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

Citation: *S. F. v. Minister of Employment and Social Development*, 2018 SST 440

Tribunal File Number: AD-17-655

BETWEEN:

S. F.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: April 23, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] S. F. (Claimant) did not complete high school before joining the paid workforce. She has worked in a factory, as a custodian and as a security guard. She stopped working in 2015 on her family physician's recommendation. She has diabetes, knee pain, a Baker's cyst at one knee, osteoarthritis and fibromyalgia. She applied for a Canada Pension Plan disability pension. The Minister of Employment and Social Development (Minister) refused the application. The Claimant appealed this decision to this Tribunal. The Tribunal's General Division dismissed the appeal. The Claimant's appeal to the Appeal Division is dismissed because the General Division applied the correct legal test to the facts and made no erroneous findings of fact under the *Department of Employment and Social Development Act* (DESD Act).

PRELIMINARY MATTER

[3] The Claimant included two medical reports with her written submissions for this appeal. They support the Claimant's claim that she is disabled. New evidence generally is not permitted on an appeal under the DESD Act.[1] I did not take this evidence into consideration in reaching this decision.

ISSUES

[4] Did the General Division err in law by not applying the legal principle set out in the *Villani*[2] decision?

[5] Did the General Division base its decision on an erroneous finding of fact regarding the Claimant's referral to a pain clinic?

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[1] *Canada (Attorney General) v. O'Keefe*, 2016 FC 503
[2] *Villani v. Canada (Attorney General)*, 2001 FCA 248

[6] Did the General Division base its decision on an erroneous finding of fact regarding whether her work as a security guard was physical or moderately sedentary work?

ANALYSIS

[7] The DESD Act governs the Tribunal's operation. It provides only three grounds of appeal, namely that the General Division failed to observe a principle of natural justice or made a jurisdictional error; made an error in 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.[3] The grounds of appeal advanced by the Claimant must be considered in this context.

Issue 1: Did the General Division err in law by not applying the legal principle set out in the *Villani* decision?

[8] The *Villani* decision[4] teaches that when deciding if a Claimant is disabled under the *Canada Pension Plan*, their situation must be examined in a real-world context. This means that their personal circumstances, including age, education, language skills, and personal and work history must be considered. The Claimant argues that the General Division failed to apply this legal principle to the facts before it.

[9] However, the General Division decision correctly states this principle.[5] It considered that the Claimant was 48 years of age at the relevant time, that she had limited education, and that her work experience consisted of physical jobs in a factory and as a custodian and moderately sedentary work as a security guard. The General Division concluded that these circumstances would not prevent the Claimant from finding suitable work.[6] The General Division also considered her medical conditions and the limitations that these conditions imposed on her capacity to work.

[10] The General Division applied the correct legal principle from this decision to the facts before it. The General Division made no error in law. The Claimant's disagreement with the conclusion reached is not sufficient for the appeal to succeed on this basis.

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[3] DESD Act, s. 58(1)
[4] *Villani v. Canada (Attorney General)*, 2001 FCA 248
[5] General Division decision, paragraph 64
[6] *Ibid*., paragraphs 65 and 66

Issue 2: Did the General Division err regarding the Claimant being referred to a pain clinic?

[11] One ground of appeal under the DESD Act is that the General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.[7] In order for an appeal to succeed on this basis, three criteria must be satisfied: the finding of fact must be erroneous; it must have been made in a perverse or capricious manner or without regard for the material before the General Division; and the decision must be based on this finding of fact.[8] The DESD Act does not define the terms "perverse" or "capricious", but guidance can be found in court decisions that have considered the *Federal Courts Act*, which has the same wording. In that context, perverse has been found to mean "willfully going contrary to the evidence."[9] Capriciousness has been defined as being "so irregular as to appear to be ungoverned by law."[10] Finally, a finding of fact for which there is no evidence before the Tribunal will be set aside because it is made without regard for the material before it.

[12] The General Division decision states that in 2016, Dr. Papneja wrote that the Claimant might benefit from attending a chronic pain program. More than a year has passed since he made the suggestion, and this doctor has not enrolled the Claimant in such a program. The General Division concluded from this that there was no urgent need to address the Claimant's chronic pain.[11] The Claimant asserts that the finding of fact that there was no urgent need to address her chronic pain was an erroneous finding of fact under the DESD Act. In particular, the Claimant argues that the General Division did not consider all of the other treatment she underwent, including physiotherapy, medication, massage, heat, and injections.

[13] The General Division finding that there was no urgent need to address the Claimant's pain was not erroneous. It was based on the evidence before it. The General Division considered the other treatments that the Claimant underwent, including physiotherapy[12], heat and massage therapy, medication[13], home exercises from her physiotherapy, and cortisone injections.[14] The

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[7] DESD Act, s. 58(1)(*c*)
[8] *Rahal v. Canada (Citizenship and Immigration)*, 2012 FC 319
[9] *Ibid*.
[10] *Ibid*.
[11] General Division decision, paragraph 62
[12] *Ibid*., paragraph 14
[13] *Ibid*., paragraph 46

General Division is entitled to draw conclusions from the evidence. It made no error in doing so in this case.

[14] The Claimant has not established that the General Division finding of fact that there was no urgent need to address her pain was an erroneous finding of fact made without regard for the material that was before it. The appeal fails on this basis.

[15] **Issue 3: Did the General Division err in it characterization of the Claimant's security guard work?**

[16] Lastly, the Claimant argues that the General Division decision was based on an erroneous finding of fact regarding her work as a security guard. The decision describes this work as physical work where she was required to walk[15], as moderately sedentary labour[16], and as a job which would be a combination of sedentary and mobility[17]. These descriptions of the Claimant's work may appear contradictory, but they do not amount to an erroneous finding of fact under the DESD Act. The decision was not based on how the Claimant's security guard work was characterized. It was based on the lack of severity of the medical conditions, the conservative nature of treatment recommended and undergone, and the fact that there was evidence of work capacity but no evidence that the Claimant had attempted to retrain or work within her limitations.

[17] Therefore, the appeal fails on this basis as well.

CONCLUSION

[18] The appeal is dismissed for these reasons.

Valerie Hazlett Parker
Member, Appeal Division

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[14] *Ibid*., paragraph 54
[15] *Ibid*., paragraph 9
[16] *Ibid*., paragraph 65
[17] *Ibid*., paragraph 73

HEARD ON:	April 17, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. F., Appellant Esther Song, Counsel for the Appellant Faiza Ahmed-Hassan, Counsel for the Respondent