



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *D. C. v. Minister of Employment and Social Development*, 2016 SSTADIS 184

Tribunal File Number: AD-16-209

BETWEEN:

**D. C.**

Applicant

and

**Minister of Employment and Social Development  
(formerly Minister of Human Resources and Skills Development)**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division– Leave to Appeal**

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DECISION BY: Neil Nawaz

DATE OF DECISION: May 24, 2016

## REASONS AND DECISION

### INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) dated November 5, 2015. The GD conducted an in-person hearing on October 13, 2015 and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan* (CPP), as it found that her disability was not “severe” prior to the minimum qualifying period (MQP) of December 31, 2013. On January 26, 2016, the Applicant’s representative filed an application requesting leave to appeal, advancing numerous grounds of appeal and relying on various legal authorities. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

### THE LAW

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

[3] Subsection 58(1) of the DESDA sets out that the only grounds of appeal are the following:

- (a) The GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or
- (c) The GD 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.

[4] Subsection 58(2) of the DESDA provides that “leave to appeal is refused if the AD is satisfied that the appeal has no reasonable chance of success.”

## ISSUE

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

## SUBMISSIONS

### Erroneous Findings of Fact

[6] The Applicant's representative submits that the GD based its decision on erroneous findings of fact made in a perverse and capricious manner or without regard for the material before it:

- (a) At paragraphs 33 and 35 of its decision, the GD incorrectly found that the Applicant had never been referred to a specialist or taken any medications for his back pain, findings from which it later drew adverse inferences.
- (b) At paragraph 32 of its decision, the GD incorrectly found that the Applicant's surgeries were successful and he had recovered from each of them.
- (c) At paragraph 35 of its decision, the GD incorrectly found that the treatments had been successful in shrinking the Applicant's pituitary tumour, ignoring clear evidence that it had actually increased in size.
- (d) The GD contradicted itself when it acknowledged headaches and dizziness were disabling factors that led to the loss of the Applicant's license (paragraph 31) yet nevertheless found he was not suffering from a severe disability in accordance with CPP criteria.

### Errors of Law

[7] The Applicant's representative submits that in making its decision the GD erred in law, whether or not the error appeared on the face of the record:

- (a) The GD failed to apply *Garrett v. Canada*<sup>1</sup> by not considering or applying the *Villani*<sup>2</sup> factors.

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<sup>1</sup> *Garrett v. Canada (Minister of Human Resources Development)*, 2005 FCA 84

- (b) The GD failed to apply *E.J.B. v. Canada*<sup>3</sup> by inadequately considering all of the Applicant’s conditions and their collective impact on her functionality.
- (c) The GD failed to apply *D’Errico v. Attorney General*<sup>4</sup> by failing to consider the “regular” aspect of the disability severity test.

## ANALYSIS

[8] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada*.<sup>5</sup> The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada*.<sup>6</sup>

[9] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted.

### Erroneous Findings of Fact

#### *Treatment for Back Pain*

[10] The Applicant submits that the GD incorrectly found that, as he had never been referred to a specialist or taken any medications for his back pain, it was not of such severity that it prevented him from all substantially gainful employment.

[11] The Applicant objects to both the GD member’s determinations of fact and the conclusions he based on those facts. In paragraph 33, the GD wrote:

The Tribunal finds that the Appellant does have back pain however the evidence is clear that while the Appellant has indicated that his back pain has caused him pain he was able to work with that pain and since that time has not pursued any additional advice or treatment from his family doctor or asked to be referred to a specialist. The Tribunal also notes that the Appellant is not taking any medications in order to help assist with his back pain...

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<sup>2</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248

<sup>3</sup> *E.J.B. v. Canada (Attorney General)*, 2011 FCA 47

<sup>4</sup> *D’Errico v. Attorney General*, 2014 FCA 95

<sup>5</sup> *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC)

<sup>6</sup> *Fancy v. Canada (Attorney General)*, 2010 FCA 63

[12] In paragraph 35, the GD wrote:

He currently does not have medications to help deal with his pain and up until he stopped working due to the pituitary tumour he was able to work.

[13] The Applicant claims that he described his use of Oxycocet for back pain in testimony whose credibility was not challenged. He cites a specific section of the hearing recording to support this claim. Although I have not yet listened to the recording, it would support an arguable case, should its contents correspond with the Applicant's claims.

### ***Recovery from Surgeries***

[14] The Applicant submits that the GD incorrectly found that the Applicant's two hernia surgeries and two mastectomies were successful and he had recovered from each of them with no complications. The Applicant denies these findings of facts and cites Dr. Green's comments of April 15, 2013, as well as his own testimony, in support of his claim that he continues to experience pain and impairment from the areas around his incisions.

[15] A review of the GD's statements around this issue persuades me that there is no arguable ground of appeal. The GD wrote:

There is no indication in the evidence that the Appellant experienced any issues in regards to the surgeries and that while he may be experiencing some localized pain in the surgical repair area, there is no information to suggest that the Appellant has issues which would prevent him from any substantially gainful employment because of his surgeries...

[16] This passage, which itself was quoted in the Application for Leave, shows that the GD did acknowledge the Applicant's continuing complaints of "localized pain" but determined that he was nevertheless still capable of work. In making this determination, the GD was within its jurisdiction to weigh the evidence, and I would be reluctant to interfere with its assignment of weight to the evidence, which is properly the province of an administrative tribunal tasked with assessing factual evidence.

[17] For this reason, I see no reasonable chance of success on this ground.

### ***Shrinkage of Pituitary Tumour***

[18] The Applicant submits that the GD committed an error of fact when it stated that “the treatments that the Appellant received for his pituitary tumour have been successful in shrinking [it].” In fact, the Applicant provided evidence that the tumour was again increasing in size, as documented in a report from Dr. Reddy dated August 27, 2015 and sent to the GD on September 28, 2015.

[19] I find that there is a reasonable chance of success on this ground. The GD noted the Applicant’s testimony that the tumour had grown, but nevertheless found that prior treatments to shrink it were successful. Although Dr. Reddy’s report was in the hands of the GD at the time of the hearing, the GD member made no reference to it in his decision. If he declined to admit this report because it was submitted past the applicable submission deadline (and it was), he made no mention of his decision to do so in his reasons. It appears the GD based its decision to deny the Applicant benefits at least in part on the tumour’s supposed shrinkage, and if the GD ignored or failed to consider evidence to the contrary, that raises at least an arguable case.

### ***Acknowledgement of Headaches and Dizziness as Disabling Factors***

[20] The Applicant alleges the GD contradicted itself when it acknowledged headaches and dizziness were disabling factors that led to the loss of the Applicant’s driver’s license (paragraph 31), yet nevertheless concluded he was not suffering from a severe disability in accordance with CPP criteria.

[21] On this ground, there would appear to be at least an arguable case, based on a plain reading of the GD’s reasons for decision. The Applicant is a truck driver whom the GD acknowledged lost his driver’s license because of headaches and dizziness. The GD deemed these symptoms “disabling factors,” yet in any case ultimately found the Applicant was not disabled from all forms of substantially gainful employment. While the GD found that the Applicant had transferable skills that would assist him in finding alternate employment, it appears he did not explain how he might do this with “disabling” headaches and dizziness.

## **Errors of Law**

### ***Failure to Apply Garrett***

[22] The Applicant alleges the GD failed to apply *Garrett* by inadequately considering the *Villani* factors. While acknowledging that the GD did cite *Villani*, the Applicant argues that it merely recited some of his personal characteristics without discussing whether they impeded his employability in a “real world” context.

[23] I find there is a reasonable chance of success on this ground, as it must be considered in tandem with the issue, already discussed, of whether the GD made an error in deeming the Applicant’s headaches and dizziness as “disabling factors” while still concluding he was capable of work. In paragraph 29, the GD found that the Applicant had transferable skills that would assist him in finding alternate employment, but there appears to be no real analysis of how a person of his background might be able to do this with symptoms acknowledged to be “disabling.”

### ***Failure to Apply E.J.B.***

[24] The Applicant’s representative submits that the GD erred in law by failing to consider all of the Applicant’s conditions in determining that her impairments fell short of severe, specifically his severe lower back pain, dizziness, headaches, right shoulder pain and hernia pain, in addition to the side effects of his medication.

[25] The question of whether the GD fairly or logically addressed the Applicant’s complaints of headaches and dizziness has already been addressed above. The Applicant’s hernias were explicitly addressed in paragraph 32 of the decision, and the GD concluded, based on evidence that his surgeries were successful, that any residual symptoms were non-disabling. With regard to the Applicant’s back and shoulder pain, these conditions were alluded to in the GD decision’s document summary and fairly thoroughly discussed in paragraph 33. The GD considered whether side effects from the Applicant’s medications caused or contributed to any disability and determined that the evidence was inconclusive. While the GD’s discussion on these issues did not arrive at the conclusions the Applicant would have preferred, it is not my role here to retry the evidence but to assess whether the outcome was acceptable and defensible on the facts

and the law. It cannot be said that the GD simply ignored some of the Applicant's major complaints, and for that reason I see no reasonable chance of success on this ground.

***Failure to apply D'Errico***

[26] The Applicant submits that the GD committed an error in law by not considering how his impairment prevented him from "regularly" pursuing employment, which the Federal Court of Appeal interpreted to mean "consistent frequency." It is alleged that the GD applied the incorrect test for assessing the severity of a claimed disability when it stated there was no information to suggest the Applicant was prevented from "any" or "all" "substantially gainful employment." Instead, the GD should have asked whether the Applicant was "incapable regularly of pursuing any substantially gainful occupation"—the wording set out in clause 42(2)(a)(i) of the CPP—and considered his evidence that he would not be a reliable employee.

[27] The meaning of "regular" has been explored in numerous decisions, recently in *Atkinson v. Canada*,<sup>7</sup> where the Federal Court of Appeal stated that "predictability is the essence of regularity within the CPP definition of "disability." While the GD cited the applicable section of the CPP and correctly quoted the severity definition in paragraph 5 of its decision, it appears the test was misstated in paragraph 32 (not 31, as stated in the Application for Leave to Appeal) and again in paragraph 33. Furthermore, a case can be made that the GD analysis reveals no real attempt to grapple with the regularity concept and how it might apply to evidence, assuming it was tendered, of the Applicant's inability to regularly pursue employment.

[28] There is an arguable case that the GD failed to incorporate the regular aspect of the disability test. For this reason, I find that this appeal has at least a reasonable chance of success on this question of mixed law and fact.

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<sup>7</sup> *Atkinson v. Canada (Attorney General)* 2014 FCA 187



## CONCLUSION

[29] As indicated, the Application for Leave to Appeal is granted on the grounds that the GD may have made the following factual and legal errors:

- (a) Finding that the Applicant had never been referred to a specialist or taken any medications for his back pain
- (b) Finding that treatments had been successful in shrinking the Applicant's pituitary tumour;
- (c) Finding that the Applicant's headaches and dizziness were disabling factors that led to the loss of the Applicant's license, yet also finding that he was not suffering from a severe disability;
- (d) Failing to apply *Garrett* by inadequately considering the *Villani* factors;
- (e) Failing to follow *D'Errico* by not applying the "regular" aspect of the disability severity test.

[30] I invite the parties to make submissions in respect of the form of hearing (i.e. whether it should be done by teleconference, videoconference, other means of telecommunication, in-person or by written questions and answers).

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



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Member, Appeal Division