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

Citation: *D. M. v Minister of Employment and Social Development*, 2018 SST 1273

Tribunal File Number: AD-18-300

BETWEEN:

D. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: December 6, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] D. M. (Claimant) has a Grade 11 education. She was working seasonally as a breakfast cook and baker at a lodge. She stopped working in 2014 because she was in extreme pain. Her family physician notes that she is being treated for fibromyalgia, Achilles tendonitis, rotator cuff tendonitis, arthritis in her knee with a meniscal tear, osteoarthritis, and degenerative disc disease. She has chronic headaches and vertigo, bilateral carpal tunnel syndrome, and chronic pain in her neck, back, shoulders, knees, and ankle.

[3] The Claimant applied for a disability pension under the *Canada Pension Plan* (CPP) in 2015. The Minister), denied her application both initially and on reconsideration. The Claimant appealed to this Tribunal. The General Division denied her appeal in February 2018, finding that, although the Claimant had some limitations that impacted certain aspects of her day-to-day life, she did not show that she was incapable regularly of pursuing any substantially gainful occupation before the end of her minimum qualifying period (MQP) or during the proration period. The Claimant's MQP ended on December 31, 2009, and her period of proration ended on September 31, 2010.

[4] The Appeal Division granted leave to appeal the General Division's decision, finding that there was an arguable case that the General Division made an error of law by failing to provide any analysis of the facts in its decision that would allow the reader to understand how it reached the conclusion that the Claimant had yet to exhaust all treatment and medication options.

[5] The Appeal Division must decide whether the General Division made any errors under the *Department of Employment and Social Development Act* (DESDA) such that an appeal should be granted. The Appeal Division finds there is no error under the DESDA, and the appeal is dismissed.

PRELIMINARY MATTER

[6] The Claimant provided two pieces of evidence that were not before the General Division when it made its decision. First, the Claimant attached a letter from her former employer to her application for leave to appeal. Second, after the Appeal Division issued the decision granting leave to appeal, the Claimant filed documents from her neurologist dated June 2018. The Minister filed its objection to the Appeal Division considering this new evidence on appeal.

[7] The Appeal Division does not provide a new (*de novo*) hearing in which claimants are allowed to gather more evidence and present it along with all of the previous evidence in support of the claim.[1] There are some exceptions to this rule, but none of those exceptions apply here.

[8] The Appeal Division will not consider any of the new evidence the Claimant filed with the Appeal Division that was not in the record when the General Division made its decision.[2]

ISSUES

[9] The issues in the this appeal are:

1. Did the General Division make an error of fact by finding that the Claimant had yet to exhaust all treatment and medication options?

2. Did the General Division fail to observe a principle of natural justice when it did not specifically signal to the Claimant that there was no report in her file from her former employer?

3. Did the General Division base its decision on an error of fact in its description of a typical day for the Claimant at the time of the MQP?

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[1] *Parchment v Canada (Attorney General)*, 2017 FC 354.
[2] AD1-20 to 23 and AD2.

ANALYSIS

Appeal Division's Review of the General Division's Decision

[10] The Appeal Division does not provide an opportunity for the parties to re-argue their case in full at a new hearing. Instead, the Appeal Division conducts a review of the General Division's decision to decide whether it contains errors. That review is based on the wording of the DESDA, which sets out the grounds of appeal for cases at the Appeal Division.

[11] The DESDA says that a factual error occurs when the General Division bases 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. For an appeal to succeed at the Appeal Division, the legislation requires that the finding of fact at issue from the General Division's decision be material ("based its decision on"), incorrect ("erroneous"), and made in a perverse or capricious manner or without regard for the evidence.[3]

[12] By contrast, the DESDA simply says that a legal error occurs when the General Division makes an error of law, whether or not the error appears on the face of the record.[4] The DESDA also states that the General Division has made an error when it fails to observe a principle of natural justice or otherwise acts beyond or refuses to exercise its jurisdiction.[5]

Issue 1: Did the General Division make an error of fact by finding that the Claimant had yet to exhaust all treatment and medication options?

[13] The General Division did not make an error of fact by finding that the Claimant had yet to exhaust all treatment and medication options. An error of fact must be material, which means that the General Division must rely on that finding of fact in reaching its conclusion. The General Division relied on the Claimant's work at the time of the MQP to determine that her disability was not severe, so the finding about her treatment options was not material in this particular case.

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[3] DESDA, s 58(1)(c).
[4] DESDA, s 58(1)(b).
[5] DESDA, s 58(1)(c).

[14] The CPP definition for a severe disability does not include any reference to how much treatment a claimant must try. The Federal Court of Appeal has found, however, that claimants have an obligation to show efforts to manage their medical conditions.[6]

[15] As the Federal Court of Appeal stated in *Lalonde v Canada*, a claimant who unreasonably refuses treatment may not be entitled to the disability pension.[7] In such a case, the General Division must consider the expected impact of the treatment on the claimant's disability status.

[16] In its analysis of the issues, the General Division stated:

> A claimant's condition is to be assessed in its totality. All of the possible impairments are to be considered, not just the biggest impairments or the main impairment (*Bungay v. Canada (Attorney General)*, 2011 FCA 47). I have also considered the impact of the [Claimant's] cumulative conditions which include fibromyalgia, tendonitis, carpal tunnel syndrome, dizziness, left side body pain, right sided head pain, and a breast abscess. The fact remains that as of the expiration of her MQP and possible prorated date she once again continued to regularly work as a seasonal cook/baker 6 days per week during the Lodge's operating season. I recognize that she was taking a significant amount of over the counter Tylenol and Advil at the time of her MQP, but she had been doing so for several years according to Dr. Tovich. She also had yet to exhaust all treatment and medication options. As such, even when assessing the [Claimant's] global condition at the time of her MQP I find that she was not precluded regularly from all substantially gainful work.[8]

[17] The Minister argues that the General Division did not make an error on the question of the Claimant's efforts to manage her conditions because the General Division's conclusion on this issue was just one element of its decision, which, when read as a whole, is intelligible, transparent, and justified, as required by the Supreme Court of Canada. The Minister also argues that the General Division's conclusion about treatment in this case was not material to its ultimate finding on the severity of the disability, in other words: "even without exhausting all

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[6] *Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33, para 16.
[7] *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.
[8] General Division decision, para 38.

treatment options, the [Claimant's] health conditions do not meet the threshold of a severe and prolonged disability with the meaning of the CPP."[9]

[18] The General Division did not make an error of fact. The General Division stated that the Claimant had not exhausted all treatment and medication options. The decision was somewhat short on analysis underlying that finding. However, reviewing the decision as a whole makes it clear that the General Division relied on the Claimant's work during the MQP to determine that her disability was not severe.

[19] Before the General Division made any reference in its analysis to the Claimant's treatment, the member found that the Claimant did not have a severe disability specifically because she worked

> nearly full-time hours on a regular basis during the operating season at the Miner's Bay Lodge for several years beyond the expiration of her MQP. Her role was physically and posturally demanding, but with accommodations made by her employer and some assistance from her co-workers, she was able to continue working and did not seek other more sedentary work.[10]

[20] Ultimately, in the analysis, the General Division relied instead on the Claimant's work,[11] the limited objective medical evidence,[12] and the Claimant's evidence about her typical day at the time of the MQP[13] to determine that she did not have a severe disability at the time of the MQP. As a result, the finding that the Claimant had yet to exhaust all treatment options and medications was not material to the General Division's decision, and therefore it is not an error of fact.

Issue 2: Did the General Division fail to observe a principle of natural justice when it did not specifically signal to the Claimant that there was no report in her file from her former employer?

[21] The General Division did not fail to observe a principle of natural justice by failing to ensure that the Claimant's former employer's report was in the record.

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[9] AD4-7, para 12.
[10] General Division decision, para 31.
[11] General Division decision, para 31.
[12] General Division decision, paras 32 and 33.
[13] General Division decision, para 34.

[22] The right to be heard is a critical component of natural justice, and the Claimant had a right during her hearing to present submissions on relevant issues. The Supreme Court of Canada states that part of the duty of decision makers is to act fairly and allow for the right to be heard.[14] The right to be heard is about allowing a person the opportunity to answer the questions put to them and to make submissions on every fact or factor likely to affect the decision.[15]

[23] At the General Division, the Minister argued that it gathered additional information from the Claimant by phone about her work history, and "efforts to obtain additional employment information in letter to her employer dated November 2 and December 4, 2017 were unsuccessful."[16]

[24] The Claimant is unrepresented and currently has multiple medical conditions that impact her functioning in day-to-day life. She argues that she did not realize that an employer's report was not in the record at the General Division. When she realized the error after the General Division issued its decision, her employer wrote a letter of support and attached it to her application for leave to appeal. She argued that the General Division's decision was not fair because her employer did not give a report.

[25] The Minister argues that the Claimant's concerns regarding the lack of a report from her employer before the General Division does not raise a ground of appeal under the DESDA because it was the Claimant's responsibility, not the General Division's, to ensure that the record before the General Division was complete.

[26] The Claimant did have notice of the fact that there was no employer's report in the record before the General Division hearing: there was no evidence to suggest that the Claimant did not have the appeal documents before the hearing at the General Division. The Appeal Division can address errors that the General Division may have made, but in this case there is not even arguably a failure to observe the right to be heard. The General Division allowed the Claimant an opportunity to make submissions in support of her case. If, after reviewing the Minister's submissions and before the hearing, the Claimant wished to call evidence from her former

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[14] *Therrien (Re)*, 2001 SCC 35.
[15] *Kouama v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9008 (FC).
[16] GD4-12, para 36.

employer, she could have done that. The General Division did not fail to observe a principle of natural justice.

Issue 3: Did the General Division base its decision on an error of fact in its description of a typical day for the Claimant at the time of the MQP?

[27] The General Division did not base its decision on an error of fact in its description of a typical day for the Claimant at the time of the MQP.

[28] The General Division stated:

> The [Claimant] described that a typical day at the time of her MQP involved getting up, collecting wood with her husband for their wood stove which was a primary heat source, cooking, sewing, reading, and playing cards with her grandchildren when they visited. She was still able to swim and drive when she had to. Her grandchildren cut the lawn and shovelled snow. The [Claimant] reported that her knee would swell up, she had left-sided body pain, and left breast pain. Since the time of her MQP she has progressively been unable to climb stairs, fold laundry, grocery shop, bake, and can't even peel vegetables. She experiences side effects with her current medications and has a significant amount of stress dealing with her husband and his post-traumatic stress at home. The [Claimant] reported that she has essentially isolated herself in her own room. The [Claimant] now staggers when she walks and she avoids driving frequently due to dizzy spells.[17]

[29] In the materials she filed on leave to appeal, the Claimant argued that the General Division was incorrect in stating that she was able to swim. The Minister argues that the General Division did not make any error in this description of the Claimant's abilities at the time of the MQP.

[30] The Appeal Division reviewed the oral hearing. There is no error of fact here—the Claimant described a typical day at the time of the MQP as including trying to help her husband bring some wood into the house and doing a bit of cooking and a bit of sewing. She did state during the hearing that she was still swimming and still driving at the time. The Claimant has made it clear that she does not swim anymore. The General Division did not use the precise

[17] General Division decision, para 12.

phrasing that the Claimant used, “a bit” of sewing and “trying to help,” but those differences are not enough to show an error of fact on which the General Division based its decision.

[31] At the Appeal Division hearing, the Claimant made note of some other parts of the General Division decision that she says were in error. The General Division stated that the Claimant lives with her “estranged” husband,[18] and the Claimant points out that they are not estranged. This was an unfortunate error in terms of the facts, but it is not material—the General Division did not base its decision on that particular fact—so it is not an error under the DESDA that the Appeal Division would use as a basis to grant the appeal.

CONCLUSION

[32] The appeal is dismissed.

Kate Sellar
Member, Appeal Division

HEARD ON:	October 17, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. M., Appellant Stephanie Pilon, Representative for the Respondent

[18] General Division decision, para 5.