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

Citation: *J. B. v. Minister of Employment and Social Development*, 2018 SST 295

Tribunal File Number: AD-18-20

BETWEEN:

J. B.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Valerie Hazlett Parker

Date of Decision: March 28, 2018

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] J. B. (Claimant) is a registered nurse. She worked as a nurse until 1999, when she was in an accident while on a transit bus. She sustained a number of injuries in this accident, which left her with limitations. Despite her limitations, she was able to work "freelance" assisting with anaesthesia in dental offices. In May 2014, she began to receive a Canada Pension Plan retirement pension.

[3] The Claimant first applied for a Canada Pension Plan disability pension in 1990. This application was granted, but the pension was terminated in July 1991. She applied again in 2005. The Minister of Employment and Social Development (as it is now titled) refused the application. The Claimant appealed this decision to the Office of the Commissioner of Review Tribunals, and a review tribunal dismissed her appeal. She appealed this decision to the Pension Appeals Board without success. Her application for judicial review of the Pension Appeals Board decision was also dismissed.

[4] The Claimant last applied again for a Canada Pension Plan disability pension in 2013, and this is the application that is before the Tribunal. The Minister of Employment and Social Development refused this application, and the Claimant appealed to the Social Security Tribunal. The Tribunal's General Division dismissed her appeal.

[5] Leave to appeal to the Tribunal's Appeal Division is refused because the appeal has no reasonable chance of success on the grounds that the General Division based its decision on an erroneous finding of fact or failed to observe a principle of natural justice.

ISSUES

[6] Does the appeal have a reasonable chance of success because the General Division erred in one of the following ways?

a) by failing to consider the Claimant's neck problems;

b) by failing to consider that four muscle groups were affected by the leg injury she sustained in the bus accident, or who paid for her treatment;

c) by failing to consider that a tribunal member stated that she had an "arguable case";

d) by failing to advise the Claimant before the hearing that it was bound by the prior Review Tribunal decision that she was not disabled when that decision was made;

e) by failing to fully answer her question regarding whether the Tribunal member was in a conflict of interest because he might be associated with a bank that had sued her in another proceeding;

f) by failing to consider that the Claimant felt "bullied" at the hearing;

g) by failing to consider the effect that the delay in this matter had on the Claimant;

h) because the Minister did not effectively "case manage" this application;

i) by failing to consider whether her disability was prolonged;

j) by finding that her disability was not severe;

k) by failing to explain how "gainful employment is determined," and by failing to accept that her work is not gainful;

l) by failing to consider that the Claimant has received a disability tax credit from the Canada Revenue Agency;

m) by considering her gross income as a measure of whether she is capable of substantially gainful employment, without considering her costs to earn this income, and to live;

n) by failing to consider that her income has declined in recent years;

o) by failing to consider her financial hardship and that because she applied for a Canada Pension Plan retirement pension early, she will receive less retirement income over the long term; or

p) by conducting a "real world" analysis of her condition.

ANALYSIS

[7] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It provides for only three narrow grounds of appeal that the Appeal Division can consider. They are:

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.[1]

In addition, leave to appeal is to be refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.[2] For the reasons set out below, I am satisfied that there are no grounds of appeal that may have a reasonable chance of success on appeal.

[1] Subsection 58(1) of the DESD Act
[2] Subsection 58(2) of the DESD Act

Res Judicata and the Claimant's Injuries

[8] The Claimant applied twice for the disability pension prior to the application that is before me. Her first application was granted, but the pension was later terminated because the Claimant returned to work. The second application was refused by the Minister and her appeal to the Office of the Commissioner of Review Tribunals was dismissed. The Claimant's appeal from the Review Tribunal decision was dismissed and so was the application for judicial review. The Review Tribunal decision is therefore final. The General Division reviewed this, set out the legal doctrine of *res judicata* (the matter has been decided), applied it to the facts, and concluded that this doctrine applied to this case. Accordingly, it decided that the General Division was bound by the 2007 Review Tribunal decision that the Claimant was not disabled at that time.[3] It also concluded that there was a window period between the date of the Review Tribunal hearing (March 21, 2007) and the month before she began to receive the retirement pension (May 31, 2014) and that therefore, if the Claimant proved that she became disabled during this time, she could be eligible for the disability pension.

[9] The Claimant argues that the General Division erred because it did not explain to her the legal principle of *res judicata* before the hearing. The Tribunal must remain an impartial decision maker. It cannot give advice to any party who appears before it. It is for each party to an appeal to conduct their case, and to learn the law that applies. The General Division's failure to explain the law of *res judicata* to the Claimant before the hearing was not an error.

[10] The Claimant also asserts that the General Division erred because it did not consider that she had neck surgery as a child, and its impact on her ability to function. She seems to be suggesting that the General Division based its decision on an erroneous finding of fact without considering all of the material that was before it. However, because the General Division had to consider whether the Claimant became disabled between March 2007 and May 2014, her childhood surgery and any limitations from this condition that existed prior to March 2007 were not relevant. The General Division therefore made no error by not considering this.

[11] The Claimant also argues that she provided medical evidence substantiating her injuries from the bus accident, and that her resulting limitations restricted her ability to work back to

[3] Paragraphs 12 through 30 of the General Division decision

2001–2002. This may be so. However, the legal issue that the General Division had to decide was whether the Claimant became disabled between March 2007 and May 2014. Her condition outside of this time period was not relevant. That the General Division did not consider her condition prior to 2007 is not a ground of appeal that may have a reasonable chance of success on appeal.

[12] Similarly, who paid for the Claimant's treatment is irrelevant to the decision.

Arguable Case

[13] The Claimant also contends that in October 2015, a Tribunal member wrote that she had an "arguable case," and that this should not have been "ruled out" because she represented herself and so may not have been able to present her case as well. It is not clear what the Claimant means by this statement. However, the legal test for an arguable case is whether there is some arguable ground upon which the proposed appeal might succeed.[4] This is a different legal test than to succeed on the merits of an appeal. The General Division decision sets out the legal test to succeed on an appeal: "The Appellant must prove, on a balance of probabilities, or that it is more likely than not, that she became severely disabled as defined in the CPP during the window period between March 21, 2007, and May 31, 2014."[5] It applied this test to the facts before it. Therefore, the General Division did not err regarding the legal test to be met for the Claimant to succeed, or by failing to consider whether she had an arguable case.

[14] Similarly, the fact that the Minister and the medical adjudicators opposed the Claimant's application does not point to any error by the General Division. It is not a ground of appeal under the DESD Act.

Natural Justice

[15] Prior to the General Division hearing, the Claimant requested that the Tribunal member recuse himself because there could be a possible conflict of interest. This was based on the Tribunal member being a lawyer in Ontario and the Claimant having been sued by a bank. The Tribunal member did not recuse himself, but advised that if there were a conflict of interest, he

[4] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC)
[5] Paragraph 69 of the decision

would have done so. She did not produce any evidence that this member was in a conflict of interest, or could potentially have been. Without any evidence that the General Division member was biased or had a conflict of interest, this ground of appeal cannot succeed.

[16] The Claimant also contends that at the outset of the General Division hearing, she felt "bullied by the process at hand" and that no one with a disability should have to tolerate feeling that way. It is unfortunate that the Claimant was not comfortable with the process. However, the General Division cannot change the process or alter the legal requirements set out in the DESD Act and the *Social Security Tribunal Regulations*.

[17] Also, I have listened to the recording of the General Division hearing. Although the Claimant stated at the start of the hearing that she felt bullied, after further discussion with the General Division member, she confirmed that she could continue with the hearing and present her case fully. The hearing then continued for over 90 minutes and the Claimant was given full opportunity to present her case. There was no failure to observe the principles of natural justice.

[18] The Claimant also set out a number of complaints about the time that it took for her application for disability benefits to be heard. She applied for benefits in 2013 and the hearing was not until 2017. This is regrettable. However, delay is not a ground of appeal under the DESD Act.

[19] In addition, the Claimant argues that the Minister did not efficiently "case manage" her application, and that the adjournment request made by the Minister's representative at one point in the process contributed unnecessarily to the delay in this proceeding. The *Social Security Tribunal Regulations* require that proceedings be concluded as quickly as the circumstances and the considerations of fairness and natural justice permit.[6] However, the Tribunal member has the authority to adjourn a hearing,[7] and is not to be faulted for doing so if an adjournment is required so that one party's representative can properly prepare and present their client's case. The principles of natural justice require such an adjournment.

[20] Additional hardship to the Claimant, as a result of the delays in the adjudication of this

[6] Section 3 of the *Social Security Tribunal Regulations*
[7] Section 11 of the *Social Security Tribunal Regulations*

appeal, while regrettable, is not a relevant consideration under the *Canada Pension Plan* or the DESD Act. No ground of appeal is disclosed by referring to this.

[21] Finally, in this regard, the Claimant seeks leave to appeal because the General Division did not mention the 2016 Auditor General's report that considered delays at the Social Security Tribunal. This was not an error. The issue to be decided was whether the Claimant became disabled during a specific time frame. It was not whether the Tribunal could adequately manage its caseload.

Substantially Gainful Occupation

[22] Under the *Canada Pension Plan*, a disability is severe if a person is incapable regularly of pursuing any substantially gainful occupation. A person must not only be unable to do their usual job, but also be unable to do any job they might reasonably be expected to do. This is correctly set out in the General Division decision.[8] The fact that there is no "policy" on this is not relevant to what the General Division had to decide. The Tribunal need not follow any policy. No ground of appeal is disclosed by the argument that the General Division failed to mention or consider a policy on this issue.

[23] The Claimant also repeats her evidence that she is "self-employed with no job and no guaranteed hours." She also states that she was not able to work recently at a flu clinic due to computer issues. The repetition of evidence is not a ground of appeal under the DESD Act.

[24] The Claimant also complains that in deciding whether her income was substantially gainful, the General Division examined her gross income, and not the net amount she retained after expenses to earn this income and provide for herself. This ground of appeal does not have a reasonable chance of success. The General Division considered what the Claimant was able to earn, along with her working conditions, to conclude that her work was substantially gainful.

[25] The General Division did not err when it failed to consider the *Canada Pension Plan Regulations*[9] regarding how substantially gainful occupation is calculated because the

[8] Paragraph 70 of the decision
[9] Section 68.1 of the *Canada Pension Plan Regulations*

Claimant's application for the disability pension was made before this section of the Regulations came into force.

Tax Credit and the Claimant's Income

[26] The Claimant contends that the General Division erred because it referred to the fact that she had received a disability tax credit from the Canada Revenue Agency retroactive to 2009, when in fact it was retroactive to 1999. In order to succeed on appeal on this argument, the Claimant would have to 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. The General Division decision was not based on this finding of fact. No ground of appeal is disclosed by this argument.

[27] Furthermore, the General Division correctly considered the Claimant's income only during the window period at issue. The fact that the Claimant's income declined after May 2014 was not a relevant consideration.

[28] The Claimant also asserts that the General Division erred because it failed to consider that because she applied for a Canada Pension Plan retirement pension early, she will receive a significantly lower amount over the long term than if she had waited to apply at age 65, and that she is unable to apply for Old Age Security for a number of years. The General Division did not err in this regard. Socio-economic factors are not relevant to the determination of disability under the *Canada Pension Plan*. This is not a ground of appeal under the DESD Act.

[29] Finally, the Claimant argues that the General Division erred because it considered her age, education, language skills, and work and life experience.[10] However, the Federal Court of Appeal teaches that to decide whether a claimant is disabled, the Tribunal must conduct a real-world analysis, which means that the claimant's personal circumstances, including age, education, language skills, and work and life experience, are to be considered.[11] It is an error in law not to do so.[12]

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[10] Paragraphs 84 and 85 of the decision
[11] *Villani v. Canada (Attorney General)*, 2001 FCA 248
[12] *Garrett v. Canada (Minister of Human Resources Development)*, 2005 FCA 84

CONCLUSION

[30] The Claimant has not presented a ground of appeal that may have a reasonable chance of success on appeal. I have reviewed the General Division decision and the written record, and I have listened to the recording of the General Division hearing. I am satisfied that the General Division did not overlook or misconstrue any important information. I am also satisfied that it made no errors in law and that it observed the principles of natural justice.

[31] Therefore, leave to appeal is refused.

Valerie Hazlett Parker
Member, Appeal Division

REPRESENTATIVE:	J. B., self-represented