



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. W. v. Minister of Employment and Social Development*, 2017 SSTADIS 105

Tribunal File Number: AD-16-1059

BETWEEN:

L. W.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: March 20, 2017

REASONS AND DECISION

DECISION

The appeal is allowed.

INTRODUCTION

[1] This is an appeal of the decision of the General Division of the Social Security Tribunal (Tribunal) issued on June 22, 2016, which determined that the Appellant was not eligible for disability benefits under the *Canada Pension Plan* (CPP), as it found that her disability was not “severe” during her minimum qualifying period (MQP), which ended on September 30, 2013, the date before the month she was approved to collect the CPP retirement pension.

[2] Leave to appeal was granted on February 9, 2017, on the grounds that the General Division may have erred in rendering its decision.

OVERVIEW

[3] The Appellant was 60 years old when she applied for CPP disability benefits on September 25, 2013. In her application, she disclosed that she attended school up to Grade 10 and was employed for more than 27 years as a convenience store clerk, a job that ended in April 2011, when she injured her back in a slip and fall accident.

[4] The Respondent denied the application at the initial and reconsideration levels on the grounds that her disability was not severe and prolonged as of the MQP. On January 8, 2015, the Appellant appealed these denials to the General Division.

[5] At the hearing before the General Division on May 4, 2016, the Appellant testified that she was trained as a registered nursing assistant and worked in this capacity in a Brantford Ontario hospital for five years. She later worked in a grocery store and at a golf club as a cook and bartender. She and her husband then operated a delicatessen, prior to purchasing a convenience store in 1990. She said that she did not have any significant medical problems until May 2010, when she lost her footing and fell onto her right hip. She suffered from severe pain

after the accident but continued to work on a modified and reduced-hours basis. She could not lift, pull, or push items, and could not stand for any significant length of time. By April 2011, she could no longer endure the pain and stopped working. She had received treatment from a physiotherapist, osteopath, and holistic practitioner with limited benefit. She was told that surgery was not an option.

[6] In its decision of March 31, 2016, the General Division dismissed the Appellant's appeal, finding that, on a balance of probabilities, she was capable of substantially gainful employment as of the MQP. The General Division determined that the Appellant's post-MQP earnings did not relate to employment, but merely reflected her share of profits derived from her co-ownership of the convenience store. Nevertheless, it found insufficient objective medical evidence to indicate a severe disability as of September 30, 2013 and faulted the Appellant for failing to explore alternate employment suitable to her limitations, given her education and proficiency in English.

[7] On August 26, 2016, the Appellant's representative filed an application for leave to appeal with the Appeal Division of the Tribunal, alleging errors of fact and law on the part of the General Division. In a decision dated February 9, 2017, I agreed there was an arguable case that the General Division, at the hearing, misdirected the Appellant's representative that he had met the burden of proving his client's disability was severe and prolonged as of the MQP.

[8] On March 3, 2017, the Respondent submitted a letter in which it consented to the matter being referred back to the General Division for redetermination by a different member.

[9] I have now decided that an oral hearing is unnecessary and the appeal can proceed on the basis of the documentary record for the following reasons:

- (a) The Respondent has agreed to a rehearing of the Appellant's disability claim on its merits.
- (b) There are no gaps in the file or need for clarification.
- (c) This form of hearing respects the requirements under the *Social Security Tribunal Regulations* (SST Regulations) to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

[10] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), the only grounds of appeal are 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 made in a perverse or capricious manner or without regard for the material before it.

[11] According to subsection 59(1) of the DESDA, the Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate, or confirm, rescind or vary the decision of the Appeal Division in whole or in part.

[12] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an Appellant must:

- (a) Be under 65 years of age;
- (b) Not be in receipt of the CPP retirement pension;
- (c) Be disabled; and
- (d) Have made valid contributions to the CPP for not less than the MQP.

[13] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[14] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable

regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.

ISSUE

[15] Did the General Division fail to observe a principle of natural justice by misdirecting the Appellant and her representative at the hearing?

SUBMISSIONS

[16] In the application requesting leave to appeal, the Appellant's representative alleged that the presiding General Division member failed to observe a principle of natural justice when he declared during the hearing that the Appellant had satisfied the severe and prolonged criteria and therefore did not need to hear submissions on the issue of disability. The member then issued a written decision denying the Appellant entitlement to CPP disability benefits, on the basis that the severe and prolonged criteria had not been met, in diametric contradiction to his statement at the hearing.

[17] The representative specifically alleged that, at the 48:00 minute mark of the audio recording of the hearing, following witness testimony, the General Division member could be heard asking for written submissions on the issue of whether the Appellant's post-MQP income was employment income that potentially disqualified her from CPP disability benefits. The member added:

I think I am going to be up front with you sir... I believe she has proved on the balance of probabilities that she suffered from a severe and prolonged disability on or before September 2013.

[18] The Appellant's representative further alleged that the General Division member repeated, at the 57:00 mark, that he was looking for written submissions on the Appellant's employment income and confirmed that he did not want to hear any more on the issue of "severe and prolonged." After the recording device was turned off, the member allegedly advised the representative that he had decided to seek further written submissions only if he could not obtain the information he was seeking by other means. The next day, a member of the Tribunal's staff advised the representative that no further submissions would be required.

[19] The Appellant's representative submitted that the General Division member led him to believe that the issue of his client's disability prior to September 30, 2013 was settled. He claimed that he relied on the member's assurance in delivering his closing argument. When the member subsequently changed his mind and based his decision on a finding that the Appellant's disability fell short of "severe and prolonged," the Appellant was, in effect, denied a full opportunity to be heard.

[20] In its letter of March 3, 2017, the Respondent maintained its position that the Appellant was not disabled, but conceded that the General Division member had told the Appellant during the hearing that her disability was severe and prolonged and further submissions on that issue were not required. The Respondent agreed that these statements served to prevent the Appellant from presenting her case on the issue of whether she had a severe and prolonged disability. Had the General Division subsequently issued a decision consistent with its statements during the hearing, none of this, arguably, would have been cause for concern. However, the decision ultimately found that the Appellant's conditions were not, on a balance of probabilities, severe and prolonged, after denying the Appellant the opportunity to make further submissions on this very point.

[21] The Respondent recommended that the Appeal Division refer the matter back to the General Division for a new hearing, pursuant to subsection 59(1) of DESDA, in the interest of providing the Appellant with a fair opportunity to present her case.

ANALYSIS

[22] The grounds of appeal advanced by the Appellant turn, in large part, on what was said during the oral hearing. I have reviewed the audio recording, and it essentially confirms the account of the proceedings provided by the Appellant's representative.

[23] In its decision, the General Division devoted the majority of its analysis to a consideration of whether the Appellant's disability was severe and prolonged according to the definition set out in paragraph 42(2)(a) of the CPP. It is obvious that the General Division still considered the issue alive, contrary to the member's assertion at the hearing, and his finding

that the Appellant failed to meet the statutory definition appears to have been directly at odds with what he told counsel.

[24] Accordingly, I am convinced that the General Division breached a principle of natural justice by assuring the Appellant's representative at the hearing that he had met the burden of proving his client's disability was severe and prolonged as of the MQP. In doing so, just before the representative was to deliver his closing submissions, the General Division misdirected him about what remained to be proven. It is conceivable—even probable—that the representative relied on the General Division's assurance and crafted his closing submissions to de-emphasize the severity issue. If so, the Appellant was deprived of her right to present her best case.

[25] This lapse in procedural fairness was made worse by the General Division's withdrawal of its promise to allow counsel an opportunity to make post-hearing written submissions on the issue of the Appellant's post-MQP employment income. The member apparently resolved whatever outstanding questions he had about this issue by himself, but his decision to forego further written submissions may have again robbed the Appellant's representative of an opportunity to present a full argument on his client's behalf.

CONCLUSION

[26] For the reasons discussed above, the appeal is allowed.

[27] Section 59 of the DESDA sets out the remedies that the Appeal Division can give on appeal. To avoid any apprehension of bias, it is appropriate in this case that the matter be referred back to the General Division for a *de novo* hearing before a different General Division member. I also direct the Tribunal to expunge from the record the General Division's decision dated June 22, 2016.



Member, Appeal Division