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

Citation: *D. O. v. Minister of Employment and Social Development*, 2018 SST 231

Tribunal File Number: AD-17-662

BETWEEN:

D. O.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: March 12, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] D. O. (Claimant) entered the paid workforce after she completed Grade 11. She last worked in a factory, until the company was sold in 2009. She applied for a Canada Pension Plan disability pension and claimed that she was disabled by chronic obstructive pulmonary disease (COPD) and associated symptoms. She also had issues related to a hernia, acid reflux, and sleep apnea. 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. Leave to appeal was granted on the basis that the General Division may have based its decision on an erroneous finding of fact regarding her attempts to comply with medical recommendations, or it may have erred in law by failing to consider whether the Claimant could work regularly, or whether her last work was for a benevolent employer. I am not persuaded that the General Division made any of these errors.

PRELIMINARY ISSUE

[3] This appeal was set to be heard by videoconference on March 1, 2018. Counsel for the Claimant wrote to the Tribunal and advised that she would be participating by teleconference. Counsel for the Minister also agreed to participate by teleconference. The form of hearing was therefore changed to a teleconference hearing, held on March 1, 2018.

ISSUES

[4] Did the General Division base its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it regarding the Claimant's compliance with medical recommendations?

[5] Did the General Division err in law by failing to consider whether the Claimant had capacity to work regularly, or whether her last job was for a benevolent employer?

ANALYSIS

[6] The *Department of Employment and Social Development Act* governs the Tribunal's operation. It provides for three grounds of appeal, namely, that the General Division failed to observe a principle 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.[1] The Claimant's grounds of appeal must be considered in this context.

Issue 1: Did the General Division base its decision on an erroneous finding of fact?

[7] The Pension Appeals Board consistently stated that to be found disabled under the *Canada Pension Plan* (CPP), a claimant is required to follow reasonable treatment recommendations or provide a reasonable explanation for not doing so.[2] In this case, the Claimant had been advised to stop smoking and lose weight. There was evidence in the record and the Claimant's testimony that she tried to stop smoking but was not successful.[3] The General Division decision concludes that the Claimant attempted to quit smoking a number of times, and that she had some short-term success but continued to smoke.[4] Dr. MacGregor also wrote in his notes that the Claimant had not succeeded in losing weight despite her attempts to do so.

[8] After considering this evidence, the General Division concluded that the Claimant did not follow medical advice to quit smoking and lose weight, and that both of these factored significantly into her medical problems. The General Division also found that the Claimant did not make reasonably sustained efforts to cooperate in her health care.[5]

[9] The Claimant argues that these were erroneous findings of fact under the DESD Act. In order for the Claimant to succeed on this, she must establish three things: The finding of fact must be erroneous, it must have been made in a perverse or capricious manner or without regard

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[1] Subsection 58(1) of the DESD Act
[2] *Lombardo v. Minister of Human Resources Development*, (July 23, 2001), CP 12731. Although this decision is not binding on the Tribunal, I find it persuasive in this case.
[3] See clinical notes from Dr. MacGregor, November 2008 and September 2009, for example
[4] Paragraph 21 of the decision
[5] Paragraph 45 of the decision

for the material before the General Division, and the decision must be based on this finding of fact.[6]

[10] Based on the evidence that was before the General Division, I am satisfied that its finding that the Claimant did not make reasonably sustained efforts to cooperate in her health care was not erroneous, since there was an evidentiary basis for it. She tried and failed both to lose weight and to stop smoking. While some might disagree with this finding of fact, the mandate of the Appeal Division is not to reweigh the evidence to reach a different conclusion than the General Division did.[7]

[11] I reject the Minister's argument that she did not follow medical advice simply because her efforts were unsuccessful. There was no evidence that the Claimant was insincere in her efforts to quit smoking or lose weight. Simply because she failed to stop smoking or lose weight does not mean that she made no efforts to do so.

[12] I am satisfied that the General Division's finding of fact that the Claimant did not follow medical advice to quit smoking and lose weight was erroneous. The evidence indicates that she attempted to do both of these things. This finding of fact was made without regard for all the evidence that was before the General Division.

[13] However, the General Division decision was not based on this finding of fact. The conclusion reached from this finding of fact was that her failure to follow medical advice factored significantly into her medical problems.

[14] The General Division decision was based on a number of other findings of fact, including the following:

a) The Claimant's health conditions, apart from COPD, were controlled adequately;[8]

b) The medical evidence prior to the minimum qualifying period did not set out significant impairments that would preclude the Claimant from being capable regularly of pursuing

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[6] *Rahal v. Canada(Citizenship and Immigration)*, 2012 FC 319
[7] *Simpson v. Canada (Attorney General)*, 2012 FCA 82
[8] Paragraph 42 of the decision

any substantially gainful occupation, as she was able to complete more sedentary tasks at her last place of employment;[9]

c) Dr. Rahimi noted only mobility limitations and no restrictions that would preclude all forms of employment;[10]

d) Dr. MacGregor did not set out limitations that would preclude the Claimant regularly from pursuing any substantially gainful occupation;[11]

e) The Claimant had failed to make reasonably sustained efforts to cooperate in her health care; and

f) The totality of the Claimant's conditions were not severe.[12]

I am satisfied that the decision was based on these findings of fact. These findings of fact are not erroneous as they are based on the evidence that was before the General Division. When the decision is read in its entire context,[13] it is logical, transparent, and based on the law and the facts.

Issue 2: Did the General Division err in law?

[15] I am not persuaded that the General Division's findings that the Claimant failed to follow medical recommendations or to make reasonably sustained efforts to cooperate in her health care are errors in law. They are factual findings.

[16] The CPP states that a claimant is disabled if they have a disability that is both severe and prolonged. A person has a severe disability if they are incapable regularly of pursuing any substantially gainful occupation.[14] Every word in this definition must be given meaning. The Claimant contends that the General Division erred in law because it failed to consider whether she could work *regularly* due to her need to nap daily. The General Division referred to evidence

[9] Paragraph 43 of the decision
[10] Paragraph 44 of the decision
[11] Paragraph 47 of the decision
[12] Paragraph 46 of the decision
[13] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62
[14] Paragraph 42(2)(*a*) of the *Canada Pension Plan*

that the Claimant naps daily.[15] The Claimant testified that when she last worked, she napped after work.[16] She also testified that when she last worked, she missed only the "odd day" due to her health. I am not persuaded, based on the evidence and counsel's arguments, that the Claimant had a condition that caused issues with regularity. Therefore, the General Division made no error by not specifically considering this issue.

[17] The Claimant also argues that the General Division erred in law because it failed to consider whether the Claimant's last work was for a benevolent employer. This term is not defined in the CPP, but the Federal Court of Appeal sets out factors that are to be considered when deciding this issue. They include whether the employee is paid the same as others, whether performance expectations are changed, and what the employee's other work conditions are.[17] In addition, an employer is not a benevolent employer if the accommodations made are not beyond what is expected in the competitive marketplace.[18]

[18] In this case, accommodations were made for the Claimant; she did more office work and less physical work.[19] She also testified that she could work to her own deadlines, and ask others for help.[20] There was no evidence that her pay was changed because of her condition or that the accommodations made for her were beyond what is expected in the marketplace. The General Division cannot be faulted for not considering an issue fully when there is no evidence upon which it could do so. Therefore, the General Division did not err by not considering this legal issue specifically. The appeal must be dismissed on this basis.

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[15] Paragraphs 23 and 27 of the decision
[16] Minute 40 of the audio recording of the hearing, although the actual time may vary depending on what device is used to listen to the recording
[17] *Atkinson v. Canada (Attorney General)*, 2014 FCA 187
[18] *K. A. v. Minister of Human Resources and Skills Development*, 2013 SSTAD 6
[19] Paragraphs 43 and 51 of the decision
[20] Minute 35 of the hearing recording

CONCLUSION

[19] The appeal is dismissed for the reasons set out above.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	March 1, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Alexandra Victoros, Counsel for the Appellant Philipe Sarazin, Counsel for the Respondent