



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. R. v. Minister of Employment and Social Development*, 2018 SST 229

Tribunal File Number: AD-17-920

BETWEEN:

D. R.

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 13, 2018

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] D. R. (the Claimant), stopped working as an administrative assistant in November 2014. She was laid off in a downsizing, but she also stated that she was prevented from working due to osteoarthritis in her right hip; thrombocytopenia due to splenomegaly; cirrhosis of the liver, possibly due to swelling of the feet, ankles, and legs; and Hepatitis B. She began receiving a Canada Pension Plan retirement pension in September 2015, and applied for the Canada Pension Plan disability benefit that same month. She can cancel the retirement pension in favour of the disability pension only if she is deemed to be disabled before the month for which the retirement pension first became payable. That means she had to prove she had a severe and prolonged disability on or before August 2015.

[3] The Minister denied her application initially and upon reconsideration. She appealed the Minister's decision to this Tribunal, and the General Division dismissed her appeal in September 2017.

[4] The Claimant seeks leave to appeal the General Division's decision. The Appeal Division must decide whether it can be argued that the General Division made an error in its decision such that the Claimant should be granted leave to appeal.

ISSUE

[5] Can it be argued that the General Division made an error of fact in failing to acknowledge the Claimant's alcohol abuse disorder?

ANALYSIS

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

- 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.

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

Can it be argued that the General Division made an error of fact in failing to acknowledge the Claimant's alcohol abuse disorder?

[8] There is no arguable case that the General Division made an error of fact in failing to acknowledge the Claimant's alcohol abuse disorder. The General Division took the Claimant's Hepatitis C and cirrhosis of the liver into account, as well as Dr. Lau's opinion about the need to abstain from alcohol in order for the Claimant to be a candidate for Hepatitis C treatment.

[9] The Claimant submits that the General Division made an error under s. 58(1)(c) of the DESDA in ignoring an important fact in the appeal file. The Claimant indicates that the General Division did not acknowledge her alcohol abuse disorder in conjunction with all her other conditions, which, together, rendered her severely disabled under the CPP. The Claimant submits that when alcohol abuse disorder is included, it provides a more complete picture of her disability.

[10] There is no mention in the General Division's decision of the Claimant having alcohol abuse disorder specifically, any limitations resulting from that specific disorder, or what course of treatment the Claimant has tried for that disorder. There is a reference, at paragraph 25 of the decision, to Dr. Lau's diagnosis of "cirrhosis secondary to a combination of Hepatitis C and alcohol. She was advised to abstain from alcohol in June but in October 2015 she reported that

she was still drinking.” The General Division acknowledged that Dr. Lau had noted that if the Claimant abstained from alcohol, she “may be a candidate for Hepatitis treatment.”

[11] The Appeal Division wrote to the Claimant’s advocate to ask where in the record the information about the Claimant’s alcohol abuse disorder can be found. The Claimant’s advocate responded by referring to the Claimant’s testimony. In that testimony, she claimed she was abstaining from alcohol and that she saw Dr. Lau every six months with respect to her Hepatitis C and cirrhosis of her liver. The Claimant’s advocate also referred to Dr. Lau’s letter of March 7, 2016 (GD2-67) which the General Division referenced in its decision. That letter states that the main treatment he recommended in June 2015 was to remain abstinent from alcohol and that as of her last visit in October 2015, the Claimant was still drinking alcohol. The Claimant’s advocate also notes that the Claimant’s testimony about her capacity to function differed from that of her husband’s, which points to the existence of her alcohol abuse disorder.

[12] If there was evidence about alcohol abuse disorder and the General Division ignored it, the General Division’s finding about the severity of the Claimant’s disability may have been made in error because it was not based on the cumulative impact of all of the Claimant’s conditions.¹

[13] However, the Appeal Division cannot grant leave to appeal on a hypothetical. The Federal Court has found that the Appeal Division erred when it failed to “articulate in any way what evidence [it] relied upon in deciding that the Respondent had a reasonable chance of success on appeal.”² The decision to grant leave must point to the evidence that supports that the appeal has a reasonable chance of success.³

[14] The bar for leave to appeal is low, but leave to appeal cannot be granted on a hypothetical. The Claimant has not pointed to any specific evidence in the record that shows the Claimant had alcohol abuse disorder. The Claimant’s advocate has provided evidence that could assist the General Division to infer that the Claimant had such a disorder, but there is no factual

¹ *Bungay v. Canada (Attorney General)*, 2011 FCA 47

² *Canada (Attorney General) v. Hoffman*, 2015 FC 1348

³ *Canada (Attorney General) v. Hoffman*, 2015 FC 1348, at para. 44; *Canada (Attorney General) v. Hines*, 2016 FC 112, at para. 48; *Canada (Attorney General) v. O’Keefe*, 2016 FC 503, at para. 40; *Cvetkovski v. Canada (Attorney General)*, 2017 FC 193, at para. 48

error in failing to infer the existence of a particular diagnosis from the evidence. Without pinpointing evidence about alcohol abuse disorder that the General Division ignored, the Claimant has no reasonable chance of success. The General Division did not ignore the evidence about alcohol use (as opposed to alcohol abuse disorder), and referenced Dr. Lau’s opinion in the decision.

[15] The Claimant must provide all the evidence and arguments required under s. 58(1) of the DESDA.⁴ However, the Appeal Division should go beyond a mechanistic review of the grounds of appeal.⁵ The Appeal Division examined the record and is satisfied that the General Division did not overlook or misconstrue any evidence. The focus of the Claimant’s testimony was on the pain and mobility limitations she experienced as a result of an injury in August 2014. The Claimant did give evidence about the treatment of her Hepatitis C. At the hearing, the General Division member asked the Claimant about Dr. Lau’s opinion. The Claimant stated she had abstained from alcohol because she hoped “at some point” she could be treated for her Hepatitis C. Her advocate’s closing argument referenced a “consistent history of alcohol use” and referenced Dr. Lau’s statement about the Claimant “still drinking alcohol.”

[16] The General Division did not ignore the medical evidence from Dr. Lau about cirrhosis secondary to a combination of Hepatitis C and alcohol. It is referenced in the analysis at paragraph 52. The decision does not reference “alcohol abuse disorder” because there was no evidence before it about that particular diagnosis.

CONCLUSION

[17] The application for leave to appeal is refused.

Kate Sellar
Member, Appeal Division

REPRESENTATIVE:	Keith Poulson, Advocate for
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⁴ *Tracey v. Canada (Attorney General)*, 2015 FC 1300

⁵ *Karadeolian v. Canada (Attorney General)*, 2016 FC 615

	the Applicant
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