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

Citation: *J. G. v. Minister of Employment and Social Development*, 2018 SST 210

Tribunal File Number: AD-17-895

BETWEEN:

J. G.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Kate Sellar

Date of Decision: March 2, 2018

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] J. G. (Claimant) has degenerative disc disease and mechanical low back pain. She has lived and worked in Canada for more than 20 years, mainly in factory settings. She stopped working as a press operator in 2013. She completed Grade 10 in India, and English is not her first language.

[3] The Claimant applied for a disability pension under the *Canada Pension Plan* (CPP). The Minister denied her application initially and upon reconsideration. She appealed the Minister's decision to the General Division of this Tribunal, and the General Division dismissed her appeal. The Claimant seeks leave to appeal the General Division's decision. The Appeal Division must decide whether it is arguable that the General Division made an error in its decision such that the Claimant should be granted leave to appeal.

ISSUE

[4] Is there an arguable case that the General Division's decision contains an error of fact in that it ignored Dr. Prutis' evidence about the Claimant's medical condition and limitations?

ANALYSIS

[5] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds that allow for appeal of General Division decisions:

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.

[6] An applicant on leave to appeal has to show that the appeal has a reasonable chance of success. To meet that requirement, the Claimant needs to show only that there is some arguable ground on which the appeal might succeed.

Does the General Division's decision contain an error of fact?

[7] The Claimant argues that the General Division ignored the medical evidence about her back injury, the treatments she has tried (and the medications she is on), as well as the evidence she gave about the extent of her functional impairments and her pain. Arguably, the General Division's decision contains an error of fact in that it reached its conclusion about the real-world employability of the Claimant without first considering the evidence from Dr. Prutis about the Claimant's medical condition and limitations.

[8] In order to be eligible for the disability pension, the Claimant must show that her disability was severe on or before her minimum qualifying period (MQP), which in this case ended on December 31, 2015. A person with a severe disability in this context is a person who is incapable regularly of pursuing any substantially gainful occupation.[1]

[9] Under the heading "Other Evidence on File," the General Division summarizes a medical report from Dr. Prutis dated September 5, 2014.[2] Dr. Prutis' report reviews the Claimant's treatment history, medications, results of a physical assessment and other tests, and concludes that the Claimant was not in remission and that she had degenerative disc disease of the lumbar spine and chronic low back pain. The report concludes that the Claimant was disabled from pursuing her current job and "given her age, experience and education, she remains disabled from pursuing any other job."[3] The report expressly considers part time and seasonal work and describes a series of ongoing restrictions and limitations in the Claimant's daily activities.

---

[1] *Canada Pension Plan*, paragraph 42(2)(*a*).
[2] At GD4-31 in the Tribunal's record.
[3] *Ibid.*, GD4-31 and following.

[10] In its analysis, the General Division states that the medical evidence "describes symptoms that would prevent the Appellant from returning to heavy or physically demanding work" (para. 33). The General Division's decision does not include any analysis of Dr. Prutis' report, and goes on to find that the Claimant's personal circumstances would "not make her unemployable in the real world context with her physical limitations" (para 34).

[11] It seems that Dr. Prutis' evidence does not support the General Division's real-world assessment of the Claimant's employability. Evidence of the Claimant's medical condition from a treating physician before the MQP that states she is disabled from her current job (and given her personal circumstances, any other job) is central to the question of whether the Claimant had a severe disability. Arguably, reaching a conclusion about the Claimant's employability without discussing Dr. Prutis' evidence is an error of fact made without regard for the evidence on a material issue.

[12] It may be, as well, that the failure to engage in any analysis at all of the medical conditions and limitations to determine whether the disability was severe is an error of law as it alters the legal test for severity that the General Division is purporting to apply.[4] The test for severity includes whether a claimant is "incapable regularly" of pursuing any substantially gainful occupation. Arguably, failing to provide any analysis of the Claimant's capabilities (established through medical evidence about her medical conditions and limitations) is an error of law. Each aspect of the test for severity has meaning and requires consideration.[5]

[13] Given that the Claimant has identified a possible error, the Appeal Division does not need to consider any other grounds raised by the Claimant at this time. Subsection 58(2) of the DESDA does not require that individual grounds of appeal be considered and accepted or rejected.[6] The Claimant is not restricted in her ability to pursue the arguments raised in her application for leave to appeal.

---

[4] *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, paras. 43-44, contains a discussion of the situation in which the application of a legal test to a set of facts is a mixed question, but if in the course of that application the underlying legal test is altered, then a legal question arises.
[5] *Villani v. Canada (Attorney General)*, 2001 FCA 248, para. 42, explains that the "crucial phrase" incapable regularly of pursuing any substantially gainful occupation cannot be ignored or pared down.
[6] *Mette v. Canada (Attorney General)*, 2016 FCA 276.

[14] If the Claimant wishes to argue that she has psychological overlay and that evidence about the impact her medication has on her capacity was ignored by the General Division, it would be helpful if she could point the Appeal Division to where that evidence is in the record.

[15] At the next stage of the proceeding, the Appeal Division welcomes submissions from the parties as to whether the General Division's decision contains the following:

a) An error of law in that it required the Claimant to show that efforts at obtaining and maintaining employment were unsuccessful by reason of her health condition[7] without first making a clear finding that there was evidence of capacity to work;

b) An error of fact in that it ignored evidence from the Claimant and her witness about the Claimant's personal circumstances[8] (including language proficiency);

c) An error of law in that in considering the Claimant's personal circumstances, the General Division seemed to require objective third party evidence of language proficiency and the ability to retrain without providing reasons as to why the Claimant's evidence in this regard was dismissed as assumption; and

d) An error of law in that it required the Claimant to prove that "all work that is more sedentary" requires qualifications and language skills beyond those the Claimant already has (para. 36).

CONCLUSION

[16] The application for leave to appeal is granted. This means that the Claimant has a reasonable chance of success in her appeal (which is a low standard to meet). At the next stage of the appeal, the Appeal Division will decide whether it is more likely than not that the General Division's decision contained an error (this is a higher standard). Since the next stage of the appeal involves a higher standard of proof, the outcome of this decision does not determine the outcome of the next decision.

---

[7] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.
[8] *Villani v. Canada (Attorney General)*, 2001 FCA 248.

Kate Sellar
Member, Appeal Division

REPRESENTATIVES:	J. G., self-represented