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

Citation: *C. C. v Minister of Employment and Social Development*, 2018 SST 1261

Tribunal File Number: AD-18-668

BETWEEN:

C. C.

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: December 3, 2018

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, C. C., suffered a severe ankle fracture in February 2015. She required surgery because of that fracture and had to take several months off work. Eventually, she returned to work—and was working at the time of the General Division hearing—but continued to struggle with problems related to her ankle and has even changed jobs several times because of her symptoms.

[3] In December 2016, the Applicant applied for a disability pension under the *Canada Pension Plan* (CPP), but the Respondent, the Minister of Employment and Social Development, denied her application at the initial and reconsideration levels. The Tribunal's General Division later dismissed her appeal of the Minister's reconsideration decision.

[4] The Applicant now wants to challenge the General Division decision to the Tribunal's Appeal Division, but she 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] When reaching this decision, I focused on whether there was an arguable case that the General Division:

a) committed an error of law in its interpretation of the CPP; and

b) overlooked or misconstrued relevant evidence.

ANALYSIS

The Appeal Division's Legal Framework

[6] 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.

[7] 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 move forward. This is a preliminary hurdle aimed at filtering out cases that have no reasonable chance of success.[1] 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?[2] Applicants must show that this legal test has been met.[3]

Issue 1: Is there an arguable case that the General Division committed an error of law in its interpretation of the CPP?

[8] The Applicant claims that the General Division misinterpreted the CPP when it:

a) concluded that she was ineligible for a CPP disability pension during the nine months following her surgery when she was completely unable to work; and

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[1] DESD Act, s 58(2).
[2] *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12; *Ingram v Canada (Attorney General)*, 2017 FC 259 at para 16.
[3] *Tracey v Canada (Attorney General)*, 2015 FC 1300 at para 31.

b) failed to recognize that the CPP includes a provision for claimants who are partially disabled.

[9] It is clear, in my view, that the General Division did not misinterpret the CPP in the ways that the Applicant alleges.

[10] Although the Applicant has offered her own interpretation of the CPP, she has not pointed to any specific statutory provisions or court decisions in support of that interpretation. While doing so is not essential, my decision must still be based on the law as it is written and the CPP's eligibility requirements cannot be overlooked on compassionate grounds or in cases of financial hardship.[4]

[11] To be entitled to a CPP disability pension, the Applicant had to show that she had a severe and prolonged disability on or before September 27, 2018, the date of the General Division hearing.[5] Under the CPP, a disability is severe if the claimant is incapable regularly of pursuing any substantially gainful occupation, and a disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

[12] I have concluded that the General Division was clearly justified in finding that the Applicant's nine-month disability was not prolonged within the meaning of the CPP. In support of its decision, the General Division cited *Henderson*, a case in which the claimant was incapable of working from 1997 until he recovered from an April 2000 operation on his knee.[6] Despite this long period of disability, the Federal Court of Appeal concluded that he was not entitled to a CPP disability pension because his disability was not of indefinite duration, so he did not meet the prolonged requirement under the CPP.

[13] Similarly in this case, though nine months is a long time to be away from work, the Applicant's disability cannot be described as being of an "indefinite duration", so it is clearly not "prolonged" within the requirements of the CPP.

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[4] *Miter v Canada (Attorney General)*, 2017 FC 262 at para 35; *Carter v Canada (Attorney General)*, 2008 FC 1046.
[5] CPP, s 42(2)(a).
[6] *Canada (Minister of Human Resources Development) v Henderson*, 2005 FCA 309.

[14] Concerning the Applicant's argument that the CPP provides a benefit to claimants who are partially disabled, I am not aware of any such provision. Rather, there is only one type of disability pension under the CPP, and beneficiaries must (among other requirements) have a severe and prolonged disability, as described above.

[15] Nevertheless, the Applicant claims that she should be entitled to a CPP disability pension because she cannot work five days per week or do the work that she used to do before her injury.

[16] Respectfully, this is not the legal test set out in the CPP. The relevant question under the CPP is not whether claimants are unable to do their regular or preferred occupation, but whether they are regularly incapable of performing **any substantially gainful occupation** that is suitable to their condition, even if it might be part-time or at a different workplace.[7]

[17] As a result, I was unable to find any legal authorities supporting the Applicant's argument that the General Division committed an error of law by failing to recognize that the CPP includes a partial disability benefit.

[18] The Applicant's arguments on this issue have no reasonable chance of success and cannot, therefore, justify granting leave to appeal.

Issue 2: Is there an arguable case that the General Division overlooked or misconstrued relevant evidence?

[19] In my view, the answer to this question is also no.

[20] The Applicant argues that the General Division overlooked important evidence, including evidence on how:

a) her left ankle injury creates problems walking, taking stairs, and sleeping;

b) she cannot work outside when it is cold or when the ground is covered with snow or ice; and

[7] *Patterson v Canada (Attorney General)*, 2009 FCA 178 at para 2; *Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33 at para 15; *Miceli-Riggins v Canada (Attorney General)*, 2013 FCA 158 at paras 14–15.

c) she is incapable of prolonged standing and walking.

[21] In my view, it is clear that the General Division neither ignored nor disputed this evidence. As mentioned above, however, the question the General Division needed to decide was whether the Applicant was regularly capable of doing "any substantially gainful occupation." In this respect, the Applicant seemed to accept—and still seems to accept—that she is capable of doing light or sedentary work (as a security dispatcher or as a legal assistant, for example).[8]

[22] Given the General Division's finding that the Applicant remains capable of doing light or sedentary work, it did not specifically have to consider her challenges associated with doing other types of work. As a result, I have concluded that the Applicant's arguments on this issue have no reasonable chance of success.

[23] In addition to the arguments raised by the Applicant, I have conducted my own review of the file to determine whether there is any other relevant evidence that the General Division might have misconstrued or failed to properly consider. If that were to be the case, then leave to appeal should normally be granted regardless of any technical problems that might be found in the request for leave to appeal.[9]

[24] However, after reviewing the documentary record, listening to the audio recording of the hearing, and examining the decision under appeal, I am satisfied that the General Division neither overlooked nor misconstrued relevant evidence.

[25] Again, therefore, I have been unable to identify an arguable ground on which the appeal might succeed.

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[8] AD1-9; General Division decision at paras 12, 13, and 17.
[9] *Griffin v Canada (Attorney General)*, 2016 FC 874 at para 20; *Karadeolian v Canada (Attorney General)*, 2016 FC 615 at para 10.

CONCLUSION

[26] While I have sympathy for the Applicant, I have concluded that her application requesting leave to appeal has no reasonable chance of success. As a result, leave to appeal is refused.

Jude Samson
Member, Appeal Division

REPRESENTATIVE:	C. C., self-represented