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

Citation: *K. R. v. Minister of Employment and Social Development*, 2018 SST 731

Tribunal File Number: AD-17-475

BETWEEN:

K. R.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: July 13, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, K. R., was involved in a workplace accident in October 2011 that resulted in back and hip pain. She went on short-term disability for a few months, until her claim was accepted by Ontario's Workplace Safety and Insurance Board (WSIB). She then returned to work but says that she was essentially put in a corner with nothing to do. The company that she worked for closed its doors in February 2013, and she has not worked since, though she was retrained through WSIB.

[3] The Appellant applied for a disability pension under the *Canada Pension Plan* (CPP) in December 2014. Her application was refused by the Respondent, the Minister of Employment and Social Development (Minister), as was her request for reconsideration. She then appealed to the Tribunal's General Division, but it dismissed her appeal.

[4] In her application requesting leave to appeal, the Appellant alleged that the General Division committed numerous errors of law and fact and that it breached the principles of natural justice. In my earlier decision, I granted leave on the basis that the Appellant had raised an arguable case that the General Division might have committed an error of fact, but I did not restrict the scope of the appeal in any way. However, for the reasons described below, I have now concluded that the appeal should be dismissed.

PRELIMINARY MATTERS

Adjournment Request Withdrawn and Appellant's Absence

[5] The day before the hearing, the Tribunal received a letter from the Appellant's representative asking that the hearing be adjourned, in part because the Appellant's son had been involved in a motor vehicle accident and she needed to be by his side.[1] Given the timing of the

[1] AD3.

adjournment request and the Tribunal's inability to contact the parties prior to the hearing, the hearing began at the appointed hour, which is when the Appellant's representative withdrew her request for an adjournment.

[6] With respect to the Appellant's attendance at the hearing, her representative assured me that she wanted the hearing to proceed in her absence, and so it did.

Post-Hearing Submissions

[7] As part of her submissions during the hearing, the Minister's representative relied on *R.P.*, a recent Appeal Division decision that had not yet been published or made publicly available.[2] As a result, I invited her to provide a redacted copy of that decision to the Tribunal and said that it would be provided to the Appellant's representative, with an opportunity for comment.[3]

[8] The comments from the Appellant's representative were received within the time allowed, but strayed far beyond a mere response to the particular case that had been provided, and included new evidence and submissions on unrelated topics including, for example, the Appellant's attempts to return to work, labour market "realities", and reports from Statistics Canada and the Ontario Human Rights Commission.[4] Not surprisingly, the Minister's representative noted the breadth of the Appellant's submissions and asked for the opportunity to reply to these reports, should the Tribunal intend to rely on them.[5]

[9] The Appellant's submissions are somewhat convoluted. Plus, the parts that are permissible are so intertwined with the parts that are impermissible that it is hard to separate the two. In any event, I have taken the Appellant's submissions into account, but only insofar as they respond to the Appeal Division's decision in *R.P.*

[2] *R.P. v Minister of Employment and Social Development* (March 8, 2018), AD-16-1373.
[3] AD4.
[4] AD5.
[5] AD6.

[10] As already stated in my leave to appeal decision, the Appeal Division does not normally consider new evidence.[6] Its mandate is not to conduct fresh hearings. Rather the Appeal Division's focus is on whether the General Division committed a recognized error, based on the information that the General Division had before it. While there are some exceptions to the rule against considering new evidence, none of those exceptions apply to the facts of this case, and I refuse to consider any new evidence provided by the Appellant, even if cloaked as a responding submission.

ISSUES

[11] In reaching this decision, I considered the following issues:

a) Did the General Division commit an error of fact by failing to appreciate that the Appellant's condition had deteriorated over time, as evidenced by changes to her medication and evolving MRI reports?

b) Did the General Division commit an error of fact by concluding that the Appellant had a residual capacity to work, based on her ability to continue working after the October 2011 accident and to obtain a certificate in office administration?

c) Did the General Division commit an error of law in its interpretation of the Federal Court of Appeal's decision in *Inclima*?[7]

d) Did the General Division violate a principle of natural justice by not asking more questions of and obtaining more information from the Appellant during the hearing?

[12] As mentioned above, and in paragraphs 8 and 9 of my leave to appeal decision, the Appellant raised a large number of issues in her application requesting leave to appeal. At the hearing before me, however, the list of alleged errors was greatly simplified to those above. Importantly, the Appellant's representative abandoned any allegation that the choice of a teleconference hearing had limited her client's ability to present her case.

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[6] *Mette v Canada (Attorney General)*, 2016 FCA 276 at para 12; *Marcia v Canada (Attorney General)*, 2016 FC 1367 at para 34.
[7] *Inclima v Canada (Attorney General)*, 2003 FCA 117.

ANALYSIS

The Appeal Division's Legal Framework

[13] For the Appellant to succeed, she must show that the General Division committed at least one of the three recognized errors (or grounds of appeal) set out in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act). Generally speaking, these reviewable errors concern whether the General Division:

a) breached a principle of natural justice or made an error relating to its jurisdiction;

b) rendered a decision that contains an error of law; or

c) 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.

[14] When considering the degree of scrutiny with which I should review the General Division decision, I have focused on the language set out in the DESD Act.[8] As a result, any breach of a principle of natural justice or any error of law could justify my intervention. For an erroneous finding of fact to justify my intervention, however, the General Division decision must be based on that error, and the General Division must have made the error in a perverse or capricious manner or without regard for the material before it. The Federal Court of Appeal recently characterized erroneous findings of fact as ones that squarely contradict or are unsupported by the evidence.[9]

Issue 1: Did the General Division commit an error of fact by failing to appreciate that the Appellant's condition had deteriorated, as evidenced by changes to her medication and evolving MRI reports?

[15] In my view, the General Division did not commit an error of fact that justifies my intervention.

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[8] *Canada (Attorney General) v Jean*, 2015 FCA 242 at para 19; *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93.
[9] *Garvey v Canada (Attorney General)*, 2018 FCA 118 at para 6.

[16] On seven occasions, the General Division mentioned that the Appellant took Tylenol or Tylenol No. 3 to manage her back pain. In paragraph 27 of its decision, the General Division noted the following: "Treatment for her hip and back pain continues to be Tylenol 3" and "there is no medical report showing that Tylenol 3 is ineffective in managing her pain or that she requires a change in her medication to better improve the management of her pain and better improve her functionality." Further, in paragraph 37 of its decision, the General Division concluded that the Appellant was able to manage her pain with the use of Tylenol.

[17] In contrast, the Appellant highlights a medical expense report provided by her pharmacy in which prescriptions for stronger painkillers appear, starting in December 2013.[10]

DATE	QUANTITY	DRUG NAME
10-Dec-2013	60	Oxyneo 10 mg
17-Jan-2014	60	Oxyneo 10 mg
20-May-2014	60	Hydromorph Contin 3 mg
24-Apr-2015	100	Oxycocet 5/325 mg

[18] The Appellant also discussed the medications she takes at two points during the General Division hearing. On the first occasion, she mentioned taking daily doses of Tylenol No. 3 and Gabapentin, along with Oxycodone on days when her pain was so severe that she could not move.[11] On the second occasion, the Appellant only mentioned taking Tylenol No. 3 and Gabapentin.[12]

[19] According to the Appellant, the General Division ignored the fact that she was taking stronger painkillers, revealing a deterioration in her condition.

[20] In addition, the Appellant argues that the General Division failed to appreciate how MRIs of her spine taken in 2012 and 2014 also revealed a deterioration in her condition. Those MRIs—

[10] GD2-13 to 14.
[11] Audio recording of General Division hearing (GD hearing) at approx 19:50 to 20:55.
[12] GD hearing at approx 28:10 to 28:55.

summarized in paragraphs 12 and 16 of the General Division decision, and analyzed in paragraphs 25 to 26—state the following:

2012 MRI of Lumbar Spine (GD2-45)	2014 MRI of Lumbar Spine (GD2-41)
L4-5: Mild bulging disk, annular tear in the 4 o'clock and small far left lateral disk protrusion. No significant stenosis of spinal canal and neural foramina. L5-S1: Mild bulging disk. No significant spinal stenosis. Mild bilateral foraminal stenosis.	At L4-5, there is left lateral disk bulge with mild narrowing of the left intervertebral foramen. Lateral recesses are clear with no evidence of spinal stenosis At L5-S1, there is broad based disk bulge with mild narrowing of the right intervertebral foramen. Lateral recesses are clear with no evidence of spinal stenosis OPINION: Mild degenerative changes as described.

[21] In response, the Minister notes that the 2012 and 2014 MRIs were adequately dealt with in the General Division decision. As a result, the Appellant is simply asking for the evidence to be reweighed, which is something that I must avoid doing.

[22] With respect to the medical expense report, the Minister acknowledges that it was not specifically mentioned in the General Division decision, but contends that the General Division is presumed to have considered all the evidence and need not refer to each and every piece of evidence that it has before it.[13] In addition, the Minister argues that the Appellant's medical expense report lacks the context required to be deserving of significant weight.

[23] Finally, the Minister emphasizes how the General Division's conclusion that the Appellant relies on Tylenol No. 3 to manage her pain is well supported by the evidence, including the medical report completed by her family physician in December 2014;[14] the questionnaire for disability benefits that the Appellant completed with her application, also in December 2014;[15] and her reconsideration request from May 2015, which describes a day in

[13] *Simpson v. Canada (Attorney General)*, 2012 FCA 334 at para 10.
[14] GD2-47 to 52.
[15] GD2-53 to 60.

which her pain was particularly severe.[16] None of these documents refer to the use of pain medication beyond Tylenol No. 3. And in the Appellant's own testimony, she made only one reference to using Oxycodone on days when her pain was very severe.

[24] I largely agree with the Minister's submissions on this issue. The General Division decision summarized and assessed the 2012 and 2014 MRIs but did not find them to be indicative of an important deterioration in the Appellant's condition. That conclusion was open to the General Division. While there were changes between the two reports, the radiologist's overall impression, as expressed at the end of the 2014 report, was of just "mild degenerative changes".

[25] In addition, the fact that the Appellant occasionally took other opioid-based pain-relief medication does not detract from the General Division's conclusion to the effect that the Appellant's pain is managed on a day-to-day basis with Tylenol No. 3 and that there is no medical report to the contrary.

[26] I acknowledge, of course, that there was evidence indicating that the Appellant sometimes took other opioid-based medication, but that evidence was of little value without further explanation. For example, it is unknown how often the Appellant took those medications and what effect, if any, they had on her functionality.

[27] Similarly, the Appellant's medical expense report was of little value without further context. In particular, I note that the Appellant was prescribed three different medications and that there were significant gaps between some of her prescriptions, the last two being over a year apart.

[28] In the circumstances, I cannot say that the Appellant's medical expense report was of such importance that the General Division should have mentioned it specifically.

[29] To the extent that the Appellant is arguing that her medical expense report and changing MRIs should have signalled to the General Division that the Appellant's condition was deteriorating, I interpret her submissions as urging me to reweigh the evidence in a way that

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[16] GD2-11.

would be more favourable to her case. However, the courts have already held that this is not part of the Appeal Division's role.[17] The fact that the Appellant disagrees with the way that the evidence was weighed does not fall within any of the grounds of appeal listed under section 58(1) of the DESD Act.[18]

[30] In other words, it was open to the General Division to conclude that the Appellant's medical expense report and evolving MRIs did not reveal a deterioration in her condition. I cannot find that the General Division arrived at a conclusion that is squarely contradicted or unsupported by the evidence.

Issue 2: Did the General Division commit an error of fact by concluding that the Appellant had a residual capacity to work, based on her ability to continue working after the October 2011 accident and to obtain a certificate in office administration?

[31] In my view, the General Division did not commit the error of fact alleged by the Appellant.

[32] In order for the Appellant to be eligible for a disability pension, she had to show that she had a severe and prolonged disability, as defined under the CPP, on or before December 31, 2015 (the end of her minimum qualifying period).

[33] Part of the challenge of the Appellant's case, however, came from the fact that she claimed to have been disabled by a workplace injury that occurred in October 2011. Nevertheless, she returned to work after that injury and continued to work until February 2013, when her employer declared bankruptcy. She then participated in a six-month course at X College and obtained a certificate in office administration. On its face, therefore, the evidence suggests that the Appellant maintained the capacity to work, even after her October 2011 workplace accident.

[34] The Appellant argues, however, that these facts were not indicative of an ability to work and that the General Division misunderstood the evidence, leading it to the wrong conclusion.

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[17] *Garvey*, *supra* note 9 at para 11; *Johnson v Canada (Attorney General)*, 2016 FC 1254 at para 17.
[18] *Rouleau v Canada (Attorney General)*, 2017 FC 534 at para 42; *Grosvenor v Canada (Attorney General)*, 2018 FC 36 at para 34.

[35] More specifically, the Appellant explained during the General Division hearing that her previous employer initially said that it could not accommodate her restrictions on sitting, standing, walking, lifting, pulling, and pushing. Once her WSIB claim was approved, however, they preferred to put her back on the payroll, even though she was just put in an office with nothing to do. And concerning her course at X College, she said that it was only four hours per day, and that the pain from driving prevented her from attending on a regular basis. The Appellant submits that this evidence was significant in light of the "regularity" requirement in section 42(2)(*a*) of the CPP.

[36] In response, the Minister argues that the General Division's conclusion concerning the Appellant's ability to work was well supported by the evidence. In particular, regardless of how much work she had to do, the Appellant was regularly able to attend work for up to five hours per day, which is significant in light of her transferable skills. Plus, she managed to complete a college course, even if she did not attend regularly.

[37] In addition, the General Division's conclusion regarding the Appellant's capacity to work was supported by the June 13, 2012, ambulatory care report of Dr. McCormick.[19] In that report, Dr. McCormick reviewed the Appellant's history and 2012 MRI, performed a physical exam, and then concluded that the Appellant should not return to her previous job but that she would be able to retrain for another job.

[38] Again, I am largely in agreement with the submissions of the Minister. Based on the evidence that it had before it, it was open to the General Division to conclude that the Appellant maintained a residual capacity to work. The Appellant has not alleged that the General Division completely overlooked the evidence regarding the Appellant's modified duties at work or her inability to attend X College on a regular basis.

[39] It is also clear that the General Division was aware of the "regularity" requirement embedded in section 42(2)(*a*) of the CPP, but was entitled to weigh the Appellant's evidence concerning her spotty attendance at X College against the fact that there was no similar evidence

[19] GD2-42 to 43.

concerning her attendance at work until February 2013, and a lack of supporting medical evidence.[20]

[40] In my view, the Appellant is arguing, once again, that the General Division gave too much or too little weight to certain parts of the evidence. As mentioned above, however, this is not one of the grounds on which section 58(1) of the DESD Act allows my intervention.

Issue 3: Did the General Division commit an error of law in its interpretation of the Federal Court of Appeal's decision in *Inclima*?

[41] I agree with the General Division's interpretation of *Inclima* in this case.

[42] *Inclima* is a very short decision from the Federal Court of Appeal, but one that has been cited countless times for the following proposition, which relates to the obligation of certain CPP disability claimants to show efforts at obtaining and maintaining employment:[21]

> Consequently, an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.

[43] In this case, the General Division concluded that, despite her impairments, the Appellant maintained a residual capacity to work. It also recognized that the Appellant had applied for jobs after completing her course at X College, but was never called back for an interview. The General Division then made the following observation (at paragraph 30):

> As the Appellant has not attempted alternate work since being laid off from her job in 2013 due to her employer having declared bankruptcy and after undergoing training it is difficult to conclude that effort at obtaining and maintaining employment has been unsuccessful by reason of her health condition.

[44] Before me, the Appellant argues that she met the test in *Inclima* because she made serious efforts to look for work, but her efforts were ultimately unsuccessful.

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[20] General Division decision at para 31.
[21] *Inclima*, *supra* note 7 at para 3.

[45] In response, the Minister cites *R.P.* and argues that the elements of the test in *Inclima* are conjunctive, meaning that those who are subject to its requirements must show efforts at obtaining **and** maintaining employment before they can be considered eligible for disability benefits. In the Minister's submission, therefore, claimants will never meet the requirements in *Inclima* based solely on their efforts at finding work. Rather, they must actually obtain a suitable position and attempt to fulfill its associated duties.

[46] In reply, the Appellant argues that it would be troubling to adopt the Minister's submissions on this point. First, claimants such as the Appellant operate at a significant disadvantage when trying to secure a position, making the test very difficult to meet. And second, the choice of who to hire is something entirely out of a claimant's control. In addition, the Appellant argues that the Appeal Division decision in *R.P.* is non-binding and can be distinguished on the facts. On the one hand, the appellant in *R.P.* had merely looked into alternative employment, but resigned himself to the fact that he was unable to do the available jobs, so never applied for any of them. And on the other hand, the Appellant in this case not only investigated, but also applied for several jobs. She should not be punished for the fact that prospective employers never responded to her application.

[47] Though the *Inclima* decision refers to claimants showing efforts at obtaining and maintaining employment, those efforts are not an eligibility requirement expressly set out in the CPP. This recently prompted one of my colleagues to try and describe how the *Inclima* decision fits within the CPP disability pension framework. Her analysis is worth repeating here:[22]

> The burden of proving on a balance of probabilities that one's disability is severe and prolonged rests with the claimant. While there is no explicit requirement under the CPP for a claimant to search for employment, attempt lighter work or retrain in order to expand their vocational options, the failure of such employment efforts can provide an evidentiary basis to support a claimant's inability regularly to pursue a substantially gainful occupation (by substantiating an inability to work at all, or by supporting an inability to maintain employment, to work in sufficiently remunerative employment, or to do so with consistent frequency). Starting with *Inclima*, the Federal Court of Appeal has repeatedly affirmed that evidence of employment efforts is required to discharge the burden of proof, in the context of residual work capacity. As I understand the direction from the

[22] *S. G. v Minister of Employment and Social Development*, 2018 SST 19 at para 17.

> Federal Court of Appeal, an individual who is capable of some type of employment will not generally establish, on the balance of probabilities, that he or she is truly incapable regularly of pursuing any substantially gainful employment, without making genuine yet unsuccessful efforts to secure such employment.

[48] Flowing from this, my colleague later focused on cases in which the claimant has a residual capacity to work and summarized the relevant analysis in this way:[23]

> If there is evidence of work capacity, what do the claimant's employment efforts tell us about whether he or she was, in the real world context, "incapable" "regularly" of "pursuing" "any" "substantially gainful" occupation? Were the claimant's efforts at obtaining and maintaining employment unsuccessful by reason of the health condition?
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> If there have been no employment efforts, or if employment efforts failed solely for reasons unrelated to the health condition, the *Inclima* analysis allows the decision-maker to conclude that severity has not been established; in these circumstances the claimant has not discharged the burden of proving that he or she was, by reason of his or her disability, incapable regularly of pursuing any substantially gainful occupation.

[49] Whether the test in *Inclima* can be met by claimants who have never obtained alternate employment is an interesting question, but not one that I need to decide on the facts of this case. I say that because, regardless of the efforts that were made, *Inclima* requires that those efforts be unsuccessful **because of the claimant's health condition**. In this case, the link between the Appellant's health condition and her unsuccessful job applications was never made.

[50] Certainly, the Appellant's health condition did not prevent her from applying for jobs, since that is something she testified to doing several times. However, she claims to have never gotten a response to any of those applications. According to the General Division, this lack of response was due to socio-economic factors, though I am unclear as to the evidentiary basis on which the General Division relied when drawing that conclusion.[24] Nevertheless, it is clear to me that there was no evidence linking the Appellant's unsuccessful job applications to her health condition. Since this link was not established, it was open to the General Division to rely on *Inclima* and conclude that the Appellant had not discharged her burden of proof: she had not

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[23] *Ibid* at para 19.
[24] General Division decision at para 36.

established, on a balance of probabilities, that she was incapable regularly of pursuing any substantially gainful occupation.

Issue 4: Did the General Division violate a principle of natural justice by not asking more questions of and obtaining more information from the Appellant during the hearing?

[51] I have decided to deal with this issue briefly, although it was not clearly raised until the Appeal Division hearing.

[52] At the hearing before me, the Appellant's representative emphasized several times how the Appellant had no legal representation at the General Division hearing and suggested that the member should, therefore, have asked more questions of her, particularly in areas that the member knew would be important to her decision. For example, the General Division member should have asked more questions concerning the Appellant's medications, her attendance at work before February 2013, the extent to which her duties were modified at that time, and her attempts to return to work after completing the course at X College.

[53] As mentioned above, the Appellant had initially argued that the fairness of the General Division hearing was compromised by its decision to proceed by way of a teleconference hearing, rather than by videoconference or in-person. The Appellant's representative abandoned that argument at the hearing before me, but the Minister had already responded to it by saying that alleged breaches of natural justice must be raised at the earliest practicable opportunity or are deemed to have been waived, and that the Appellant confirmed during the hearing that she had had a full opportunity to present her case.[25]

[54] In my view, the Minister's arguments also apply to this issue, with minor adjustments. First, the Appellant's arguments could have been raised sooner, such as in her application requesting leave to appeal. Second, there is no allegation that the General Division prevented the Appellant in any way from fully presenting her case. Third, it was the Appellant's obligation to establish her entitlement to a CPP disability pension.[26] And finally, the Appellant cited no legal authority in support of the proposition that the General Division was under an obligation to seek

[25] *Gill v Canada (Attorney General)*, 2011 FCA 195; GD hearing at approx 36:20 to 37:25.
[26] *Dossa v Canada (Pension Appeal Board)*, 2005 FCA 387 at para 6.

evidence or obtain more information from the Appellant. In fact, the Federal Court recently came to the opposite conclusion.[27]

CONCLUSION

[55] While I sympathize with the difficult situation in which the Appellant finds herself, the legal framework that the Appeal Division operates within does not allow me to weigh the evidence afresh. Rather, I can only intervene in cases where a recognized ground of appeal has been established, but that is not the case here.

[56] The appeal is dismissed.

Jude Samson
Member, Appeal Division

HEARD ON:	May 2, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Angela Browne (paralegal), Representative for the Appellant Nathalie Pruneau, Representative for the Respondent

[27] *Grosvenor*, *supra* note 18 at para 38.