



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *S. L. v. Minister of Employment and Social Development*, 2018 SST 956

Tribunal File Number: AD-17-484

BETWEEN:

**S. L.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: September 27, 2018

## **DECISION AND REASONS**

### **DECISION**

[1] The appeal is dismissed.

### **OVERVIEW**

[2] S. L. (Claimant) obtained a college diploma as a Personal Support Worker (PSW). She worked in this position for a number of years, even returning to work after being injured on the job. After being injured at work, the Claimant was assigned lighter duties, which were further reduced because of her physical limitations. The Claimant was laid off in 2014. She applied for a Canada Pension Plan disability pension and claimed that she was disabled by her injuries, which resulted in many limitations, including chronic back pain and difficulties sitting, standing, bending, and concentrating.

[3] The Minister of Employment and Social Development refused the application. The Claimant appealed this decision to this Tribunal. The Tribunal's General Division dismissed the Claimant's appeal because it found that although the Claimant could no longer work as a PSW, she retained some capacity regularly to pursue a substantially gainful occupation. The Claimant's appeal from this decision is dismissed because the General Division applied the correct legal test to decide whether the Claimant's disability was severe and did not base its decision on an erroneous finding of fact regarding her work duties.

### **ISSUES**

[4] Did the General Division make an error in law by considering whether the Claimant had attended treatment rather than whether she was incapable regularly of pursuing any substantially gainful occupation?

[5] Did the General Division base its decision on an erroneous finding of fact without regard for the evidence of the Claimant's increasingly limited work duties?

## ANALYSIS

[6] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It sets out 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.<sup>1</sup> The Claimant's arguments that the General Division made an error in law and based its decision on an erroneous finding of fact are considered below.

### Issue 1: Legal test for severe

[7] The *Canada Pension Plan* states that a claimant must have a disability that is both severe and prolonged to be found to be disabled. A disability is severe if it renders a claimant incapable regularly of pursuing any substantially gainful occupation.<sup>2</sup> This is correctly set out in the General Division decision.<sup>3</sup> The General Division decision also states:

The Tribunal has considered the evidence on file and from the hearing. The Tribunal notes that there is very little current medical information on file with the only medical report from the period after she left work being the CPP Medical Report. In fact, since leaving work, she has received limited medical intervention as would be expected of an applicant with a severe condition. The Tribunal appreciates that her oral evidence helped to clarify gaps in the file; however, she has not demonstrated on a balance of probabilities that her condition was severe as defined in legislation when she last qualified for the benefit.<sup>4</sup>

The Claimant argues that the General Division applied the incorrect legal test by focussing on whether the Claimant received medical intervention for her conditions rather than whether she had capacity regularly to pursue any substantially gainful occupation.

[8] The Supreme Court of Canada teaches that a decision should be approached as an organic whole, without a line-by-line treasure hunt for error.<sup>5</sup> Considering the General Division decision

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<sup>1</sup> DESD Act s. 58(1)

<sup>2</sup> *Canada Pension Plan* s. 42(2)(a)

<sup>3</sup> General Division decision para. 6

<sup>4</sup> *Ibid.* para. 33

<sup>5</sup> *Irving Pulp & Paper Ltd. v. CEP, Local 30*, 2013 SCC 34

as a whole makes it clear that the General Division did not make an error in law. The General Division correctly sets out the legal definition of “severe” at the beginning of the decision.<sup>6</sup> It states that the Claimant had not demonstrated that her condition was severe, as defined in the legislation, when she last qualified for the benefit.<sup>7</sup> In reaching its decision, the General Division considered the Claimant’s limitations regarding lifting, bending and the need to change position noted in the medical evidence and other restrictions the Claimant reported. The General Division found that this would not preclude all work apart from work as a PSW.<sup>8</sup> Because the Claimant retained some capacity to work, the General Division also considered that the Claimant had a legal obligation to demonstrate that her efforts to obtain or maintain work were unsuccessful because of her health condition and found that she had not done so.<sup>9</sup> It also considered the Claimant’s personal circumstances, including her age, education, and work experience.

[9] The statement in question set out in paragraph 7 above refers to the fact that there was very little medical evidence that supported the Claimant’s appeal, not to any failure by the Claimant to seek medical treatment. It did not form the basis of the General Division’s decision. The appeal cannot succeed on the basis that the General Division erred in law.

## **Issue 2: Erroneous finding of fact**

[10] The Claimant also contends that the General Division erred because it failed to consider that she had increasingly fewer and lighter duties at work, until she was let go in 2014 because the employer had no more modified duties for her. This ground of appeal points to the General Division having based its decision on an erroneous finding of fact made without regard for all of the material that was before it.

[11] For the appeal to succeed on this basis, the Claimant must establish three things: that a finding of fact was erroneous, that it was made without regard for the material that was before the General Division, and that the decision was based on this finding of fact.<sup>10</sup> The General

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<sup>6</sup> General Division decision para. 6

<sup>7</sup> Ibid.

<sup>8</sup> Ibid. para. 35

<sup>9</sup> Ibid. para. 37

<sup>10</sup> *Rahal v. Canada (Citizenship and Immigration)*, 2012 FC 319

Division decision summarizes the written and oral evidence that was before it.<sup>11</sup> The General Division considered that the Claimant was having more difficulty at work with reduced responsibilities and increased absenteeism and that she worked modified duties until she stopped working in July 2014.<sup>12</sup>

[12] The decision does not set out specifically that the Claimant continued to work lighter or fewer duties over time before she stopped working. This may have been an error. However, the decision was not based on what specific duties the Claimant was able to perform or not perform. The decision was based on the facts that the Claimant retained some capacity to work despite limitations that would prevent continued employment as a PSW,<sup>13</sup> that the Claimant had not looked for alternate work within her limitations,<sup>14</sup> and the fact that she had not provided evidence of failed work attempts to support her contention that she could not work or that her personal circumstances would prevent her from working.<sup>15</sup> Therefore, the decision was not based on an erroneous finding of fact made without regard for all of material that was before the General Division.

[13] The appeal fails on this basis also.

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<sup>11</sup> General Division decision paras. 8–29

<sup>12</sup> Ibid. para. 34

<sup>13</sup> Ibid. para. 35

<sup>14</sup> Ibid. para. 36, 37

<sup>15</sup> Ibid. para. 36

**CONCLUSION**

[14] The appeal is dismissed for these reasons.

Valerie Hazlett Parker  
Member, Appeal Division

HEARD ON:	September 25, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. L., Appellant  Terry Copes, Counsel for the Appellant  Tiffany Glover, Counsel for the Respondent