



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. L. v. Minister of Employment and Social Development*, 2018 SST 582

Tribunal File Number: AD-18-75

BETWEEN:

A. L.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: May 30, 2018

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] A. L. (Claimant) qualified as a practical nursing care aide and worked in this position until she was injured in a number of car accidents. She applied for a Canada Pension Plan disability pension and claimed that she was disabled as a result of these injuries. 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 from the General Division decision is allowed because the General Division erred in law when it failed to give meaning to each word in the definition of "severe." The appeal is referred back to the General Division for reconsideration because the General Division failed to consider any evidence regarding the Claimant's capacity regularly to pursue any substantially gainful occupation.

PRELIMINARY MATTER: FORM OF HEARING

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

- a) The legal issue to be decided is straightforward;
- b) The Minister conceded that the General Division erred in law and requested that the matter be referred back to the General Division for reconsideration;
- c) The Claimant requested that the Appeal Division give the decision that the General Division should have given;
- d) The *Social Security Tribunal Regulations* require that proceedings be conducted as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

ISSUE

[4] Did the General Division err in law when it failed to give meaning to each word in the definition of “severe” in the *Canada Pension Plan (CPP)*?

ANALYSIS

[5] 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. They are 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.¹ I must decide whether the General Division made at least one of these errors for the appeal to succeed.

[6] The Claimant argues that the General Division made a number of errors under the DESD Act, including that it erred in law by failing to consider any of the medical evidence and by concluding that the receipt of long-term disability benefits is determinative of whether her condition was severe under the CPP.

[7] The Minister concedes that the General Division erred in law when it failed to consider the medical evidence that was before it.

[8] Under the CPP, a person is considered disabled only if they are determined to have a severe and prolonged disability. A person is considered to have a severe disability if they are incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.² The Federal Court of Appeal teaches that each word in the definition of “severe” must be given meaning.³ A failure to give meaning to each word in the definition when analyzing the evidence is an error in law.⁴ Therefore, to determine whether the Claimant was disabled, the General Division should have considered whether she was:

¹ DESD Act, s. 58(1)

² CPP, s. 42(2)(a)

³ *Villani v. Canada (Attorney General)*, 2001 FCA 248

⁴ *Garrett v. Canada (Minister of Human Resources Development)*, 2005 FCA 84

- a) Incapable – This element of the definition is normally fact-driven and depends on the evidence presented regarding a claimant’s functioning.
- b) Regularly – This word describes a claimant’s incapacity rather than their employment,⁵ and predictability of work attendance is a necessary consideration.⁶
- c) Of pursuing any substantially gainful occupation – The Federal Court of Appeal instructs that a decision maker must examine a claimant’s terms of employment, including whether performance or production expectations have been adjusted, whether work hours or conditions have been changed, whether any accommodations have been made for the claimant at work, and whether the claimant’s remuneration is different than co-workers’, to decide whether employment is substantially gainful, or whether any work done by the claimant is for a benevolent employer.⁷ The *Canada Pension Plan Regulations* (CPP Regulations) also set out a mathematical formula for “substantially gainful” in relation to an occupation.⁸

[9] In this case, the General Division decision that the Claimant did not have a severe disability was based solely on her receipt of long-term disability payments from her employer that were greater than the amount calculated to be substantially gainful under the CPP Regulations. The decision failed to consider the incapacity and regularity issues. Therefore, it failed to give meaning to all the words in the definition of “severe.” This is an error in law.

[10] The CPP Regulations set out a formula for determining whether an occupation is “substantially gainful” for defining a severe disability.⁹ Therefore the receipt of a salary or wages greater than the amount calculated to be substantially gainful is relevant but not determinative of whether a disability is severe. The receipt of long-term disability benefits is not evidence of work capacity, nor is it evidence of the regularity of the claimed incapacity. Therefore, although earned income is relevant, it is not solely determinative of whether a claimant is disabled under the CPP.

⁵ *Canada (Minister of Human Resources Development) v. Scott*, 2003 FCA 34

⁶ *Chandler v. Minister of Human Resources Development* (November 25, 1996), CP 4040

⁷ *Atkinson v. Canada (Attorney General)*, 2014 FCA 187

⁸ CPP Regulations, s. 68.1

⁹ CPP Regulations, s. 68.1

[11] The CPP Regulations require that a disability pension claimant provide specific information so that the claim can be assessed. This includes a detailed medical report that sets out the nature, extent and prognosis of the disability; the findings upon which the diagnosis is based; and any limitations resulting from the disability.¹⁰ The Federal Court of Appeal also instructs that medical evidence and evidence of efforts to work are necessary to determine whether a claimant is disabled. Clearly, if this evidence is necessary, it must also be considered. The General Division failed to consider this evidence. For these reasons, I am satisfied that the General Division erred in law.

CONCLUSION

[12] The appeal is allowed. The DESD Act states what remedies the Appeal Division can give.¹¹ The Claimant has requested that I give the decision that the General Division should have given. The Minister has requested that the matter be referred back to the General Division for reconsideration. The General Division failed to consider any evidence regarding the Claimant's capacity regularly to pursue an occupation. The receiving and weighing of evidence is at the heart of the General Division's mandate. It is therefore appropriate that this matter be referred back to the General Division so that it can weigh all of the evidence and make a decision on the merits of the disability claim.

[13] It may be that this appeal can be reconsidered based on the written documents filed and the recording of the General Division hearing.

Valerie Hazlett Parker
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
SUBMISSIONS BY:	Paul Wilkins, Counsel for the Appellant Matthew Vens, Counsel for the

¹⁰ CPP Regulations, s. 68

¹¹ DESD Act, s. 59(1)

	Respondent
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