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

Citation: *D. D. v. Minister of Employment and Social Development*, 2018 SST 1131

Tribunal File Number: AD-18-664

BETWEEN:

D. D.

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: November 2, 2018

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] D. D. (Claimant), came to Canada 30 years ago and has worked in a variety of jobs. He experiences chronic pain, depression, and anxiety. He stopped working and then applied for a disability pension under the *Canada Pension Plan* (CPP) in 2010. The Minister denied his application both initially and upon reconsideration. The Claimant appealed to the Office of the Commissioner of Review Tribunals, and that appeal was dismissed. He did not appeal that decision to the Pension Appeals Board.

[3] The Claimant did not make any more contributions to the Canada Pension Plan, but he applied for a disability pension again in 2013. The Minister denied that application both initially and upon reconsideration. The Claimant appealed to this Tribunal, and the General Division dismissed his appeal in August 2018, finding that the matter was already decided and could not be decided again (which is a principle called *res judicata*). The Tribunal found that there were no special circumstances that meant the Tribunal should allow the Claimant to have the question of his entitlement to the Canada Pension Plan disability pension decided again.

[4] The Appeal Division must decide whether there is an arguable case that the General Division made any error in its decision such that it can grant leave to appeal.

[5] There is no reasonable chance for the Claimant to successfully show that the General Division made an error under the *Department of Employment and Social Development Act* (DESDA).

PRELIMINARY MATTER

[6] In his application for leave to appeal, the Claimant argued that the General Division made an error of law because he had a severe and prolonged disability within the meaning of the CPP on or before the end of his minimum qualifying period (MQP). He attached a medical report

dated September 20, 2018, about his condition. He argues that this report shows that he should have been successful at the General Division.[1]

[7] The Tribunal wrote to the Claimant explaining that, as a general rule, the Appeal Division will decide whether to grant leave to appeal based only on the documents that were before the General Division. The Appeal Division cannot consider new evidence, except in limited situations.[2]

[8] The letter asked the Claimant whether he wanted the new evidence to form part of his application for leave to appeal or to bring an application to rescind or amend the General Division decision based on the new evidence. The Claimant chose the first option.

[9] The Appeal Division will not consider the Claimant's 2018 medical report as part of the application for leave to appeal. It is new evidence, and the Claimant's situation is not an exception to the general rule that the Appeal Division does not decide leave to appeal applications based on new evidence.

ISSUES

[10] The Appeal Division will answer the following questions:

1. Is there an arguable case that the General Division made an error of fact about why the Claimant did not appeal the Review Tribunal's decision?

2. Is there an arguable case that the General Division made an error of fact by ignoring evidence about why the Claimant did not file a request for reconsideration of the second application in a timely manner?

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[1] AD1-8
[2] *Sharma v Canada (Attorney General)*, 2018 FCA 48; *Belo-Alves v Canada (Attorney General)*, 2014 FC 1100; *Parchment v Canada (Attorney General)*, 2017 FC 354

ANALYSIS

Issue 1: Is there an arguable case that the General Division made an error of fact about why the Claimant did not appeal the Review Tribunal's decision?

[11] There is no arguable case that the General Division made an error of fact in this regard. It acknowledged the Claimant's evidence that he did not appeal the Review Tribunal's decision because he did not understand he had a right to appeal.

[12] The Claimant argues that the General Division made an error of fact in its decision about the reason he did not appeal the Review Tribunal decision related to his initial application. The Claimant argues that he did not understand that he had a right of appeal; he just understood that he was not granted the disability pension.

[13] The General Division decision acknowledged the Claimant's testimony arguing that he did not receive procedural fairness because, in 2011, he did not know that he could appeal the Review Tribunal decision and that if he had known, he would have appealed:[3]

> The Claimant testified that he had not received procedural fairness at the Review Tribunal hearing because he was unaware in 2011 that he could appeal the Review Tribunal decision, although he acknowledged that his representative had received copy of it. Had he known that an appeal was possible, he said, he would have pursued an appeal. I note that this submission is not based on any recollection of a conversation with his representative or on any written evidence, but on what the Claimant thinks must have happened. However, it is my duty to make a decision only on credible and supporting evidence and not on speculation. There is no supporting evidence to establish that the Claimant was unaware of his right to appeal in 2011. Further, the Claimant did not indicate that he had pursued any inquiries himself about his right to appeal the Review Tribunal decision at the time it was issued.

[14] The General Division decided that there was nothing in the application or in any of the material that the Claimant filed later that pointed to any potential injustice that would occur if he was prevented from "duplicating the decision-making/appeal process" he already had in his previous application at the Review Tribunal.[4]

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[3] General Division decision, para 16
[4] General Division decision, para 18

[15] There is no arguable case that the General Division ignored the Claimant's evidence about why he did not appeal the Review Tribunal's decision. The General Division member asked about the reason in the hearing, and the decision reflects the answer the Claimant provided. There is no arguable case that the General Division ignored the evidence on this point, nor did it come to a finding that was perverse or capricious—the Claimant said that if he had known an appeal was possible, he would have pursued one. This is clearly reflected in the General Division's decision.

Issue 2: Is there an arguable case that the General Division made an error of fact by ignoring evidence about why the Claimant did not file a request for reconsideration of the second application in a timely manner?

[16] There is no arguable case that the General Division made an error of fact by ignoring evidence about why the Claimant did not file a request for reconsideration of the second application in a timely manner. This question was not material and, therefore, the General Division decision did not mention it.

[17] In the application for leave to appeal, the Claimant clarifies that he delayed his request for reconsideration of the Minister's decision to deny his second application for disability benefits because a paralegal advised him that the request for reconsideration would not be successful.

[18] Because the Minister accepted the late request for reconsideration and the matter was then properly before the General Division,[5] the reasons why the reconsideration request was late are not relevant to the issues the General Division decided regarding whether the Claimant could challenge his eligibility for a pension benefit again. The General Division did not discuss the evidence in its decision. There is no arguable case that the General Division ignored the Claimant's evidence about why he delayed in requesting reconsideration of the second application. The General Division did not discuss the evidence because it was not material to the issue it needed to decide. The General Division did not base its decision on any finding about the Claimant's delay in requesting reconsideration because that was not relevant to the issues it had to decide. There is no arguable case for an error of fact.

[5] GD1-8

[19] Generally speaking, the Claimant does not agree with the General Division's decision because he takes the position that he had a severe and prolonged disability on or before the end of his MQP in 2008. However, for his appeal to proceed, the Claimant must raise an arguable case for an error under the DESDA in the General Division's decision,[6] and he has not done that.

[20] The Appeal Division has also reviewed the record and is satisfied that the General Division did not ignore or misconstrue evidence in the case.[7] The General Division member asked relevant questions of the Claimant at the hearing in light of the legal tests involved, and while the Claimant provided answers to all of those questions, including a history of his medical situation and personal circumstances, not all of his answers needed to be discussed in the decision because the General Division ultimately found that it could not decide the issue of the Claimant's eligibility for benefits over again. That matter had already been decided.

CONCLUSION

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

Kate Sellar
Member, Appeal Division

REPRESENTATIVE:	D. D., self-represented

[6] *Griffin v Canada (Attorney General)*, 2016 FC 874
[7] Consistent with the principle in *Karadeolian v Canada (Attorney General)*, 2016 FC 615