



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: G. N. v. Minister of Employment and Social Development, 2018 SST 209

Tribunal File Number: AD-17-639

BETWEEN:

G. N.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: March 2, 2018

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] G. N. (Claimant) completed Grade 10 before entering the workforce. He worked for many years as a miner and as a labourer. He has limited computer skills. The Claimant stopped working in 2014, at age 62, due to pain and loss of movement in his shoulders. He applied for a Canada Pension Plan disability pension and claimed that he was disabled by his shoulder limitations. The Minister of Employment and Social Development refused his application. The Claimant appealed this decision to this Tribunal. The Tribunal's General Division dismissed his appeal. The appeal is allowed because the General Division erred in law by not conducting a real-world analysis of the matter, and based its decision on an erroneous finding of fact.

PRELIMINARY MATTER

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

- a) The legal issues to be decided are straightforward;
- b) The *Social Security Tribunal Regulations* require that proceedings be concluded as quickly as the circumstances and the considerations of fairness and natural justice permit¹; and
- c) There were no gaps in the arguments or need for further submissions.

ISSUES

[4] Did the General Division err by not conducting a "real world" analysis of the Claimant's disability claim?

¹ Section 3 of the *Social Security Tribunal Regulations*.

[5] Did the General Division err by not setting out an evidentiary basis for its finding regarding the Claimant's intelligence?

ANALYSIS

[6] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It provides for only three grounds of appeal, namely that the General Division failed to observe a principle of natural justice, 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.² The appeal must be considered in this context.

Issue 1: Did the General Division conduct a "real world" analysis?

[7] The Federal Court of Appeal teaches that when deciding whether a claimant is disabled under the *Canada Pension Plan*, the General Division must conduct a "real world" analysis; it must consider the claimant's personal characteristics such as age, education level, language proficiency, and past work and life experiences.³ A failure to do so is an error in law.⁴

[8] In this case, the General Division decision sets out that the Claimant was 64 at the date of the hearing, left school after completing Grade 10 and worked primarily as a hard rock underground miner.⁵ It also states that the Claimant has no skills for other work, is a beginner using a computer and has no office skills.⁶ The decision states that the Tribunal was mindful of this when it made its decision. However, the General Division failed to analyze this information, or to consider how it would impact his capacity regularly to pursue any substantially gainful occupation given his physical limitations. It also failed to explain why it appears to have given greater weight to the observation that the Claimant was "well-spoken" and "intelligent" than to other characteristics such as his age, lack of varied work experience, and limited formal education. I am therefore satisfied that the General Division failed to conduct a "real world" analysis. This is an error of law.

² Subsection 58(1) of the DESD Act.

³ *Villani v. Canada (Attorney General)*, 2001 FCA 248.

⁴ *Garrett v. Canada (Minister of Human Resources Development)*, 2005 FCA 84.

⁵ Paragraph 6 of the General Division decision.

⁶ Paragraph 12 of the General Division decision.

[9] The wording of the DESD Act suggests that the Appeal Division owes no deference to the General Division when an error of law is made. The appeal must therefore be allowed.

Issue 2: Did the General Division err regarding its finding of the Claimant's intelligence?

[10] To succeed on an appeal based on an erroneous finding of fact under the DESD Act, a claimant must establish three things: that the finding of fact was erroneous; that it was made perversely, capriciously, or without regard for the material that was before the General Division; and that the decision was based on this finding of fact.⁷ I am satisfied that the General Division made such an error in this case.

[11] The General Division decision states that the Tribunal was mindful of the Claimant's age, limited education and narrow work history. The Tribunal member relied on his own observation that the Claimant was well-spoken and intelligent, and concluded that he would be able to learn alternative work.⁸

[12] While a decision-maker is entitled to make findings based on their own observations during a hearing, there must be an evidentiary basis for such findings of fact. For example, the Federal Court overturned a decision of the Veterans Review and Appeal Board because it based its decision on its own medical knowledge and research, and used this to discredit evidence that was before it. The Federal Court concluded that the tribunal "embarked on forbidden territory making medical findings to discount uncontradicted credible evidence when it had no inherent medical expertise and the ability to obtain and share independent medical evidence on points which troubled it."⁹ Similarly in this case, the General Division, based on its own observation, concluded that the Claimant had sufficient intelligence to learn other work when the evidence before it was that the Claimant did not complete high school, and had limited computer and no office skills. The decision sets out no evidentiary basis for its finding regarding the Claimant's intelligence. The General Division has no special expertise regarding a claimant's intelligence. I am therefore satisfied that this finding of fact was erroneous. It was made without regard for the

⁷ *Rahal v. Canada (Citizenship and Immigration)*, 2012 FC 319.

⁸ Paragraph 30 of the General Division decision.

⁹ *Macdonald v. Canada (Attorney General of Canada)*, 2003 FC 1263.

material that was before it. The decision was based on this finding of fact. Consequently, the General Division erred under the DESD Act.¹⁰

[13] The appeal must also be allowed on this basis.

CONCLUSION

[14] The appeal is allowed for these reasons.

[15] As evidence must be weighed, it is appropriate that the matter be referred back to the General Division for reconsideration. To avoid any possibility of an apprehension of bias, the matter should be reconsidered by a different General Division member.

Valerie Hazlett Parker
Member, Appeal Division

METHOD OF PROCEEDING:	On the written record.
APPEARANCES:	Paul Sacco, Representative for the Appellant Stéphanie Pilon, Representative for the Respondent

¹⁰ Paragraph 58(1)(c) of the DESD Act.