



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. H. v. Minister of Employment and Social Development*, 2018 SST 416

Tribunal File Number: AD-17-380

BETWEEN:

J. H.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: April 13, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, J. H., was born in 1961 and attended school up to Grade 10. She worked as a fleet administrator until she was laid off in 2009. She then began a nail salon business, which she operated from her home.

[3] Over the years, her health declined, and she has been diagnosed with numerous medical conditions, including Cushing's disease, sciatica, chronic pain syndrome, depression, anxiety, shingles, rectovaginal fistula, breast cancer, obesity, renal stones, and sleep apnea. She has undergone multiple surgeries and sustained injuries in a motor vehicle accident in September 2014 and a fall in February 2015.

[4] The Appellant closed her business in early 2015 and applied for disability benefits under the *Canada Pension Plan (CPP)* in July 2015. In addition to medical records, the Appellant submitted copies of tax summaries indicating that she had reported self-employment income from 2010 to 2014, inclusively, as well as CPP deductions for those years.

[5] The Respondent, the Minister of Employment and Social Development (Minister), refused her application, finding that her condition did not amount to a severe and prolonged disability during her minimum qualifying period (MQP), which the Minister determined ended on December 31, 2012.

[6] The Appellant appealed the Minister's refusal to the General Division of the Social Security Tribunal of Canada. On January 16, 2017, the General Division convened a hearing by teleconference but ultimately found that the Appellant had not demonstrated a severe and prolonged disability as of the MQP, which it determined, as had the Minister, ended on December 31, 2012. The General Division also placed weight on evidence that the Appellant was able to continue working as a manicurist, with a full client list, until 2014.

[7] The Appellant, who was previously self-represented, retained legal counsel and applied for leave to appeal to the Tribunal's Appeal Division, alleging that the General Division erred by failing to recalculate her MQP in light of her self-employment earnings and CPP contributions from 2010 to 2014.

[8] In my decision of December 28, 2017, I granted leave to appeal, finding an arguable case that the General Division based its decision on an erroneous finding that the Appellant had not registered valid CPP earnings and contributions as a self-employed manicurist.

[9] On March 27, 2018, the Minister conceded that the General Division had erred in rendering its decision and recommended that the matter be returned to the General Division for a rehearing.

[10] In view of the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness, and natural justice permit, I have decided to dispense with an oral hearing and consider this appeal on the basis of the existing documentary record.

ISSUE

[11] According to s. 58(1) of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: the General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact.

[12] The issue in this appeal is whether the General Division erred in disregarding evidence that the Appellant recorded valid CPP earnings and contributions in the years 2010 to 2014, inclusive.

ANALYSIS

[13] I have reviewed the Appellant's submissions against the record and concluded that her appeal must succeed.

[14] This case raises the possibility that the General Division relied on the Appellant’s Record of Employment (ROE), which was produced by the Minister, despite indications that this document might not have been accurate or up to date.

[15] In January 2016, the Appellant submitted copies of tax summaries for 2010–14 (GD2-107) that appeared to show that she had recently reported self-employment income and authorized CPP deductions as follows:

Year	Net Earnings	CPP Contributions
2010	\$6,505.55	\$148.78
2011	\$9,198.00	\$282.05
2012	\$8,065.31	\$225.38
2013	\$5,162.59	\$82.30
2014	\$3,640.00	\$6.93

[16] The file indicates that the Minister generated an ROE on at least three occasions over the history of this proceeding: July 31, 2015 (GD2-49); May 20, 2016 (GD2-34); and September 21, 2016 (GD4-21). On each occasion, the printouts showed the same information—that the Appellant had recorded valid earnings and contributions for more than 25 years, with the last three instances in 2007, 2008, and 2009. All of the printouts had the following notation in the headings: “CPP contributor information as of 2013-01-26.”

[17] The Minister based its MQP calculation on these ROEs and determined that the Appellant was required to show that her disability became severe and prolonged on or before December 31, 2012. In none of its correspondence, adjudication summaries, or submissions did it address the Appellant’s evidence that she had made valid contributions to the CPP in the years 2010 to 2014, other than to note that her tax summaries indicated substantially gainful earnings after the nominal MQP. The Minister apparently did not entertain the possibility that the Appellant’s earnings and contributions—provided they were validly reported—might have extended her MQP.

[18] In paragraph 28 of its decision, the General Division accepted the Minister’s MQP calculation:

The Respondent has calculated the Appellant's MPQ [*sic*] as December 31, 2012 based on her last three years of contributions from 2007 to 2009. The Tribunal has reviewed those calculations and agrees. The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2012.

[19] The General Division noted that the Appellant had "filed her income tax returns from 2010 to 2014" and reported self-employment income, although it made no mention of her claimed CPP contributions, nor did it address the question of why earnings and contributions supposedly reported after 2009 were not apparent on any of the three ROEs generated by the Minister.

[20] For this reason, I find that the General Division may have based its decision on an erroneous finding of fact by disregarding evidence that might have extended the Appellant's MQP. I have also listened to a portion of the audio recording of the January 2017 teleconference and note that the Appellant did make an attempt to raise this issue during her hearing before the General Division. At the 7:50 mark, this exchange is heard:

Member: In your case, your premiums, they've calculated, cover you up to December 2012, which means that you have to show that you were disabled as of December 2012. Is that your understanding?

Appellant: Yes... that is what they keep going back to. I don't think it's right, but that's what they keep [inaudible].

Member: Uh, okay. So while it's also important, you know, what your condition is today, when we're talking, we'll be referring probably a lot to what was going on in 2012 and around that date in terms of your condition...

[21] This issue was not discussed again, and the presiding General Division member appears to have ignored or glossed over the Appellant's expression of disagreement with the Minister's determination of the MQP. The Appellant, who was without the benefit of legal representation at the time, did not press the issue but, as a matter of fairness, the General Division should have addressed her objection to the MQP and attempted to reconcile the presence of CPP contributions on her 2010–14 income tax returns with their absence on the ROE.

[22] In its letter of March 27, 2018, the Minister informed the Appeal Division that it had contacted the Canada Revenue Agency (CRA) to confirm whether the Appellant had, in fact, made additional contributions to the CPP, for the purpose of calculating her MQP:

The Respondent affirms that the information found in the Appellant's Notices of Assessment from 2010 through 2014, which are not included in the materials filed before the tribunal and of which the Respondent did not obtain copies, does not match the tax information which the Appellant has filed before the tribunal.

Therefore, the determination of the General (para 15) and Appeal (para 11) Divisions in respect of the Appellant's tax information, as filed with the tribunal in AD-17-380, is at odds with the information held by the CRA for the same taxation years.

[23] It appears that, while the Minister continues to deny that the Appellant made valid CPP contributions in 2010–14, it is nevertheless agreeing to allow her an opportunity “to provide evidence to the Tribunal in respect of her tax information held by the CRA as it might pertain to her eligibility for disability benefits under the *Canada Pension Plan*.”

CONCLUSION

[24] Since the appeal succeeds for the above reason alone, I see no need to consider any of the other grounds put forward by the Appellant.

[25] Section 59 of the DESDA sets out the remedies that the Appeal Division can give on appeal. To avoid any apprehension of bias, it is appropriate, in this case, that the matter be referred back to the General Division for a *de novo* hearing before a different member.



Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVES:	John Wodak, for the Appellant Sandra Doucette, for the Respondent