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

Citation: *M. S. v. Minister of Employment and Social Development*, 2018 SST 976

Tribunal File Number: AD-18-450

BETWEEN:

M. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Kate Sellar

Date of Decision: October 4, 2018

Canada

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] M. S. (the Claimant) is a broadcast engineer. He injured his back in his workplace and received short-term disability and then long-term disability benefits from a private insurer. His long-term disability benefits ended in May 2017, and he returned to work for his employer, doing the same job he had previously without any accommodation. Less than a year later, he stopped working due to a cardiac condition and began receiving short-term disability benefits again. He was terminated from his job several months later.

[3] The Claimant applied for a disability pension under the *Canada Pension Plan* (CPP). The Minister denied the Claimant's application both initially and on reconsideration. The General Division of this Tribunal dismissed his appeal on June 25, 2018.

[4] The General Division found that the Claimant had functional limitations as a result of his back injury and that he was restricted in his ability to perform his job as he had before his injury. However, the medical evidence did not show that his back condition was a severe disability within the meaning of the CPP. The General Division found that the Claimant had capacity to work during his minimum qualifying period (MQP), which ended December 31, 2017. The General Division also found that the Claimant could retrain for other types of work, including sedentary work.

PRELIMINARY MATTER

[5] The Claimant filed additional evidence for the first time at the Appeal Division level, meaning that this evidence was not before the General Division.

[6] The Tribunal wrote to the Claimant explaining that, as a general rule, the Appeal Division decides whether to grant leave to appeal based only on the documents that were before the

General Division.[1] The letter stated that another option is to make an application to rescind or amend a General Division decision based on new evidence, but noted that the circumstances under which the General Division can rescind or amend a decision are very limited. In response to the letter, the Claimant stated that he wanted the new evidence to form part of the application for leave to appeal.[2] The Claimant did not file an application to rescind or amend the General Division decision.

[7] The evidence the Claimant wants to rely on does not raise any ground of appeal under the *Department of Employment and Social Development Act* (DESDA). This new evidence will not form the basis of leave to appeal to the Appeal Division, and the Appeal Division would not consider it if leave were granted. The Appeal Division does not provide a new (*de novo*) hearing in which claimants are able to gather more evidence and present it along with all of the previous evidence supporting the claim.

[8] The Appeal Division has not considered the new evidence the Claimant filed in support of the application for leave to appeal.

ISSUES

[9] Is there an arguable case that the General Division made an error of fact by ignoring the Claimant's evidence about his low back condition and cardiac function and their impact on his sleep?

[10] Is there an arguable case that the General Division member made an error by failing to observe a principle of natural justice by failing to request that the Claimant submit further information about his cardiac condition to her after the hearing?

[11] Is there an arguable case that the General Division made an error of law or of fact by failing to consider one of the Claimant's medical conditions, namely his cardiac condition?

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[1] *Canada (Attorney General) v. O'Keefe*, 2016 FC 503
[2] AD2

ANALYSIS

Appeal Division Reviews of General Division Decisions

[12] The Appeal Division grants leave to appeal General Division decisions only where there is an arguable case that the General Division has made an error. The only errors that allow the Appeal Division to grant leave to appeal are those that are listed in the DESDA. These errors are referred to as the "grounds of appeal."

[13] One of the grounds of appeal listed in the DESDA occurs when the General Division makes an error of law, whether or not the error appears on the face of the record.[3] One of the other grounds of appeal listed in the DESDA occurs when the General Division makes an error of fact that is either capricious or perverse or makes the error without regard for the evidence.[4]

[14] At the application for leave to appeal stage, a claimant must show that the appeal has a reasonable chance of success. To meet that requirement, the claimant needs to show only that there is some arguable ground on which the appeal might succeed.[5]

Issue 1: Is there an arguable case that the General Division made an error of fact by ignoring the Claimant's evidence about his low back condition and cardiac function and their impact on his sleep?

[15] The Claimant has not raised an arguable case that the General Division made an error of fact by failing to consider his evidence about the impact of his conditions on his functioning, including his sleep.

[16] The trier of fact is presumed to have considered all the evidence before it, even if the evidence is not expressly discussed in the reasons.[6] That presumption does not apply where the evidence is so important that it should have been discussed.[7]

[17] In his application for leave to appeal, the Claimant argued that the General Division failed to consider his evidence about how his conditions affect his abilities, including the impact

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[3] DESDA, s. 58(1)(*b*)
[4] DESDA, s. 58(1)(*c*)
[5] *Fancy v. Canada (Attorney General)*, 2010 FCA 63
[6] *Simpson v. Canada (Attorney General)*, 2012 FCA 82
[7] *Lee Villeneuve v. Canada (Attorney General)*, 2013 FC 498; *Kellar v. Canada (Minister of Human Resources Development)*, 2002 FCA 204; and *Litke v. Canada (Human Resources and Social Development)*, 2008 FCA 366

that his symptoms have on his sleep. The Claimant argued that the General Division failed to "relate and present" this evidence, which he provided at the hearing.

[18] The General Division did not specifically reference the Claimant's evidence about the impact that his symptoms had on his ability to sleep. However, the importance of that evidence is not so high that it needed to be discussed in the General Division decision.

[19] The General Division found that the Claimant had returned to his previous position in May 2017 on a full-time basis and without accommodation until he stopped working in February 2018 because of a cardiac condition.[8] The Claimant's MQP ended on December 31, 2017.[9] The Claimant's evidence about the impact that his condition had on his ability to sleep was not particularly important given the General Division's conclusion that he was working full time without accommodation when the MQP ended.

Issue 2: Is there an arguable case that the General Division member made an error by failing to request that the Claimant submit further information about his cardiac condition to her after the hearing?

[20] The Claimant has not raised an arguable case that the General Division failed to observe a principle of natural justice.

[21] Claimants have the onus (or an obligation) to prove, on a balance of probabilities, that they have a severe disability on or before the end of the MQP.[10]

[22] The Claimant argues that the General Division failed to observe a principle of natural justice because it did not request that he produce certain pieces of medical evidence that he referenced during the hearing.

[23] The General Division has not breached any principle of natural justice. It is for the Claimant to raise any issues about how sufficient the record is before the General Division hearing ends. The fact that the Claimant would have liked the General Division to ask for certain documents does not raise an arguable case that the General Division made an error under the DESDA.

[8] General Division decision, para. 18
[9] General Division decision, para. 3
[10] *Bagri v. Canada (Attorney General)*, 2006 FCA 134

Issue 3: Is there an arguable case that the General Division made an error of law or of fact by failing to consider one of the Claimant's medical conditions, namely his cardiac condition?

[24] The Claimant has not raised an arguable case that the General Division made any error in its consideration of the Claimant's medical conditions.

[25] The General Division is required to consider all of a claimant's possible impairments in their totality, not just the biggest impairments or the main impairment.[11] A failure to consider a particular condition can therefore form the basis of (i) an error of law (by failing to apply the legal principle that the decision maker must consider all possible impairments in their totality), or (ii) an error of fact (by reaching a factual finding without regard for the record).

[26] The Claimant argues that the General Division made an error by dealing with only the back condition and not with the cardiac dysfunction.

[27] The General Division did not fail to consider the Claimant's conditions in their totality. The General Division expressly considered what it referred to as the Claimant's "back condition," reviewing both Dr. Gupta's detailed description of that condition[12] and also the diagnostic evidence in support of that condition.[13] The General Division considered the restrictions arising from that condition, which the Claimant argued would impact his capacity for work.[14]

[28] The General Division reviewed the medical evidence relating to the Claimant's cardiac condition, noting that he had a surgical procedure for a cardiac condition pending when he stopped working in February 2018 and that the Claimant stated the procedure was not a success but that he was waiting for another procedure that he hoped would be successful.[15] The General Division found that:

> Although the Claimant now has a diagnosed cardiac condition of supraventricular ectopic beats with no significant tachycardia, bradycardia or atrial fibrillation, there is no evidence that this condition

[11] *Bungay v. Canada (Attorney General)*, 2011 FCA 47
[12] General Division decision, para. 11
[13] General Division decision, para. 12
[14] General Division decision, paras. 16, 18
[15] General Division decision, para. 16

> prevented him from working as of his MQP or that it prevents him from doing any type of work including sedentary work.[16]

[29] The General Division cited the need to consider the conditions in their totality[17] and concluded that, as of the MQP, the only impairment he had was his back injury. It noted that, although his cardiac condition was "evident" in July 2016 before his MQP, there was insufficient evidence to support a finding that, as of the MQP, his condition prevented him from regularly engaging in substantially gainful employment.[18] The General Division also considered the Claimant's anxiety and depression, finding that there was insufficient evidence to show that either or both of those conditions prevented the Claimant from working as of the MQP.[19]

[30] There is no error of fact—the General Division did not ignore the evidence about the Claimant's cardiac condition. It simply reached a decision about the impact of that condition at the time of the MQP that the Claimant may well disagree with. There is no error of law either—the General Division considered all of the conditions that affected the Claimant during the MQP in their totality.

[31] When seeking leave to appeal from the Appeal Division, the Claimant must provide all of the evidence and arguments required under the DESDA.[20] Even so, the Appeal Division should go beyond what has been called a "mechanistic" review of the grounds of appeal.[21] The Appeal Division has reviewed the documentary record and is satisfied that the General Division did not ignore or misconstrue the evidence before it.

[32] The Claimant takes the position that no employer can accommodate his disabilities. However, the General Division noted that the Claimant's physician set out some functional limitations for the Claimant but "did not indicate that the Claimant was precluded from any work as a result of his health."[22] The General Division reviewed the key aspects of the evidence in

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[16] General Division decision, para. 14
[17] General Division decision, para. 16
[18] General Division decision, para. 16
[19] General Division decision, para. 17
[20] *Tracey v. Canada (Attorney General)*, 2015 FC 1300
[21] *Karadeolian v. Canada (Attorney General)*, 2016 FC 615
[22] General Division decision, para. 10

terms of the CPP medical report,[23] the diagnostic evidence,[24] and the Claimant's CPP Disability Questionnaire.[25]

[33] The General Division could not ignore the fact that, at the time of the MQP, the Claimant was working full time without accommodation, although more slowly than he did previously and despite evidence that the employer was not happy with the Claimant's performance.[26] The General Division could not ignore the Claimant's significant education and work experience[27] and found that the Claimant does not have a severe disability within the meaning of the CPP. The General Division's conclusion (that the Claimant has some physical limitations but that, at the time of the MQP, he did not have a disability that was severe according to the CPP) is supported by evidence.

CONCLUSION

[34] The application for leave to appeal is refused.

Kate Sellar
Member, Appeal Division

REPRESENTATIVE:	M. S., self-represented

[23] General Division decision, paras. 10, 11
[24] General Division decision, para. 12
[25] General Division decision, para. 7
[26] General Division decision, para. 18
[27] General Division decision, para. 7