



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. G. v. Minister of Employment and Social Development*, 2018 SST 455

Tribunal File Number: AD-18-67

BETWEEN:

L. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: April 30, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed, and the appeal is referred back to the General Division for reconsideration.

OVERVIEW

[2] L. G. (Claimant) completed Grade 12 and some welding courses. He worked for a number of years in a physically demanding role in a foundry until it closed. He was then self-employed as a renovator until he was injured in a car accident in 2009. The Claimant has not worked since the car accident. He applied for a Canada Pension Plan disability pension and claimed that he was disabled by these injuries and chronic obstructive pulmonary disease (COPD). 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 because it found that his conditions were not a severe disability. The Claimant's appeal of the General Division decision is allowed because the General Division based its decision on an erroneous finding of fact it made without considering all of the material that was before it.

PRELIMINARY MATTER

[3] This appeal was decided on the basis of the documents filed with the Tribunal after the following were considered:

- a) The legal issues to be decided are straightforward;
- b) The parties filed detailed written submissions, and there were no gaps in the submissions;
- c) Neither party requested an oral hearing; and

- d) The *Social Security Tribunal Regulations* require that the Tribunal conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.¹

ISSUES

[4] Did the General Division err in law by failing to consider the impact of the Claimant's COPD on his disability claim?

[5] Did the General Division base its decision on an erroneous finding of fact when it found that the Claimant could retrain?

[6] Did the General Division base its decision on an erroneous finding of fact when it found that the Claimant's refusal to work demonstrated capacity to work?

ANALYSIS

[7] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It provides only three grounds of appeal that can be considered, 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.² The Claimant's grounds of appeal must be considered in this context.

Issue 1: Did the General Division err in law by failing to consider the Claimant's COPD?

[8] The Federal Court of Appeal teaches that, when deciding whether a claimant is disabled, a decision-maker must consider all of their conditions, not just the main ones.³ The Claimant contends that the General Division erred in law because it failed to consider his COPD symptoms. The decision states that the Claimant was not diagnosed with this condition until 2015, which was after the minimum qualifying period (MQP)—the date by which a claimant must be found to be disabled in order to receive the disability pension—which was December 31,

¹ *Social Security Tribunal Regulations*, s. 3

² DESD Act, s. 58(1)

³ *Bungay v. Canada (Attorney General)*, 2011 FCA 47

2011. In addition, it states that, while the Claimant may have had COPD symptoms before his diagnosis, there was insufficient evidence to decide that the condition was severe prior to the MQP, and accordingly the the Claimant's COPD was not a health impairment that could be considered in the context of the disability application.⁴ The decision also states that the totality of the Claimant's impairments was his shoulder and thumb impairments.⁵ From this it is clear that the General Division did not consider the Claimant's COPD when deciding whether he was disabled.

[9] I have reviewed the documents filed with the Tribunal and the relevant portions of the recording of the General Division hearing. The only evidence regarding the Claimant's COPD prior to the MQP is the Claimant's testimony at the hearing. He testified that he was diagnosed with COPD in 2015, he had symptoms prior to the MQP, and they were not as severe then as they were in 2015.⁶ This evidence is set out in the General Division decision.⁷

[10] The General Division did not err by failing to consider evidence regarding the Claimant's COPD at the MQP because there was no evidence of the impairment before it aside from a general statement that the Claimant had symptoms. This evidence is insufficient for any decision to be made regarding this condition. The General Division is not to be faulted for failing to do something that it could not do. The appeal cannot succeed on the basis that the General Division erred in law by failing to consider evidence of the Claimant's COPD.

Issue 2: Did the General Division base its decision on an erroneous finding of fact when it found that the Claimant could refrain?

[11] One ground of appeal that can be considered 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 that was before it.⁸ In order for an appeal to succeed on the basis of an erroneous finding of fact, three criteria must be satisfied. The finding of fact must

⁴ General Division decision, paragraph 41

⁵ *Ibid.*, paragraph 48

⁶ General Division hearing recording at 07:30, although the exact time may vary depending on what device is used to listen to the recording

⁷ General Division decision, paragraph 7

⁸ DESD Act, s. 58(1)(c)

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.

[12] The General Division found as fact that the Claimant could retrain for work other than what he had done before the car accident.⁹ This was based on evidence that the Claimant completed Grade 12, had many years of work experience in a foundry and in self-employment, was fluent in English, and was 57 years old at the MQP.¹⁰

[13] The Claimant argues that this finding of fact was erroneous because the General Division failed to consider that he had no computer skills, difficulties with memory and concentration, and limited sitting tolerance. While these limitations are set out in the General Division's summary of the evidence, the mere recitation of the evidence does not demonstrate, in this case, that the General Division Member considered it when making its decision. The decision fails to grapple with how a lack of computer skills, difficulty with memory and concentration, or the Claimant's limited sitting tolerance would impact his capacity to learn or retrain on the job. Therefore, this finding of fact was erroneous and made without regard for all of the material that was before the General Division. The decision was based on this finding of fact. Therefore it was an error under the DESD Act. The appeal must be allowed on this basis.

Issue 3: Did the General Division base its decision on an erroneous finding of fact when it found that the Claimant's refusal to work demonstrated capacity to work?

[14] The General Division decision also states that the evidence demonstrated that the Claimant did not make attempts to work despite offers of employment¹¹ after the accident. The Claimant asserts that this finding of fact was erroneous because the work offered was beyond his capabilities.

[15] The Claimant testified at the hearing that he had been offered work after the accident but turned it down because he could not do it.¹² The Claimant's reason for not taking on this work is not set out in the decision. However, while the Claimant is not required to attempt work that is not within his restrictions, there is an obligation to attempt to obtain and maintain suitable work

⁹ General Division decision, paragraph 44

¹⁰ *Ibid.*

¹¹ General Division decision, paragraph 47

¹² General Division hearing recording at 18:05

when there is evidence of work capacity. The Claimant made no such efforts. Therefore, the finding of fact that there was no evidence regarding efforts to obtain or maintain work is not erroneous. The appeal fails on this basis.

CONCLUSION

[16] The appeal is allowed because the decision was based on an erroneous finding of fact.

[17] The DESD Act sets out what remedies the Appeal Division can give.¹³ In this case it is appropriate for the matter to be referred back to the General Division for reconsideration. The evidentiary record is incomplete regarding the Claimant’s COPD at the MQP. Evidence will have to be weighed, and this is at the heart of the General Division’s mandate.

Valerie Hazlett Parker
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
SUBMISSIONS:	Terry Copes, Counsel for the Appellant Erika Schneiderei, Representative for the Respondent

¹³ DESD Act, s. 59(1)