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

Citation: *L. S. v. Minister of Employment and Social Development,* 2018 SST 129

Tribunal File Number: AD-17-135

BETWEEN:

L. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: February 6, 2018

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] L. S. (Claimant) completed high school and obtained a Personal Support Worker diploma. She worked in this physically demanding job until January 2013. She applied for a Canada Pension Plan disability pension and claimed that she was disabled by fibromyalgia, diabetes, chronic fatigue syndrome and other conditions. The Minister of Employment and Social Development (Minister) refused the application. The Claimant appealed this decision to the Tribunal. The Tribunal's General Division dismissed the appeal. The appeal to the Appeal Division is allowed because the General Division failed to apply relevant legal principles to the facts before it.

PRELIMINARY MATTER: FORM OF HEARING

[3] This appeal was decided on the basis of the written record after considering the following:

a) The *Social Security Tribunal Regulations* require that proceedings be conducted as informally and quickly as the circumstances and considerations of fairness and natural justice permit;

b) Credibility was not an issue on the appeal;

c) The Claimant requested that the matter be decided without a further formal hearing; and

d) Both parties filed written submissions on all of the relevant issues.

ISSUES

[4] Did the General Division fail to apply relevant legal principles to the facts before it?

[5] Did the General Division fail to observe the principles of natural justice by unduly limiting the Claimant's testimony at the hearing?

[6] Did the General Division improperly weigh the evidence to reach its decision?

[7] Should the Appeal Division consider new evidence from the Claimant?

ANALYSIS

[8] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operations. It sets out the only grounds of appeal that the Appeal Division can consider. They are that the General Division failed to observe the principles of natural justice or made a jurisdictional error, made an error of 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.[1] The Claimant's grounds of appeal must be considered in this context.

Issue 1: Did the General Division fail to apply relevant legal principles?

[9] The General Division's mandate is to receive the parties' evidence, weigh it, and apply the law to this evidence to reach a decision. In this case, the General Division correctly sets out the law, including the relevant provisions of the *Canada Pension Plan* and relevant court decisions. However, I am satisfied that the General Division erred in law because it did not apply the legal principles to the evidence before it.

[10] First, the decision states that the determination of the severity of the disability is not premised on a person's inability to perform their regular job, but on their inability to perform any work.[2] This is a correct statement of the law. However, the decision then concludes that the Claimant's fibromyalgia symptoms did not make her incapable regularly of pursuing any substantially gainful occupation. The decision does not set out the evidentiary basis for this conclusion. It is therefore not clear why it reached this decision. The General Division failed to apply the law to the facts before it.

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[1] Subsection 58(1) of the DESD Act.
[2] Paragraph 42 of the decision; *Klabouch v. Canada (Social Development)*, 2008 FCA 33.

[11] Similarly, the decision states that where there is evidence of work capacity, a claimant must show that effort at obtaining or maintaining employment has been unsuccessful by reason of their health condition.[3] Again, the General Division does not explain what evidence there was of the Claimant's work capacity. The Claimant argues that she had no such capacity but the decision also fails to mention this. The decision concludes that the Claimant failed to meet this legal obligation, but does not explain how it came to this conclusion. This is also an error in law.

[12] Based on the unqualified wording of the DESD Act,[4] no deference is owed to the General Division on errors of law. The appeal must therefore be allowed.

Issue 2: Did the General Division fail to observe the principles of natural justice?

[13] The principles of natural justice are concerned with ensuring that all parties to a claim know the case that they have to meet, have an opportunity to present their case, and have a decision made by an impartial decision-maker based on the facts and the law. In addition, a decision-maker is to control the process of a hearing and may limit time for testimony, especially where the time allotted for the hearing is reasonable and not objected to.

[14] The Claimant did not object to the time allotted for her hearing. She argues that because the General Division member interrupted her testimony on a few occasions, she could not fully present her case. The General Division member permitted the Claimant and her witness to testify fully, and interrupted only to redirect testimony when it strayed from the questions asked. When M. S. testified, the Claimant's representative questioned him and he answered all of the questions. The fact that the member stated that he had no questions before the representative completed her sentence advising that she had no further questions did not prevent any evidence from being presented. It is not for the Tribunal member to direct a representative what questions to ask of a witness, or to "double-check" when they say that they have no further questions for the witness.

[15] Regarding the Claimant's testimony, she points to five instances on the recording where the Tribunal member interrupted her testimony. [5] In each case, the Claimant's representative

[3] Paragraph 43 of the decision; *Inclima v. Canada (Attorney General)*, 2003 FCA 117.
[4] Paragraph 58(1)(*b*) of the DESD Act.

asked the Claimant a question, which she answered. The Claimant then began to stray off the topic of the question asked. For example, at 41:07 the representative had asked the Claimant to describe the pain she has in each particular body part. The Claimant responded by describing the pain in her shoulders, then began to testify about not wanting to take more pills. The Tribunal member intervened to focus the Claimant on the question asked. Similarly, when the Tribunal member stated, "short answers please,"[6] it was to focus the Claimant's testimony on the question asked of her.

[16] The Tribunal member did not prevent the Claimant's representative from asking any questions. He did not intervene during her oral submissions.

[17] I have listened to the hearing recording and reviewed the Appeal Division record. I am satisfied that the General Division member gave the Claimant and her witness an adequate opportunity to testify and to present the Claimant's case at the hearing. This ground of appeal fails.

Issue 3: Did the General Division improperly weigh the evidence?

[18] The General Division's mandate is to receive the evidence from the parties, weigh it and reach a decision based on the facts and the law.[7] It is not for the Appeal Division to reconsider or reweigh the evidence to reach a different conclusion, but to assess whether the outcome was acceptable and defensible on the facts and the law.[8] In the lengthy application for leave to appeal, the Claimant responds to many of the written arguments that the Minister presented to the General Division, and disagrees with how the General Division weighed the evidence that was before it. Disagreement with the Minister's legal position or how the General Division weighed evidence does not point to any error made by the General Division under the DESD Act. The appeal cannot succeed on this basis.

[19] For example, the Claimant disagrees with the General Division's statement that there were no reports from a chronic pain specialist although the Claimant claims to have seen one,

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[5] The Claimant sets out the following time stamps, although there may be some variation if listened to on a different device: 41:07; 53:29; 1:04:39; 1:07:31 and 1:09:53.
[6] 1:09:53 time stamp.
[7] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.
[8] *Gaudet v. Canada (Attorney General)*, 2013 FCA 254.

and that she had not seen any specialists for two years.[9] This statement is not erroneous, but rather is based on the written record and the Claimant's testimony at the hearing.

[20] The Claimant also disagrees with the General Division's conclusion that her depression did not contribute to her disability.[10] This conclusion is also based on the evidence. The Claimant was not undergoing treatment by a mental health specialist and had not been referred for such treatment; she was taking medication prescribed by her family doctor, and one specialist opined that the clinical records did not support a diagnosis of major depressive disorder and limiting psychiatric impairment. This is therefore not an erroneous finding of fact.

[21] The Claimant also disagrees with the weight that the General Division placed on the reports penned by Dr. Rumack and Dr. Grossman. She argues that there was significant medical evidence that contradicted this. However, it is for the General Division to assign weight to evidence. The decision explains that the conclusion reached was supported by Dr. Rumack and Dr. Grossman. It acknowledges that Dr. Catania is supportive of the disability claim, but that his advice regarding fibromyalgia did not seem to be current.[11] The reason to prefer Dr. Rumack's opinion is clear and intelligible. There is no reason in law for the Appeal Division to intervene on this basis.

[22] The Claimant also argues that there is abundant evidence that she made every reasonable effort to improve, and not just to maintain her level of functioning. This is not set out in the decision. The General Division did not base its decision on the Claimant's efforts to improve, so it made no error in not reporting this evidence.

Issue 4: Should the Appeal Division consider new evidence?

[23] The DESD Act specifically and clearly sets out only three narrow grounds of appeal.[12] The presentation of new evidence to the Appeal Division is not a ground of appeal. The Federal Court has also confirmed that new evidence is not generally accepted on an appeal.[13] Therefore,

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[9] Paragraph 39 of the decision.
[10] Paragraph 38 of the decision.
[11] Paragraph 35 of the decision.
[12] Subsection 58(1) of the DESD Act.
[13] *Canada (Attorney General) v. O'keefe*, 2016 FC 503.

the new medical evidence submitted by the Claimant was not considered in reaching the decision in this matter.

CONCLUSION

[24] The appeal is allowed because the General Division erred in law. This matter is referred back to the General Division for reconsideration since evidence will have to be weighed for a decision to be made on the merits of the claim.

[25] Since the Claimant requested that this decision be made on the basis of the written record, the General Division should consider whether the matter can be decided without a further oral hearing.

Valerie Hazlett Parker
Member, Appeal Division

METHOD OF PROCEEDING:	On the written record
APPEARANCES:	Glenn Toni, Representative for the Appellant Philipe Sarazin, Counsel for the Respondent