



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. G. v Minister of Employment and Social Development*, 2018 SST 1272

Tribunal File Number: AD-18-751

BETWEEN:

A. G.

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: December 6, 2018

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] A. G. (Claimant), experiences back pain and panic attacks. She has a fear of crowds and problems with concentration and energy. She has worked in retail and in fast food. In 2008, she was assaulted. At that time, she was working as the assistant manager at a drug store and working part-time at a video store. She stopped working in 2012 due to her medical conditions. She received short-term disability benefits from her employer at the drug store for just over a year.

[3] The Claimant applied for a disability pension under the Canada Pension Plan. The Minister denied her application both initially and on reconsideration. She appealed the Minister's decision to the Tribunal, and the General Division dismissed her appeal. The Claimant made an application to rescind or amend the General Division's decision based on new evidence (a "new facts application"). The General Division dismissed the new facts application on August 17, 2018.

[4] The Claimant appealed the decision on the new facts application. The Appeal Division must decide whether there is an arguable case that the General Division made an error under the *Department of Employment and Social Development Act* (DESDA) such that leave to appeal the decision on the new facts application can be granted.

[5] The Appeal Division finds that there is no arguable case that the General Division made an error in its decision to deny the new facts application. The application for leave to appeal the General Division's decision on the new facts application is refused.

ISSUE

[6] Is there an arguable case that the General Division's decision refusing the new facts application contains an error under the DESDA?

ANALYSIS

[7] The Appeal Division allows a claimant 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 called the “grounds of appeal.” One of the grounds of appeal listed in the DESDA occurs when the General Division bases its decision on an erroneous (wrong) finding of fact that is made in a perverse or capricious way or without regard for the evidence in the case.¹

[8] By contrast, the DESDA provides for a ground of appeal where there is an error of law, regardless of whether that error occurs on the face of the record.²

[9] On leave to appeal, a claimant must show that the appeal has a reasonable chance of success.³ A claimant needs to show only that there is some arguable ground on which the appeal might succeed.⁴

Is there an arguable case that the General Division’s decision refusing the new facts application contains an error under the DESDA?

[10] There is no arguable case that the General Division’s decision refusing the new facts application contains an error under the DESDA. The Claimant’s counsel raises only allegations of errors in the initial General Division decision, not in the decision refusing the new facts application, so there is no basis on which the Appeal Division can grant leave on the decision denying the new facts application.

[11] The DESDA states that the Tribunal may rescind or amend a decision that it has given regarding any particular application if a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence.⁵

[12] The Claimant is represented by counsel and has appealed the decision refusing the new facts application. While the Claimant’s counsel signaled in a form that the appeal was based on

¹ DESDA, s 58(1)(c)

² DESDA, s 58(1)(b).

³ DESDA, s 58(2).

⁴ *Fancy v Canada (Attorney General)*, 2010 FCA 63.

⁵ DESDA, s 66.

an alleged error of law as well as an error of fact under the DESDA, the attached arguments make no mention of any alleged errors at all in the decision denying the new facts application. It is the Claimant who has the burden of making an arguable case for an error under the DESDA, and she has not done so here.

[13] The Appeal Division has reviewed the record and is satisfied that the General Division did not ignore or misconstrue any evidence in the new facts application. The General Division reviewed the evidence and determined which parts of the evidence were new in the sense that they were not filed at the General Division during the initial hearing. The General Division considered that the Claimant was unrepresented during the initial hearing and that while the new evidence was not in her possession, she did not meet the “discoverability test,” which requires her to show that she could not have discovered these documents by exercising reasonable diligence. There was no evidence that she could not obtain evidence of her condition, whether as a result of personal circumstances or a lack of cooperation from health care providers.

[14] Ultimately, the General Division concluded that the Claimant had not provided evidence of “any difficulties she encountered or efforts she made before the hearing to get the documentation she has presented on this application. She has not given a satisfactory explanation for why it was not produced in June 2017 or earlier.”⁶

⁶ General Division decision dated August 17, 2018, para 17.

CONCLUSION

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

Kate Sellar
Member, Appeal Division

REPRESENTATIVE:	Joelle Malette, for the Applicant
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