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

Citation: *Z. D. v. Minister of Employment and Social Development*, 2018 SST 953

Tribunal File Number: AD-17-464

BETWEEN:

Z. D.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: September 27, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] Z. D. (Claimant) completed high school in Bosnia. She came to Canada with her husband and children, escaping war. She had back surgery in 2003. She worked as a supervisor at a hotel for over two years and then as a manager at a major retailer. She quit the job with the retailer because she was required to lift heavy furniture, which was difficult on her back. She explains that she could not find light work, so she accepted a job with a catering company as an events server in 2011. Her hours at that job varied, depending on the employer's needs and her ability to accept the shift based on her health. She explains that she quit the job in 2013 because it involved heavy lifting that aggravated her back pain and right shoulder pain. The Claimant applied for a disability pension under the *Canada Pension Plan* (CPP) in August 2013. She listed her main disabling conditions as: diabetes, high blood pressure, high cholesterol, back surgery, thyroid problems, two caesarian sections, anxiety, eye surgery, a torn shoulder, and a bad lower back.

[3] She says she tried to find other light-part time work without success, so she stopped searching for a job in 2016. The Minister denied her appeal both initially and on reconsideration. The General Division of this Tribunal denied her appeal in April 2017. The General Division found that the Claimant did not have a severe disability within the meaning of the CPP. In reaching that conclusion, the General Division relied on: the lack of medical reports and the lack of treatment during her minimum qualifying period (MQP) and the period of proration, as well as the Claimant's own evidence about the part-time work she completed.

[4] The Appeal Division granted leave to appeal the General Division's decision, finding that there was an arguable case for errors of law in the decision.

[5] The Appeal Division must decide whether the General Division made any errors such that the appeal should be granted. If the Appeal Division grants the appeal, it must decide

whether to give the decision that the General Division should have given, to refer the case back to the General Division for reconsideration, or to rescind or vary the General Division's decision.

[6] The Appeal Division finds that the General Division did make an error of law by failing to engage in the required analysis of the Claimant's personal circumstances. The Appeal Division has a complete record on the issue and will provide the decision that the General Division should have given.

[7] Analysis of the Claimant's personal circumstances produces the same result: the Claimant has not proven that she had a severe disability at or before the end of her minimum qualifying period (MQP) or the period of proration. The appeal is dismissed.

ISSUES

1. Did the General Division make an error of law by requiring the Claimant to show that she was "significantly functionally disabled and limited in her activities of daily living," rather than considering whether she was "incapable regularly of pursuing any substantially gainful occupation?"

2. Did the General Division make an error of law by failing to provide adequate reasons in relation to the Claimant's work from 2011 to 2013?

3. Did the General Division make an error of law by failing to consider all the Claimant's personal circumstances in determining whether she has a severe disability within the definition of the CPP?

ANALYSIS

Appeal Division Review of the General Division Decision

[8] 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 *Department of Employment and Social Development Act* (DESDA), which sets out the grounds of appeal for cases at the Appeal Division.

[9] The DESDA says that a factual error occurs when the General Division bases 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.[1]

[10] By contrast, the DESDA says that a legal error occurs simply when the General Division makes an error of law, whether or not the error appears on the face of the record.[2]

Issue 1: Did the General Division make an error of law by requiring the Claimant to show that she was "significantly functionally disabled and limited in her activities of daily living," rather than considering whether she was "incapable regularly of pursuing any substantially gainful occupation?"

[11] The General Division did reference a need for the Claimant to show that she was "significantly functionally disabled and limited in her activities of daily living," but the use of this phrase in this case is not sufficient to show that the General Division applied the wrong test for a severe disability. The General Division required the Claimant to show that she was incapable regularly of pursuing any substantially gainful occupation, but in the context of that analysis, it also considered the Claimant's functional limitations as they relate to her capacity to work, as is required by law.

[12] The General Division must determine whether the Claimant had a severe and prolonged disability on or before the MQP or the prorated date. In order to qualify for benefits under the CPP, the Claimant must be "incapable regularly of pursuing any substantially gainful occupation."[3] Each word in that test has meaning.[4] A failure to apply that test would be an error of law.

[13] The Appeal Division granted leave to appeal partly because there was an arguable case that the General Division required the Claimant to show that she was "significantly functionally

[1] DESDA, s. 58(1)(*c*)
[2] DESDA, s. 58(1)(*b*)
[3] *Canada Pension Plan*, s. 42(2)(*a*)(i)
[4] *Villani v. Canada (Attorney General)*, 2001 FCA 248

disabled and limited in her activities of daily living," rather than requiring her to show that she was "incapable regularly of pursuing any substantially gainful occupation."

[14] The Claimant is unrepresented and did not provide a submission on this particular point.

[15] The Minister argues that the General Division did not misstate the legal test for a severe disability under the CPP and that the General Division stated the test correctly in other parts of the decision.[5] The Minister notes that paraphrasing the legal test in one part of a decision when the test is correctly stated earlier in the reasons is generally unwise, but not an error of law.[6]

[16] In the decision, the General Division appropriately set out that the Claimant needed to show she had a severe and prolonged disability on or before December 31, 2010 (the MQP), or during the period of proration, which was January 1, 2011, to May 31, 2011.[7] The General Division also properly stated that the Claimant must be "incapable regularly of pursuing any substantially gainful occupation," which is the definition of the "severe disability" that qualifies claimants for a disability pension.[8]

[17] The General Division then reviewed some of the medical evidence and the Claimant's testimony, noting that there was no medical evidence from May 2003 to March 2012 in the file.[9] The General Division also considered the work that the Claimant completed from 2011 to 2013 and concluded that she did not show she met the definition for a severe disability.

[18] The General Division went on to consider the Claimant's evidence that although she had worked, she was not "capable regularly" of any substantially gainful occupation within the meaning of the CPP. The General Division considered the employer's evidence and the Claimant's own evidence about whether her disability impacted her availability.[10] The General Division considered the number of hours the Claimant worked.[11] Then, the General Division considered the Claimant's activities of daily living in relation to this question of whether the

[5] General Division decision, paras. 26, 32
[6] *Canada (Minister of Human Resources Development) v. Quesnelle*, 2003 FCA 92, at para 16
[7] General Division decision, para. 24
[8] *Ibid.*, para. 26
[9] *Ibid.*, para. 27; it should be noted that there were two reports in May 2003 that the General Division considered, so it seems the General Division should have said that there were no reports between June 2003 and March 2012
[10] *Ibid.*, para. 29
[11] *Ibid.*, para 29 "worked long hours on occasion"

Claimant was "capable regularly." Presumably, the General Division considered this because a claimant who requires a high degree of assistance in activities of daily living may not be capable regularly of any substantially gainful occupation, even if the claimant worked part-time.

[19] The General Division concluded that the Claimant was able to perform part-time work at a suitable job that was within her capacity and fit within her limitations on or before the end of the period of proration. It was in the context of that finding that the General Division stated "the Tribunal is unable to conclude that the [Claimant] was significantly functionally disabled and limited her activities of daily living at the time of the MQP or prorated date."[12]

[20] This reference to the Claimant's functional limitations and activities of daily living is not an error. This phrase did not replace the use of the correct test for a severe disability under the CPP; it was merely a part of the General Division's analysis about whether the Claimant might be capable regularly of any substantially gainful work, given that she had been doing some work with variable hours.

Issue 2: Did the General Division make an error of law by failing to provide adequate reasons in relation to the Claimant's work from 2011 to 2013?

[21] The General Division did not make an error of law by failing to provide adequate reasons relating to its treatment of the post-MQP evidence of part-time work from 2011 to 2013.

[22] The Appeal Division granted leave to appeal because there was an arguable case that the General Division relied on the evidence about the Claimant's post-MQP work to determine that her disability was not severe, without explaining how this evidence supports a finding that the Claimant's disability was not severe on or before the end of the MQP and during the period of proration. There was an arguable case that the General Division failed to provide reasons that offer an understanding of the analysis it applied to the pre- and post-MQP evidence, respectively.

[23] Failing to articulate reasons related to a key issue in circumstances that require an explanation can constitute an error of law.[13] More recently, the Supreme Court of Canada found (in a case from the labour law context) that the insufficiency of reasons is not a stand-alone basis

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[12] *Ibid.*, para. 31

[13] *R. v. Sheppard*, [2002] 1 SCR 869, para. 39; *Doucette v. Canada (Minister of Human Resources Development)*, 2004 FCA 292, para. 6

for appeal.[14] However, in a case in which a claimant was seeking a disability pension under the CPP, the Federal Court of Appeal distinguished that Supreme Court of Canada decision on the sufficiency of reasons:

> In my view, in these circumstances Newfoundland Nurses is distinguishable. It is one thing for an administrative decision-maker to issue sparse reasons to sophisticated parties who regularly engage in labour arbitration and, thus, are familiar with the legal and factual landscape. It is quite another to issue adverse reasons of this sort to a person like Ms. D'Errico, on a record that calls for explanation.[15]

[24] A claimant must provide some medical evidence of disability in order to prove that he or she has a severe disability under the CPP.[16] Evidence that a claimant has worked may show a capacity to work, but not in all cases. For example, some work completed by a claimant may be considered a "failed attempt" that does not show a capacity for work at all. The Federal Court found that while there is no firm line between work that establishes capacity and work that is a failed attempt, a return to work that lasts only a few days would be a failed attempt, but two years of earnings consistent with what the claimant earned before is not a failed attempt.[17]

[25] The Minister argues that the General Division's reasons were sufficient. The Minister states that while the General Division's decision did not provide a detailed summary of the earnings from this work, the General Division did cite the Claimant's pay history and time sheets, which shows that it was aware of the precise earnings and hours worked.[18] The Minister acknowledges that earnings and hours worked are relevant in determining whether work was substantially gainful, but it also acknowledges that seasonal part-time work from 2011 to 2013 cannot be considered a failed work attempt.

[26] The General Division's reasons could have been clearer about the role that the Claimant's work from 2011 and 2013 played in its decision-making. It would have been preferable for the General Division to make it clear how the post-MQP/proration work assisted in showing that the Claimant's disability was not severe during the MQP/proration period.

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[14] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62
[15] *D'Errico v. Canada (Attorney General)*, 2014 FCA 95
[16] *Warren v. Canada (Attorney General)*, 2008 FCA 377
[17] *Monk v. Canada (Attorney General)*, 2010 FC 48
[18] AD3-23 notes the General Division decision references pay history at para. 18 and time sheets at para. 29

[27] As a starting point, the General Division did note, however, that there was a lack of medical evidence during the MQP and the proration period that supported a finding of a severe disability. It does not appear that the General Division had any medical evidence before it about a change in the Claimant's condition between May 31, 2011, when the period of proration ended, and October 2011, when she began to work. The General Division may well have assumed that the Claimant's capacity for work up to May 31, 2011, was the same as it was when she started the job in October 2011.

[28] However, in this case, the failure to provide further explanation about the role of that work from 2011 to 2013 does not rise to the level of an error. The Claimant's post-MQP/proration work was part of the General Division's reasons, but in light of the lack of medical evidence in the file, it was not a key issue in a circumstance that required explanation. The General Division had already found that there was insufficient medical evidence on the record to support a finding of a severe disability. The General Division then considered the work and found that given there was a:

> lack of medical reports and/or treatment on the date of her MQP, December 2010 or her prorated date of May 2011, combined with the [Claimant's] evidence that she continued to work part-time for several years beyond that date, the Tribunal is not persuaded that the [Claimant] is severely disabled.[19]

[29] The reasons are not so deficient that there is any error of law. Reading the decision as a whole, it is clear that the Claimant's work after the end of the MQP was a factor in the General Division's analysis, but the gap in the medical evidence from the time of the MQP and the period of proration meant that the General Division's reliance on the work was not a key issue that required more explanation, given the circumstances.

Issue 3: Did the General Division make an error of law in failing to consider all the Claimant's personal circumstances in determining whether she has a severe disability within the definition of the CPP?

[30] The General Division made an error of law in its decision because it failed to engage in an analysis of all the Claimant's personal circumstances in determining whether her disability was severe.

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[19] General Division decision, para. 27

[31] When a decision-maker ignores items of evidence that the law requires it to consider, then that decision-maker has made an error of law.[20] When a decision-maker, in applying a legal test (like the requirement to consider the Claimant's personal circumstances), fails to consider a required element of that test, then the legal test has been altered such that it was not applied and the decision-maker has made an error of law.[21]

[32] In determining whether a claimant has a severe disability, the General Division must apply a real world approach to the claimant's employability, which involves, in part, considering the claimant's personal circumstances, such as age, education level, language proficiency and past work and life experience.[22] In order to properly apply this "real world" test, the General Division must do more than simply note the relevant elements of the claimant's personal circumstances: it must "draw inferences from those facts by reference to the law that it is required to apply."[23] A failure to assess the claimant's personal circumstances is an error of law.[24]

[33] There are also cases that suggest that this assessment is less important or not required in some circumstances.[25] In *Doucette*, the Federal Court of Appeal found there was no need to make an in-depth assessment of the claimant's personal circumstances given that the decision-maker had already determined that the true cause of the claimant's inability to return to work was his failure to make efforts to return. In that case, there was also medical evidence on the record (a psycho-vocational assessment) that concluded the claimant had the capacity for work and then listed jobs he could do. In *Giannaros*, the Federal Court of Appeal found that it was not an error of law to fail to consider the claimant's personal circumstances. In that case, there was evidence that the claimant was advised twice to return to work. In *Kiriakidis*, the Federal Court of Appeal found it was not an error of law in that instance to fail to assess personal circumstances. In that case, there was evidence the claimant worked during the MQP. That work was acknowledged and discussed in medical reports.

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[20] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 746, para. 41
[21] *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, para. 44
[22] *Villani v. Canada (Attorney General)*, 2001 FCA 248
[23] *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211
[24] *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211; *Canada (Attorney General) v. St-Louis*, 2011 FC 492
[25] *Doucette v. Canada (Minister of Human Resources Development)*, 2004 FCA 292; *Giannaros v. Canada (Minister of Social Development)*, 2005 FCA 187; *Kiriakidis v. Canada (Attorney General)*, 2011 FCA 316

[34] The Minister argues that the General Division did not fail to engage in an analysis of the Claimant's personal circumstances. The Minister acknowledges that the General Division did not analyze the Claimant's education or degree of language proficiency in the decision, but notes that it did reference her education in the facts.[26] In its decision, the General Division discussed the Claimant's level of education and the level of language proficiency that she displayed during the hearing. The Minister argues that the Claimant showed proficiency in English during the hearing before the General Division, so the General Division was familiar with the Claimant's level of education and language proficiency in English.

[35] The Minister argues that the General Division made an error of law when it failed to analyze the Claimant's personal circumstances in accordance with the principles,[27] and that here, the General Division considered the relevant factors. Whether those factors were properly assessed is a question of mixed fact and law, and the General Division does not have jurisdiction over that type of error.[28]

[36] The General Division made an error of law. The General Division appropriately acknowledged[29] the need to assess the severe criterion in a "real-world" context;[30] the question is whether the General Division failed to actually engage in this analysis. When reaching a conclusion about the Claimant's personal circumstances, the General Division must consider such factors as her age, level of education, language proficiency, and past work and life experience.

[37] The Minister is correct to note that the DESDA does not give the General Division jurisdiction over questions of mixed fact and law where those questions merely involve a disagreement on the application of settled law to the facts.[31] However, this is a case in which the General Division failed to expressly consider each element of the Claimant's personal circumstances. It is not enough for there to be a reference to the relevant facts in the evidence section of the decision, because the General Division needed to draw inferences from the facts by

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[26] General Division decision, para. 23
[27] *Villani v. Canada (Attorney General)*, 2001 FCA 248
[28] *Quadir v. Canada (Attorney General)*, 2018 FCA 21
[29] General Division decision, para. 25
[30] *Villani v. Canada (Attorney General)*, 2001 FCA 248
[31] *Garvey v. Canada (Attorney General)*, 2018 FCA 118

reference to the law that it was required to apply, not simply cite some of the Claimant's personal circumstances in passing.

[38] The General Division made note of the Claimant's age in the evidence but did not do so at all in the analysis. Some of the Claimant's work history is mentioned in the analysis,[32] but there is no analysis of her employability in light of her education or her degree of language proficiency. This failure to engage in an analysis of the Claimant's personal circumstances is an error of law under the DESDA.

[39] It could be argued that failing to assess all the Claimant's personal circumstances is not an error of law in light of the lack of medical evidence from the MQP/proration period and the Claimant's work activities after the MQP/proration period. However, this case is different from the cases that seem to suggest that assessing the personal circumstances is not necessary or less important. In this case, the General Division did not rely on specific and compelling medical documentary evidence like the kind in both *Doucette* and *Giannaros*, which clearly supported capacity for work.[33] The Claimant's situation is also different from the claimant's situation in *Kiriakidis* because the Claimant worked after the MQP/proration period, but was not working at the end of the period of proration itself. The Claimant's case called for an assessment of her personal circumstances, and the General Division failed to fully engage in that analysis, which is required by cases like *Lalonde* and *St-Louis*.[34] The General Division made an error of law.

Remedy

[40] Where the Appeal Division finds an error under the DESDA, it may give the decision that the General Division should have given; refer the case back to the General Division for reconsideration; or confirm, rescind or vary the General Division decision in whole or in part.[35] The Appeal Division has the authority to decide any questions of law or fact that are necessary

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[32] General Division decision, para. 27
[33] Like the psycho-vocational assessment in *Doucette* and the medical evidence in *Giannaros* that shows the claimant was advised twice to return to work
[34] *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211; *Canada (Attorney General) v. St-Louis*, 2011 FC 492
[35] DESDA, s. 59

for the disposition of any application.[36] The Tribunal is required to proceed as informally and quickly as fairness and natural justice permit.[37]

[41] During the oral hearing at the Appeal Division, the parties had the opportunity to make arguments about remedy. The Minister argued that the Appeal Division should dismiss the appeal, but if it did find an error, the Appeal Division should return the matter to the General Division for reconsideration. The Claimant did not wish to take a position on this question, noting that the process has been long and that she would live with whatever decision the Appeal Division reached.

[42] The error the General Division made was a failure to engage in an analysis of the available evidence about how the Claimant's personal circumstances impact her employability in the real world. The record is complete on that issue. The Appeal Division will give the decision that the General Division should have given. In giving that decision, the Appeal Division will consider the available evidence that the General Division considered, as well as the evidence the General Division omitted from its analysis of the Claimant's personal circumstances.

Decision the General Division Should Have Given

[43] In light of the Claimant's age, level of education, language proficiency, and past work and life experience, the Claimant experiences some barriers in the real world, but she is still employable within her physical limitations.

[44] The Claimant was 57 years old on the date of her prorated MQP. She was 59 years old when she applied for a CPP disability pension.[38] Early retirement is available under the CPP at age 60. At 65, claimants can receive retirement pension from the CPP, but they are then no longer eligible for the disability pension.[39] The Claimant's age may have somewhat negatively impacted her employability because she was only a few years from early retirement.

[36] *Ibid.*, s. 64
[37] *Social Security Tribunal Regulations*, s. 3(1)(*a*)
[38] General Division decision, para. 8
[39] *Canada Pension Plan*, s. 44(1)

[45] In her Questionnaire for Disability Benefits, the Claimant stated that she completed high school. She stated that she attended a trade school in Bosnia in 1985 but did not obtain a certificate.[40] The Claimant's formal education was not in English.

[46] The Claimant testified before the General Division that when she arrived in Canada in 1992, she did not speak English "at all." Initially, she stayed home to raise her young children and adjust to the new country and learn English while her husband worked. However, when the General Division member asked her whether she could read and write English, she said that she could.

[47] In a discharge report from a physiotherapy and rehabilitation clinic, the physiotherapist and kinesiologist stated that it would appear the Claimant would benefit from psychological counseling "in her own language."[41] The Claimant did not have an interpreter at the hearing.

[48] The Claimant speaks and writes English, but it appears from her participation in the oral hearing before the Appeal Division and her written communications that her English is not as strong as it might have been if she were educated in English in Canada. While there are some sedentary positions that would require greater proficiency in written English, the Claimant's level of proficiency in English does not pose a significant barrier to her employability for any substantially gainful occupation.

[49] The Claimant testified that she came to Canada in 1992; she was escaping war in Bosnia. She initially tried to find technical work similar to what she was trained for in Bosnia, but she did not have Canadian experience, which she found was a barrier to employment. She has worked in Canada briefly as an electronics assembler, in the hotel industry, at a retailer in the furniture department, and as a server for a catering company.

[50] The Claimant testified that after she left the furniture department and before she started as a server, it was difficult to find work within her physical limitations. There is no doubt there would have been limits on what the Claimant was qualified to do, given her education and work

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[40] GD2-137
[41] GD2-133

history (age being the most significant factor at the time of the MQP), but these barriers were not such that she was unemployable for light work.

CONCLUSION

[51] The General Division made an error of law by failing to analyze all of the Claimant's personal circumstances that impact employability. However, having analyzed all the factors, the Appeal Division finds that the Claimant is still not eligible for a disability pension. The appeal is dismissed.

Kate Sellar
Member, Appeal Division

METHOD OF PROCEEDING:	Teleconference Hearing June 12, 2018
APPEARANCES:	Z. D., Appellant Christian Malciw, Representative for the Respondent