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

Citation: *D. S. v Minister of Employment and Social Development*, 2019 SST 56

Tribunal File Number: AD-18-366

BETWEEN:

D. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: January 25, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Respondent, the Minister of Employment and Social Development (Minister), determined that the Appellant, D. S., was eligible for a disability pension under the terms of the *Canada Pension Plan* (CPP), starting in April 2008. From February 2013 to February 2015, however, the Appellant was employed as a factory worker. Then, starting in May 2015, he was employed as a farm worker with a company that his extended family owns and operates.

[3] The Appellant's earnings triggered a reassessment of his file and, in December 2015, the Minister cancelled the Appellant's disability pension, effective June 1, 2014. This resulted in an overpayment of almost $14,000, which the Minister demanded that the Appellant repay. The Appellant challenged this decision, but the Minister maintained it on reconsideration. The Appellant then appealed the Minister's decision to the Tribunal's General Division, but it dismissed his appeal. In short, the General Division concluded that the type of work the Appellant was doing as a factory worker and the amounts he was earning meant that he could no longer be considered to have a severe disability within the meaning of the CPP.

[4] The Appellant is now appealing the General Division decision to the Tribunal's Appeal Division. His main argument is that the General Division committed errors in its assessment of the regularity requirement under the CPP. I was unable to conclude that the General Division committed the errors that the Appellant alleges. As a result, I must dismiss his appeal.

ISSUES

[5] As part of this decision, I focused on the following questions:

a) Did the General Division make an error of law by failing to apply the regularity requirement under the CPP?

b) Did the General Division commit an error of law or of fact when applying the regularity requirement in this case?

c) Did the General Division make an error of law by failing to consider whether the Appellant was able to maintain his capacity to work, as required by the common law?

[6] I previously granted leave to appeal based on the Appellant's argument that the General Division failed to consider section 68.1 of the *Canada Pension Plan Regulations*. At the hearing before me, however, the Appellant's representative took the position that section 68.1 did not apply to this case, and the argument was abandoned. Indeed, the Appellant's representative changed during the life of this appeal, which has resulted in a number of the Appellant's arguments changing too.

ANALYSIS

The Appeal Division's Legal Framework

[7] To succeed at the Appeal Division, the Appellant must show that the General Division committed at least one of the recognized errors (or grounds of appeal) set out in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act). In this case, I have concentrated on whether the General Division made an error of law or 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.

[8] When considering the degree of scrutiny with which I should review the General Division decision, I have focused on the language set out in the DESD Act.[1] More specifically, any error of law could justify my intervention. Concerning errors of fact, however, section 58(1)(c) of the DESD Act states that I can intervene only if the General Division based its decision on an erroneous finding of fact and if that erroneous finding was made in a perverse or capricious way or without regard for the material that the General Division had before it. The

[1] *Canada (Attorney General) v Jean*, 2015 FCA 242 at para 19; *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93.

Federal Court of Appeal described erroneous findings of fact as ones that squarely contradict or are unsupported by the evidence.[2]

Issue 1: Did the General Division make an error of law by failing to apply the regularity requirement under the CPP?

[9] In my view, the General Division did apply the CPP's regularity requirement in this case.

[10] To be eligible for a disability pension, the CPP states that claimants must (among other things) have a severe disability, which is defined as a disability that renders the claimant "incapable **regularly** of pursuing any substantially gainful occupation [emphasis added]."[3] Here, "regularly" refers to the capacity to work and not to the work itself.[4] This is what I have been referring to as the CPP's "regularity requirement".

[11] The Appellant now argues that the General Division overlooked the CPP's regularity requirement when it wrote the following in paragraph 42 of its decision:

> The question for the Tribunal to answer is whether the Respondent has proven on a balance of probabilities that the Appellant regained the capacity to work to the point of being able to occupy a substantially gainful occupation.

[12] According to the Appellant, this portion of the decision demonstrates that the General Division was focused on determining whether the Appellant was capable of occupying a substantially gainful occupation but failed to consider whether the Appellant was capable of doing such work regularly.

[13] I cannot accept the Appellant's argument. While it would have been better if the General Division had more closely mirrored the words used in the CPP, paraphrasing the relevant legal test is not always an error, especially when the test is stated correctly elsewhere or when its

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[2] *Garvey v Canada (Attorney General)*, 2018 FCA 118 at para 6.
[3] CPP, s 42(2)(a)(i).
[4] *Canada (Minister of Human Resources Development) v Scott*, 2003 FCA 34 at para 7.

application demonstrates a proper understanding of the test.[5] In this case, the General Division did both:

a) In paragraph 41 of its decision, the General Division correctly quoted the CPP's definition of a severe disability, including the regularity requirement; and

b) In paragraphs 47, 48, and 50 of its decision, the General Division considered reasons why the Appellant missed or was late for work; in paragraph 51, the General Division concluded that the Appellant had worked "regular wages over regular hours" during a period of about two years; and in paragraph 52, it noted that the Appellant had been continuously employed for a number of months. In my view, these findings relate to the regularity requirement and demonstrate a correct understanding of the relevant legal test.

[14] Indeed, it seems obvious to say that a person's ability to regularly engage in remunerative employment is the very opposite of a severe and prolonged disability.[6]

[15] I have concluded, therefore, that the General Division did not overlook the regularity requirement, as the Appellant alleged.

Issue 2: Did the General Division commit an error of law or of fact when applying the regularity requirement in this case?

[16] No, the General Division did not commit an error of law or of fact when it applied the regularity requirement in this case.

[17] The Appellant argues that the General Division committed an error of law when it used an average number of hours to satisfy itself that the regularity requirement was met in this case. The General Division wrote this in paragraph 44 of its decision:

[5] *Osei v Canada (Minister of Employment and Immigration)*, [1990] FCJ No. 940 (QL)(FCA); *Canada (Minister of Human Resources Development) v Quesnelle*, 2003 FCA 92 at para 16.
[6] *Miller v Canada (Attorney General)*, 2007 FCA 237 at para 4.

> As detailed above the Appellant worked in excess of 2300 hours over a 20-month period. This [is equivalent to] approximately 115 hours a month or 28.83 hours a week. Given the extent of time, the hours worked, and the remuneration received it is evident on its face that the employment was substantially gainful.

[18] The Appellant argues that, by taking an average, the General Division created an inappropriate appearance of regularity. Furthermore, if the General Division had examined his records of employment,[7] it would have noted significant fluctuations in the hours worked every two-week pay period, which proves the Appellant's inability to work "regularly" or "with consistent frequency".

[19] In response, the Minister characterized the alleged error as one of fact rather than of law, but it argued that the alleged error could not justify the Appeal Division's intervention. More specifically, the Minister maintained that the hours the Appellant worked were more or less consistent and that some fluctuations should be expected because the Appellant was working on a part-time and as-needed basis.

[20] Generally speaking, I understand the Appellant's concern associated with using averages to assess the regularity of a person's capacity to work; however, the Appellant has not pointed to any relevant legal test or principle that the General Division failed to apply. As a result, I would not consider this alleged error as one of law but as one of fact.

[21] When viewed through this lens, I understand the Appellant to be alleging that the General Division based its decision on an erroneous finding of fact when it concluded that the Appellant had worked **regular hours** over a period of roughly 20 months.[8] In turn, this led the General Division to erroneously conclude that the Appellant was **regularly** or **with consistent frequency** capable of pursuing a substantially gainful occupation.

[22] I have concluded that I cannot intervene in this case based on these alleged errors.

[23] While the Appellant is correct to note that his records of employment from his factory job reveal variations in the number of hours worked every two weeks, it is clear that some of these

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[7] GD3-15 to 16.
[8] General Division decision at para 51.

figures are unusual and that the Appellant worked more than 55 hours in most two-week periods. On this issue, I agree with the Minister's submission: this type of variation on the Appellant's records of employment is to be expected given that he was working part-time and as needed.

[24] Crucially, I would highlight that a number of reasons (such as the taking of holidays) could explain variations in the number of hours the Appellant worked at the factory. However, the Appellant's representative at the General Division hearing (who was different from the representative appearing before me) did not especially raise any issues about the variable nature of the Appellant's work hours and did not try to link those variations to his medical condition. Instead, the Appellant's representative focused her arguments at the General Division on the degree to which the Appellant required special accommodation when working at the factory.

[25] In my view, therefore, there was nothing that signaled to the General Division that the use of averages was inappropriate in this case, and it was open to the General Division to conclude that the Appellant had worked regular hours at the factory during a period of about two years. Certainly, the General Division's finding that the Appellant worked regular hours at the factory could not be described as having been made perversely, capriciously, or without regard for the evidence.

[26] To the extent that the Appellant is also arguing that the General Division based its decision on a recognized error of fact when it concluded that the Appellant was **regularly** capable of pursuing a substantially gainful occupation, I note that predictability has been described as the essence of regularity within the CPP's definition of disability.[9] In this respect, it is worth highlighting that the General Division did not base its decision exclusively on the average number of hours that the Appellant worked per week. Instead, the General Division also considered how often the Appellant was late for work (approximately 10% of the time), the reason he was late for work (because of the bus schedule), his need to attend medical appointments (approximately three to four per month), and the duration of his employment (approximately two years with a single employer).

[9] *Atkinson v Canada (Attorney General)*, 2014 FCA 187 at para 38.

[27] Importantly, it was never suggested during the General Division hearing that the Appellant's health condition made his attendance at work unpredictable or that it was responsible for the variable number of hours that he worked. Instead, the Appellant's evidence at the General Division hearing was that he occasionally left work early to attend medical appointments, but that his overall attendance at work was good. In addition, the Appellant told the General Division member that one of the reasons he quit working at the factory was because he wanted to work full-time, not because his condition interfered with his ability to work the hours that he was being given.[10]

[28] Overall, therefore, I do not see the General Division's reliance on an average number of hours worked as leading to an erroneous finding of fact of the type described in section 58(1)(c) of the DESD Act.

[29] When assessing this issue, I was also mindful of the possibility that the Appellant might have been alleging that the General Division had committed errors of mixed fact and law. The Federal Court of Appeal has concluded, however, that questions involving a mere disagreement on the application of settled law to the facts are beyond the Appeal Division's jurisdiction.[11] As a result, I have tried to extract possible errors of fact and possible errors of law from the Appellant's arguments, but I have no power to consider alleged errors of mixed fact and law.

Issue 3: Did the General Division make an error of law by failing to consider whether the Appellant was able to maintain his capacity to work, as required by the common law?

[30] No, the General Division made no such error in this case.

[31] The Appellant argues that the General Division failed to consider the Appellant's ability to maintain his job with the factory beyond June 1, 2014, the date when the Minister determined that he was no longer disabled, and whether the eventual loss of this job, in February 2015, was related to his health condition.

[10] Audio recording of General Division hearing at approximately 41:05 to 41:30 and 56:20 to 57:20.
[11] *Garvey*, *supra* note 2 at para 9.

[32] In support of this argument, the Appellant relies on the Federal Court of Appeal's decision in *Inclima v Canada*, which was later repeated in *Canada v Ryall*.[12] More specifically, the Court said this in paragraph 3 of the *Inclima* decision:

> Consequently, an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and **maintaining** employment have been unsuccessful by reason of that health condition. [Emphasis added]

[33] In response, the Minister highlights the fact that the Appellant maintained his employment with the factory for roughly two years, which cannot be considered a failed attempt at returning to work.[13]

[34] The question the General Division had to decide in this case was whether the Minister had proven, on a balance of probabilities, that the Appellant stopped being disabled as of June 2014.[14] In other words, could the Minister show that, as of June 2014, the Appellant was capable regularly of engaging in a substantially gainful occupation?[15]

[35] I agree that, to succeed, the Minister had to show that the Appellant had regained the capacity to engage in a substantially gainful occupation over some period of time. In my view, however, that obligation arises from the regularity requirement discussed above, and not from cases like *Inclima* and *Ryall*, which were decided in a different context. As a result, the General Division did not commit an error by failing to refer to *Inclima* and *Ryall*: those decisions do not apply to this case.

[36] More specifically, the *Inclima* and *Ryall* decisions concerned claimants who were trying to meet the burden of proving their entitlement to a CPP disability pension despite evidence that they maintained some capacity to work. In those cases, the Federal Court of Appeal found that,

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[12] *Inclima v Canada (Attorney General)*, 2003 FCA 117; *Canada (Attorney General) v Ryall*, 2008 FCA 164.
[13] *Monk v Canada (Attorney General)*, 2010 FC 48 at para 10.
[14] *Atkinson*, *supra* note 9 at paras 1 and 39.
[15] *Gervais v Canada (Social Development)*, 2010 FCA 53.

to be successful, claimants should advance evidence of their efforts to obtain and maintain employment, which generally refers to alternative work within the claimants' limitations.

[37] This case is significantly different, however, because the Appellant had already been working for several months. Plus, the pension claimant (now recipient) is no longer the one responsible for proving their entitlement in cases like the Appellant's. Rather, it is the Minister who must prove that the pension recipient is no longer entitled to a CPP disability pension.

[38] Overall, therefore, the General Division did consider the Appellant's capacity to work over a period of time. In my view, the period of time that the General Division considered—both before and after June 2014—was appropriate.[16] In addition, for the reasons described above, I have no reason to interfere with the General Division's conclusion that the Appellant's capacity to pursue a substantially gainful occupation was "regular" within the meaning of the CPP.

[39] Ultimately, the Minister proved that the Appellant ceased to be disabled as of June 2014. However, if the Appellant's condition deteriorated after June 2014, then he is free to submit a new application for a CPP disability pension.

CONCLUSION

[40] I am very sympathetic to the Appellant's situation. I understand that the amount being demanded of him will be very difficult to repay and might even set him back in his efforts to better himself, but I have no power to bend the requirements of the CPP because of his personal circumstances. If he has not already done so, the Appellant could consider asking the Minister to write off some or all of his debt under section 66(3) of the CPP, though that is not a decision that the Tribunal can review, even if the Appellant is unhappy with the result.

[41] The appeal is dismissed.

Jude Samson
Member, Appeal Division

[16] *Gervais*, *supra* note 15 at para 11.

HEARD ON:	November 28, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. S., Appellant Holly Popenia and Abisola Omotayo (articling student), Representatives for the Appellant Stéphanie Pilon and Bianca Descôteaux (paralegal/observer), Representatives for the Respondent