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

Citation: *J. S. v. Minister of Employment and Social Development*, 2018 SST 586

Tribunal File Number: AD-17-270

BETWEEN:

J. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: May 31, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] J. S. (Claimant), was 55 years old when she applied for a disability pension under the Canada Pension Plan (CPP). She has a Grade 12 education, and a certification as a laboratory and X-ray technician. She has also had some education and training to work as a licensed practical nurse. She was working as a laboratory technician but stopped in May 2009 due to an injury. She attempted to return to work, but it aggravated her back injury.

[3] The Minister denied her application for a disability pension both initially and upon reconsideration, and she appealed to the General Division of this Tribunal. The General Division denied the Claimant's appeal in January 2017, finding that there was evidence that she had capacity for work and that she had not shown that efforts at obtaining and maintaining employment were unsuccessful by reason of her health condition.

[4] The Appeal Division granted the Claimant leave to appeal, finding that there was an arguable case that the General Division's finding about the Claimant's capacity to work was an error of fact. The Appeal Division stated that the finding may have been made without regard for the evidence from Dr. Campbell, who indicated in 2010 that the Claimant was not capable of any type of work.

[5] The Appeal Division must now decide whether to allow the Claimant's appeal. To succeed, the Claimant must show, this time on a balance of probabilities (which is a higher standard than the arguable case), that the General Division made an error under the *Department of Employment and Social Development Act* (DESDA).

[6] The General Division did not make an error in its decision, and the appeal is therefore dismissed.

PRELIMINARY MATTERS

[7] Where the Appeal Division grants leave to appeal, it does **not** provide new hearings on the merits (*de novo* hearings), in which Claimants are expected to present all their evidence for the Appeal Division to weigh and consider. The general rule is that the evidence the Appeal Division uses to make its decision is the same evidence that was available to the General Division. There are some limited exceptions to this general rule.

[8] To support her case,[1] the Claimant provided the Appeal Division with some new evidence that was not available to the General Division when it made the decision in January 2017. The Appeal Division has not considered any of this evidence as it is new and was not before the General Division when it made its decision. While there are some limited exceptions to this general rule, none of them apply in this case.

ISSUES

1. Did the General Division make an error of fact by disregarding medical evidence that was supportive of the Claimant's entitlement to the disability pension?

2. Did the General Division fail to observe a principle of natural justice by failing to contact or ask any questions of the Claimant's proposed witnesses?

3. Did the General Division make an error of law by providing inadequate reasons involving an incorrect pronoun?

ANALYSIS

Appeal Division's review of the General Division's decision

[9] The Appeal Division does not provide an opportunity for the parties to re-argue their case in full at a new hearing. Instead, the Appeal Division conducts a review of the General Division's decision to determine whether it contains errors. That review is based on the wording of the DESDA, which sets out the grounds of appeal for cases at the Appeal Division.[2]

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[1] At AD1A-7, for example
[2] DESDA, s. 58(1)

[10] The DESDA says that a factual error occurs when 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. For an appeal to succeed at the Appeal Division, the legislation requires that the finding of fact at issue from the General Division's decision be material ("based its decision on"), incorrect ("erroneous"), and made in a perverse or capricious manner or without regard for the evidence.[3]

[11] By contrast, the DESDA simply says that a legal error occurs when the General Division makes an error of law, whether or not the error appears on the face of the record.[4]

Issue 1: Did the General Division make an error of fact by disregarding medical evidence that was supportive of the Claimant's entitlement to the disability pension?

[12] The General Division made its finding about the Claimant's capacity for work with express regard for Dr. Campbell's 2010 report. The General Division did not make an error of fact by ignoring that report.

[13] In order to be eligible for a disability pension, a Claimant must have a severe disability on or before the end of the minimum qualifying period (MQP). A person with a severe disability for the purpose of a CPP pension is someone who is incapable regularly of pursuing any substantially gainful occupation.[5] Factual errors are those that are made by the General Division in a capricious or perverse manner or without regard for the material before it.[6]

[14] The Claimant's minimum qualifying period (MQP) ended on December 31, 2011.[7] In November 2010, Dr. Campbell reported that the Claimant was not capable of any type of work due to permanent incapacity and inability to "weight bear, or stand, or sit for long periods of time."[8] The General Division concluded that there was no medical evidence to indicate that the Claimant was unable to be substantially gainfully employed.[9]

[15] The Appeal Division granted leave to appeal because there is an arguable case that the

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[3] DESDA, s. 58(1)(*c*)
[4] DESDA, s. 58(1)(*b*)
[5] *Canada Pension Plan*, s. 42(2)(*a*)(i)
[6] DESDA, s. 58(1)(*c*)
[7] General Division decision, para. 7
[8] GD2-17
[9] General Division decision, para. 29

General Division reached its decision about the Claimant's capacity to work without regard for Dr. Campbell's November 2010 opinion.

[16] The Minister argues that the General Division did consider Dr. Campbell's 2010 report, but that it simply gave the report less weight than a subsequent report from the same physician from February 2014, which was after the MQP but showed some improvement in the Claimant's condition. The Minister argues that the General Division did not find the 2010 report "conclusive and definitive" in light of the other evidence in the record[10] and that the General Division noted that, in Dr. Campbell's February 2014 report, he stated the Claimant was only unable to do "any work that required prolonged sitting or standing or lifting over 20 pounds." The General Division considered this February 2014 report indicative of some improvement since the end of the MQP.

[17] The Minister argues that the phrasing the General Division used—"no medical evidence to indicate that the Claimant was unable to be substantially gainfully employed"—must not be taken to mean that there were no elements of such evidence, but that, "on the balance, 'it has not been proven that'" the Claimant is unable to be substantially gainfully employed.[11]

[18] The General Division's decision provides a summary of the Claimant's evidence it considered to be the most relevant.[12] As part of that evidence, the General Division's decision describes in some detail Dr. Campbell's November 2010 opinion, including Dr. Campbell's conclusion at that time that the Claimant "was incapable of work due to permanent incapacity and an inability to weight bear or stand for any period of time."[13]

[19] In its analysis, the General Division again made reference to Dr. Campbell's opinion from November 2010 that the Claimant was "not able to return to any type of work."[14] The General Division then considered that the Claimant had participated in a work hardening program in August 2010 and had shown improvement in her symptoms but had not met the goals needed to return to her past job duties. The General Division also considered a report from Dr. Campbell dated after the end of the MQP in February 2014. The General Division decided that report showed that the Claimant's condition had shown some improvement because it

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[10] *Ibid.*, para. 29
[11] AD5-9, para. 21
[12] General Division decision, para. 9
[13] *Ibid.*, para. 14

indicated that the Claimant could not do any work that required prolonged sitting or standing or lifting over 20 pounds.

[20] The General Division did not ignore Dr. Campbell's evidence from November 2010, so there is no error of fact in the decision. It weighed that evidence in light of evidence of the Claimant's participation in the work hardening program in 2010 and made note of a medical report from the same physician dated after the end of the MQP that identified essentially the same restrictions. That report did not indicate that the Claimant was incapable regularly of pursuing any substantially gainful employment.

[21] The fact that the General Division stated that there was "no medical evidence" to indicate that the Claimant was unable to be substantially gainfully employed is not entirely accurate in light of Dr. Campbell's evidence, but that inaccuracy alone is not evidence of an error of fact.

[22] Although the General Division's statement that there was "no medical evidence" suggests the General Division may not have considered Dr. Campbell's November 2010 opinion, the rest of the decision shows that the General Division analyzed Dr. Campbell's evidence and determined that the Claimant had a capacity for work. There is no error of fact arising from the General Division's consideration of Dr. Campbell's evidence. The Claimant would like for that evidence to have been weighed differently, but it is not the Appeal Division's role to re-weigh the evidence that was before the General Division.

Issue 2: Did the General Division fail to observe a principle of natural justice by failing to contact or ask any questions of the Claimant's proposed witnesses?

[23] The General Division did not fail to observe a principle of natural justice by failing to contact or ask any questions of the Claimant's proposed witnesses. The hearing proceeded by way of written questions and answers at the Claimant's request. Making that request meant that there would be no oral hearing during which the Claimant's witnesses would testify and potentially be asked questions by the General Division member. The Claimant may not have appreciated the impact of proceeding by questions and answers on testimony from other witnesses, but that does not mean the General Division made an error. The Claimant had the right to be heard and that right was supported; she had the opportunity to make submissions on

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[14] *Ibid.*, para. 29

the issues and to answer questions that were asked of her (in the format she selected, which was by way of written questions and answers).

[24] When the General Division issues a notice of hearing to a claimant and the Minister, the General Division decides whether to hold a hearing by way of written questions and answers; teleconference, videoconference or other means of telecommunication; or the personal appearance of the parties.[15] The DESDA says that a General Division decision can be appealed where the General Division failed to observe a principle of natural justice.[16] According to the Supreme Court of Canada, part of the duty to act fairly is to allow for the right to be heard.[17] The right to be heard is about allowing a person the opportunity to answer the questions put to them and to make submissions on every fact or factor likely to affect the decision.[18]

[25] The Claimant argues that the Minister failed to contact or question the caregiver listed as a witness on the Hearing Information Form.[19] The Appeal Division understands this submission to amount to an allegation that the General Division failed to observe a principle of natural justice[20] (namely, the right to be heard) because the Claimant did not have the opportunity to present her witnesses to give evidence and answer questions.

[26] The Minister relies on the fact that the Claimant stated she preferred that her hearing proceed by way of written questions and answers, and that it is only to the extent that the Tribunal otherwise chooses oral hearings that the witnesses "reserve the right" to be heard orally. The Minister argues that the Tribunal was under "no obligation to assume the burden of proof by reaching out to those potential witnesses or addressing questions to them specifically."[21]

[27] The Minister argues that, absent evidence that the Claimant was prevented from filing evidence, the Appeal Division should not find that the General Division denied the Claimant

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[15] *Social Security Tribunal Regulations*, s. 21
[16] DESDA, s. 58(1)(*a*)
[17] *Therrien (Re)*, 2001 SCC 35
[18] *Kouama v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9008 (FC), para. 15
[19] AD1A-1
[20] DESDA, s. 58(1)(*a*)
[21] AD5-11, para. 27

natural justice. The Minister relies on a decision from the Federal Court[22] that stands for the principle that being prevented from filing evidence results in a denial of justice.

[28] The Claimant is unrepresented (although it appears she may have had some assistance in responding to the written questions and answers posed by the General Division). She has communicated very clearly her dissatisfaction with the experience of completing Tribunal forms without the assistance of counsel.[23] The Minister is correct in pointing out that the Claimant indicated a preference for proceeding by way of question and answers in the Tribunal's Hearing Information Form. The Minister is also correct in noting that the Claimant stated in one submission that her position was that the appeal could proceed in writing based on the current record, but that if the Tribunal determined that the appeal would be heard orally, two witnesses would reserve the right to be heard on the call.[24] That is the submission that it appears the Claimant may have had some assistance in preparing.

[29] The Hearing Information Form the Claimant completed may well have been the cause for some confusion. On that form, the Claimant stated that she would not have representation at the hearing and that she had two witnesses. In response to the question "Are there any forms of hearing in which you could not participate?", she checked boxes for "videoconference," "teleconference," and "personal appearance," leaving "written questions and answers" unchecked.[25]

[30] The Claimant gave multiple reasons why she could not participate in the forms of hearing listed, but the first reason she provided was her "health issues." It may be clear to counsel for the Minister that, if a Claimant states that her health issues preclude her from all forms of hearing except written questions and answers, that means that, when the case proceeds by written questions and answers, the Claimant has forfeited the opportunity to have her proposed witnesses testify, even if the Claimant was asked to and then did identify witnesses earlier in the form. It is open to the Claimant to provide affidavit evidence in writing from witnesses when a matter proceeds by questions and answers. It is equally open to the General Division, if it has questions for the Claimant's proposed witnesses, to ask them in writing, copying the parties on both the

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[22] *Kouama v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9008 (FC)
[23] Application for Leave to Appeal, AD1-2
[24] GD6-5, para. 18
[25] GD5-1 and 2

questions and any answers it might receive in response. The extent to which all of that was clear to this Claimant, who is currently without representation, is less evident. Her submission (which she appears to have had some assistance with) signals an understanding of the implications of selecting written questions and answers, but she does not appear to understand those implications now. In future, it may be that gathering information from Claimants about forms of hearing is done separately from and before the gathering of information about proposed evidence from witnesses. Also, where the Tribunal receives information from a claimant that they cannot participate in various forms of hearing due to "health reasons," the Tribunal might choose to follow up to understand more about the identified barrier to participation and to explore whether participation could be achieved with some form of accommodation.

[31] However, the fact that the General Division did not actually contact any of the Claimant's witnesses to ask questions of them even though the Claimant listed them on the Hearing Information Form is not a violation of natural justice. Nor is it is not a violation of the right to be heard. The Claimant does not have a blanket right for her witnesses to be questioned by the General Division. In fact that may not have happened anyway, even at an oral hearing, if the General Division did not have any questions arising from the witnesses' evidence.

[32] In this case, the General Division did not breach natural justice. The Claimant stated she could not participate in other forms of hearing,[26] so the General Division provided the form of hearing that she could participate in, which was by way of written questions and answers. The Claimant provided a written submission in response to the Minister's submission. That submission signalled to the General Division that her position was that the appeal could proceed in "writing based on the current record."[27] The General Division then provided a detailed set of questions for the Claimant,[28] and the Claimant responded to those questions in writing.[29] The General Division acted fairly—it allowed the Claimant the right to be heard because the Claimant was given the opportunity to answer questions and make submissions on every fact or factor likely to affect the decision.

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[26] GD5
[27] GD6-5, para. 18
[28] GD0-1 to 2
[29] GD8

Issue 3: Did the General Division make an error of law by providing inadequate reasons involving an incorrect pronoun?

[33] The General Division did not make an error of law by providing inadequate reasons. The use of the wrong pronoun in its decision was a mistake, but it is not the type of error outlined in the DESDA that can be addressed on appeal.

[34] The adequacy of reasons is not a stand-alone basis for quashing a decision.[30]

[35] The Claimant argued that the General Division's decision showed a lack of respect for her by using the pronoun "his" to describe her. The General Division's concluding paragraph states: "there is no evidence that at this time that the Appellant has met the criteria required to establish that **his** condition was severe and prolonged…"[31] (emphasis added). The Claimant argues that this appears to have been the result of a process of copying and pasting on the computer.

[36] The Minister argues that the General Division provided adequate reasons for its decision. The Minister argues that the reasons for the decision must be considered as a whole and that the reasons in the entire decision allow the reader to understand how the General Division reached its decision. The Minister argues that the reasons are not confined only to this concluding paragraph in the decision and that the reasons are well articulated, intimately linked to the facts and evidence in the record, and would meet the Supreme Court requirements for justification, transparency, and intelligibility.[32]

[37] The General Division's reasons are not insufficient simply because of the use of the incorrect pronoun in the conclusion. In some situations, evidence of a "cut and paste" job from standard or "boilerplate" language in a decision, and especially in a conclusion, may fail to show the reader that the General Division independently considered the issues and came to grips with them. This is not the case here. It is still clear from the reasons as a whole that the General Division considered the Claimant before it, even if the wrong pronoun was used on a single occasion. The General Division considered and weighed the relevant evidence for the correct

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[30] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62
[31] General Division decision, para. 34
[32] AD5-14, para. 44

Claimant, applied the legal tests, and provided reasons for its decision that meet the Supreme Court's requirements.

CONCLUSION

[38] The appeal is dismissed.

Kate Sellar
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
SUBMISSIONS:	J. S., Appellant Minister of Employment and Social Development, Respondent Philipe Sarrazin, Representative for the Respondent