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

[TRANSLATION]

Citation: *C. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 716

Tribunal File Number: AD-16-1239

BETWEEN:

**C. S.**

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: Jude Samson

Date of Decision: December 8, 2017

Canada

## REASONS AND DECISION

## INTRODUCTION

[1] The Applicant stopped working as a representative for a telecommunications company in May 2012 and subsequently filed a claim for a disability pension under the *Canada Pension Plan*. The claim described the Applicant's main disabling conditions as back pain, lower back pain, and damaged disks (GD4-60). To be entitled to this benefit, the Applicant had to show that it was more likely than not that she had a severe and prolonged disability on or before December 31, 2014.

[2] The Respondent, the Minister of Employment and Social Development (Minister), denied the Applicant's disability claim initially and on reconsideration. The Applicant appealed the reconsideration decision to the General Division of the Social Security Tribunal of Canada (Tribunal), but the appeal was dismissed in July 2016. The appeal was decided on the record (no oral heading was held).

[3] In October 2016, the Applicant filed this application requesting leave to appeal to the Appeal Division (AD1). Leave to appeal is granted for the reasons that follow.

## THE LAW

[4] The Tribunal is created and governed by the *Department of Employment and Social Development Act* (DESD Act). For example, the DESD Act stipulates that the Appeal Division must focus on specific errors that the General Division may have made. More specifically, the Appeal Division can modify a General Division decision only if at least one of the following errors (grounds of appeal) listed in subsection 58(1) of the DESD Act has been established:

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.

[5] In addition, the DESD Act provides for a two-step process for most appeals before the Appeal Division.

a) Step 1: leave to appeal. This means that leave to appeal must be obtained from an Appeal Division member. This preliminary step aims to eliminate those appeals that have no reasonable chance of success.[1] This first hurdle is lower than the one the Applicant will have to meet in the second step of the process. At this stage, the Applicant does not have to prove her case. Instead, the relevant question is this: Is there an arguable ground upon which the proposed appeal might succeed?[2]

b) Step 2: If leave to appeal is granted, an Appeal Division member will decide on the merits of the appeal, which means that the member must decide whether it is more likely than not that the General Division committed at least one of the errors listed above.

[6] Since this appeal is at the first step, I must determine whether there is at least one arguable ground that could justify setting aside the decision under review. It is up to the Applicant to prove that this legal threshold has been met.[3]

**ANALYSIS**

[7] In support of her application, the Applicant submits that the General Division made a significant error regarding the facts in the appeal file. She refers to paragraph 58(1)(*c*) of the DESD Act and points out that the General Division failed to adequately examine the medical reports and the various radiology exams (X-rays and magnetic resonance imaging (MRIs)).

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[1] DESD Act at subsection 58(2).
[2] *Osaj v. Canada (Attorney General)*, 2016 FC 115; *Ingram v. Canada (Attorney General)*, 2017 FC 259.
[3] *Tracey v. Canada (Attorney General)*, 2015 FC 1300, at paragraph 31; *Griffin v. Canada (Attorney General)*, 2016 FC 874, at paragraph 20.

[8] The General Division is authorized to give precedence to certain evidence over other evidence. It is not the Appeal Division's role to assess or weigh the evidence again to arrive at a different conclusion.[4] However, the General Division may err if it does not fulfil its obligation to engage in a meaningful analysis of the evidence or to explain how it chose between two contradictory pieces of evidence.[5]

[9] In this case, the General Division's decision does not mention the following evidence:

a) a CT scan of the spine conducted in February 2010, which revealed disc herniation and moderately advanced degenerative disc disease at the L5-S1 level (GD4-83);

b) an MRI of the spine dated January 2011, which revealed degenerative disc disease at L5-S1 and right-side disc herniation that seems to put light pressure on the right nerve root, which would seem to correspond to clinical results (GD4-79);

c) the second medical report by Dr. Boulay, the Applicant's family physician since 1990, dated January 27, 2015 (GD4-73). In this report, Dr. Boulay indicated that he was not anticipating any more medical assessments or consultations in relation to the Applicant's main medical condition, and repeated his opinion that she was unable to work because of her severe degenerative disc disease.

[10] The General Division's analysis is almost entirely in paragraph 22 of the decision, and reads as follows (AD1A-5 to 6):

> [translation]
> [22] The Appellant clearly has her limits because of her back pain. However, she has not made every effort to find a more suitable job, and her treatment to date has been very conservative. She is still awaiting more referrals to specialists, and her symptoms may improve with future treatment. The medical evidence revealed only minor degenerative changes. Therefore, the Tribunal finds that the Appellant did not have a severe disability that rendered her incapable regularly of pursuing any substantially gainful occupation on or before December 31, 2014, and that continues to this day.

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[4] *Tracey, supra*.
[5] *Dossa v. Canada (Pension Appeals Board)*, 2005 FCA 387*; Canada (Minister of Human Resources Development) v. Quesnelle*, 2003 FCA 92; *Canada (Attorney General) v. Ryall*, 2008 FCA 164.

[11] I am of the opinion that the Tribunal's analysis raises a concern that the General Division did not fulfil its obligation to engage in a meaningful analysis of the evidence or to explain how it chose between contradictory pieces of evidence. For example, did the General Division sufficiently specify which specialists the Applicant is waiting to be referred to and which future treatments will improve her symptoms? Was the General Division able to make findings about the medical evidence without referring to the above-mentioned CT scan and MRI? In addition, given Dr. Boulay's opinions (those that are mentioned in the decision and those that are not), did the General Division have the right to require that the Applicant make every effort to find a job more suited to her condition?

[12] I find that based on the Applicant's arguments, the appeal has a reasonable chance of success under paragraph 58(1)(*c*) of the DESDA.

[13] I also invite the parties to make submissions on the following subjects, which complement the grounds of appeal raised by the Applicant:

a) In accordance with subsection 53(2) of the DESD Act, did the General Division fulfil its obligation to provide sufficient reasons for its decision?

b) Did the General Division breach a principle of natural justice by choosing not to hold an oral hearing? Are the reasons for this choice (in paragraph 2 of the decision) defensible?

c) Did the General Division err in applying binding decisions (e.g. *Villani v. Canada (Attorney General)*,[6] *Bungay v. Canada (Attorney General)*,[7] *and Inclima v. Canada (Attorney General)*[8])?

[6] 2001 FCA 248.
[7] 2011 FCA 47.
[8] 2003 FCA 117.

## CONCLUSION

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

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

Jude Samson
Member, Appeal Division