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

Citation: *D. S. v. Minister of Employment and Social Development*, 2018 SST 1098

Tribunal File Number: AD-18-605

BETWEEN:

D. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Jude Samson

Date of Decision: October 29, 2018

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] In March 2016, the Applicant, D. S., applied for a disability pension under the terms of the *Canada Pension Plan* (CPP). According to his application, he stopped working in December 2014 due to Bell's palsy, a condition that caused paralysis on the left side of his face, along with a decreased tolerance for exercise, and marked fatigue, to name a few of his symptoms. The Respondent, the Minister of Employment and Social Development (Minister), denied his application at the initial and reconsideration levels.

[3] The Applicant then appealed the Minister's decision to the Tribunal's General Division, but it dismissed his appeal. In brief, the General Division concluded that the Applicant retained some capacity for work but failed to show that he had made any efforts to obtain employment within his limitations.

[4] The Applicant now wants to challenge the General Division decision to the Tribunal's Appeal Division, but he requires leave (or permission) for the file to move forward. Unfortunately for the Applicant, I have concluded that the appeal has no reasonable chance of success. As a result, leave to appeal must be refused.

ISSUES

[5] In his notice of appeal, the Applicant alleges that the General Division committed errors of law and fact and that it failed to observe the principles of natural justice.[1] However, the details of the alleged errors are all related to the Applicant's claim that, during the hearing, the General Division member was unable to clearly define "substantially gainful" within the meaning of the CPP. Related to that error, in the Applicant's submission, is the General Division's failure to properly take this concept into account as part of its analysis.

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[1] AD1-3; AD1-6.

[6] Because the words “substantially gainful occupation” are part of the legal test that claimants have to meet in order to establish their eligibility for a CPP disability pension, I understand the Applicant to be alleging that the General Division failed to apply the law correctly in his case.[2]

[7] As a result, my decision focuses around these issues:

a) Is there an arguable case that the General Division committed an error of law by failing to consider the Applicant’s ability to obtain a “substantially gainful occupation”?

b) Did the General Division arguably overlook or misconstrue relevant evidence?

ANALYSIS

The Appeal Division’s Legal Framework

[8] The Tribunal has two divisions that operate quite differently from one another. At the Appeal Division, the focus is on whether the General Division might have committed one or more of the three 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 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.

[9] There are also procedural differences between the Tribunal’s two divisions. Most cases before the Appeal Division follow a two-step process: the leave to appeal stage and the merits stage. This appeal is at the leave to appeal stage, meaning that permission must be granted for it to proceed. This is a preliminary hurdle aimed at filtering out cases that have no reasonable

[2] CPP, s 42(2)(a)(i).

chance of success.[3] The legal test that applicants need to meet at this stage is a low one: is there any arguable ground upon which the appeal might succeed?[4] Applicants must show that this legal test has been met.[5]

Issue 1: Is there an arguable case that the General Division committed an error of law by failing to consider the Applicant's ability to obtain a "substantially gainful occupation"?

[10] I have answered no to this question.

[11] In order to be entitled to a disability pension, claimants must have a severe and prolonged disability. According to section 42(2)(a)(i) of the CPP, a claimant's disability is severe only if they are rendered "incapable regularly of pursuing any **substantially gainful occupation**" [bold added].

[12] As part of its assessment, the General Division was bound to apply this legal test, but it was also bound to apply interpretations of this test as handed down by the courts. In this case, the General Division decision turned almost entirely on the Federal Court of Appeal's decision in *Inclima*.[6] In *Inclima*, the Court concluded that, in order to be eligible for a CPP disability pension, claimants with a residual capacity to work must show that efforts at obtaining and maintaining employment have been unsuccessful by reason of their health condition.

[13] In this case, the evidence concerning the Applicant's residual capacity to work was mixed. A functional abilities evaluation concluded that the Applicant would likely be capable of doing sedentary work on a full-time basis.[7] A transferable skills analysis identified four suitable occupations that the Applicant could likely do.[8]

[14] The Applicant's family physician disagreed, however, saying that the Applicant would be unable to do the jobs that the transferable skills analysis had identified because of his trouble

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[3] DESD Act, s 58(2).
[4] *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12; *Ingram v Canada (Attorney General)*, 2017 FC 259 at para 16.
[5] *Tracey v Canada (Attorney General)*, 2015 FC 1300 at para 31.
[6] *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[7] GD4-23.
[8] GD4-15.

speaking or working on computers for prolonged periods.[9] Instead, she described the Applicant as being totally disabled and said that she did not foresee any significant improvement in his condition.

[15] Based on the concerns that his family physician expressed, the Applicant was sent for an occupational therapy assessment, where he demonstrated that he was able to do computer tasks for a maximum of three to four hours, with no changes in his voice being noted throughout the duration of the assessment.[10]

[16] As for the Applicant's testimony on this subject, I listened to the audio recording of the General Division hearing and noted the Applicant's general acceptance that he might have **some** capacity to work, but he insisted that he was unable to earn a "substantially gainful" living.

[17] Regardless of the Applicant's negative views, the General Division member noted that there was considerable evidence regarding the Applicant's residual capacity to work and specifically asked what efforts he had made to return to work.[11] The Applicant responded that undergoing the assessments described above, as required by his long-term disability insurer, was all part of his efforts to return to work. In this Applicant's mind, however, these assessments simply confirmed that he is profoundly disabled.

[18] The General Division member acknowledged all of this evidence—and more—she assessed the evidence, and she explained why she preferred some pieces of evidence over others. In the end, the General Division concluded that the Applicant had a residual capacity to work, thus triggering the obligations under *Inclima*, but found that the Applicant had not met those requirements. As a result, the Applicant failed to prove that he had a severe disability, and the General Division dismissed his appeal.

[19] In my view, the General Division's conclusion was clearly based on a correct interpretation of the Federal Court of Appeal's decision in *Inclima*. More specifically, nothing in that decision suggests that the General Division had to precisely identify the substantially gainful threshold before imposing its requirements. In any event, the assessments on which the General

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[9] GD4-37.
[10] GD4-40.
[11] Audio recording of General Division hearing from approximately 46:00 to 51:34.

Division chose to rely concluded that the Applicant's residual capacity to work was significant: the assessors found that he was capable of working full or half days.[12] To the extent that the Applicant is hoping that I might reweigh the evidence and come to a different conclusion regarding his residual capacity to work, that is not something that the DESD Act allows me to do.[13]

[20] When listening to the audio recording of the General Division hearing, I noted that the General Division member discussed the meaning of "substantially gainful", as defined under the CPP.[14] The General Division member noted that this term is now defined in the *Canada Pension Plan Regulations* and correctly stated that it is equivalent to the maximum amount that a person can receive as a disability pension but could not remember the precise figure associated with this definition (which is adjusted annually).[15] This is no way undermines my view that the General Division's conclusion is based on a correct interpretation of the law as it currently stands.

[21] I have concluded, therefore, that the Applicant's arguments have no reasonable chance of success.

Issue 2: Did the General Division arguably overlook or misconstrue relevant evidence?

[22] Regardless of the conclusion above, I am mindful of Federal Court decisions in which the Appeal Division has been told that it should go beyond the four corners of the written materials and consider whether the General Division might have misconstrued or failed to properly account for any of the evidence.[16] If it has, then leave to appeal should normally be granted, regardless of any technical problems that might be found in the request for leave to appeal.

[23] After reviewing the underlying record, listening to the audio recording of the General Division hearing, and examining the decision under appeal, I am satisfied that the General Division neither overlooked nor misconstrued relevant evidence. Rather, the General Division

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[12] General Division decision at para 22.
[13] *Canada (Attorney General) v Tsagbey*, 2017 FC 356 at para 83; *Garvey v Canada (Attorney General)*, 2018 FCA 118.
[14] Audio recording of General Division hearing from approximately 43:40 to 46:00.
[15] *Canada Pension Plan Regulations*, s 68.1.
[16] *Griffin v Canada (Attorney General)*, 2016 FC 874 at para 20; *Karadeolian v Canada (Attorney General)*, 2016 FC 615 at para 10.

summarized the most important pieces of evidence; gave reasons for preferring some pieces of evidence over others; and explained why it was not convinced, on a balance of probabilities, that the Applicant had established the onset of a severe disability during the relevant period.

CONCLUSION

[24] Although I have sympathy for the Applicant, I must conclude that his application for leave to appeal has no reasonable chance of success. As a result, leave to appeal must be refused.

Jude Samson
Member, Appeal Division

REPRESENTATIVE:	D. S., self-represented