEN:

D. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: February 26, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed and the matter is referred back to the General Division for reconsideration.

OVERVIEW

[2] D. G. (Claimant) completed high school and two years of a college program. He worked in physically demanding jobs until January 2014 when he was laid off at the same time that his health was failing. The Claimant applied for a Canada Pension Plan disability pension and claimed that he was disabled by a number of conditions, including migraine headaches, low back pain and stiffness, leg weakness and falling, poor vision, dizziness and sleep problems. The Minister of Employment and Social Development (Minister) refused the application. The Claimant appealed this decision to the Social Security Tribunal. The Tribunal's General Division dismissed the appeal. The Claimant's appeal to the Appeal Division is allowed because the General Division erred by not considering all of the relevant evidence to reach its decision.

PRELIMINARY MATTER

[3] In his application for leave to appeal, the Claimant argues, in part, that the General Division failed to observe a principle of natural justice. Just prior to the hearing, the Claimant's counsel advised that he would not pursue this ground of appeal. He confirmed this also at the opening of the hearing. This ground of appeal is abandoned.

ISSUES

[4] Did the General Division err

- a) by failing to consider the Claimant's explanation for not trying to obtain alternate work or retraining?
- b) by failing to consider each of his medical conditions or their cumulative impact on his capacity to work?

ANALYSIS

[5] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It sets out only three grounds of appeal that the Appeal Division can consider, namely that the General Division failed to observe the principles of natural justice or made a jurisdictional error, made an error in 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. The Claimant's grounds of appeal must be considered in this context.

Issue 1: Did the General Division fail to consider the Claimant's reasons for not pursuing alternate work or retraining?

[6] In order for an appeal to succeed on the basis of an erroneous finding of fact under the DESD Act, three criteria must be satisfied. The finding of fact must be erroneous, it must have been made in a perverse or capricious manner or without regard for the material before the General Division, and the decision must be based on this finding of fact. For the following reasons I am satisfied that the General Division erred in this regard.

[7] The General Division decision summarizes a vocational assessment report, stating:

Ms. Garbutt's report includes information about the Appellant's vocational abilities. In summary, she found him to be of average intelligence with the capability to continue with academic upgrading at the college level. She said his "...options would be limited only by the scope of his interests, his ability to cope physically, the pace at which he could work and the investment of time and money he is able to make."¹

It also recommended, based on Dr. Osime's report, that the Claimant not seek employment at that time.

[8] The General Division refers to the Claimant's testimony² that he attended SaskAbilities to try to obtain work within his physical limitations. However, he also testified that they concluded that he could not work, and should attend school to retrain. He testified further that

¹ Paragraph 34 of the decision.

² Time stamp 1:35 of the hearing recording, although the exact time will vary depending on what device is used to listen to the recording.

he had no funds to pay for any retraining. SaskAbilities's conclusion that the Claimant could not work is not considered in the analysis of the evidence. Also, the Claimant's lack of funds to retrain is important. This evidence provides a reasonable explanation for the Claimant's failure to pursue further work or education.

[9] While the written decision need not recite each and every piece of evidence that was presented, a finding that the General Division based its decision on an erroneous finding of fact under the DESD Act can be inferred from a failure to specifically mention and analyze important information.³ Also, when a decision-maker fails to mention important evidence that points to a conclusion contrary to its decision, it is possible to infer that this contradictory evidence was overlooked. I am satisfied that the General Division omitted important evidence that was contrary to its conclusion.

[10] The General Division concluded, "The evidence does not document that the [Claimant] made any attempts to follow up on [the assessor's] recommendations⁴, and that the Claimant made no attempts to pursue suitable work.⁵ These findings of fact are erroneous. They were made without considering the contradictory vocational recommendation and the Claimant's explanation for not pursuing work or retraining. The decision was therefore made without regard to all of the material that was before the General Division, and the decision was based, at least in part, on these findings of fact.

[11] Therefore, the appeal must succeed.

Issue 2: Did the General Division fail to consider all of the Claimant's medical conditions?

[12] The Federal Court of Appeal instructs that when deciding whether a Claimant is disabled, all of his medical conditions must be considered.⁶ This is set out in the decision. The General Division decision provides a thorough summary of each of the Claimant's conditions and their treatment.⁷ The decision considers the evidence for each of the Claimant's conditions

³ *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667.

⁴ Paragraph 47 of the decision.

⁵ Paragraph 49 of the decision.

⁶ *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

⁷ Paragraphs 27 to 32 of the decision.

and provides reasons for concluding that they are not severe.⁸ In addition, the decision states that the evidence in its entirety does not prove that the Claimant has a severe disability.⁹ I am therefore satisfied that the General Division considered each of the Claimant's conditions and their cumulative impact on his capacity regularly to pursue any substantially gainful occupation. It made no error in doing so. The appeal fails on this basis.

CONCLUSION

[13] The appeal is allowed because the General Division based its decision on erroneous findings of fact under the DESD Act. It is appropriate for the matter to be referred back to the General Division so that the evidence can be weighed.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	February 14, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. G., Appellant Daniel Griffith, Counsel for the Appellant Marcus Dirnberger, Counsel for the Respondent

⁸ Paragraphs 43 to 48 of the decision.

⁹ Paragraph 40 of the decision.