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

Citation: *A. C. v Minister of Employment and Social Development*, 2019 SST 435

Tribunal File Number: AD-18-740

BETWEEN:

A. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: May 10, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed, and the Appellant's entitlement to a disability pension is restored.

OVERVIEW

[2] A. C. is the Appellant in this case. He received a disability pension under the *Canada Pension Plan* (CPP) starting in January 2002. In March 2013, however, the Appellant contacted the Respondent, the Minister of Employment and Social Development (Minister), to report that he was working as a driver and had earned over $8,400 in the previous calendar year. Unfortunately, the Appellant stopped working again a week later, after the small bus he was driving experienced mechanical issues and jolted aggressively.

[3] In November 2013, the Minister nevertheless decided to end the Appellant's disability pension because he no longer met all the requirements under the CPP. The Appellant asked the Minister to reconsider its decision, but the Minister denied that request. The Appellant then challenged the Minister's decision to the Tribunal's General Division, but the General Division dismissed his appeal in a decision dated February 20, 2017 (First General Division Decision). The Appellant then took his case to the Tribunal's Appeal Division, at which point I concluded that the General Division had committed an error of law and sent the appeal back to the General Division for reconsideration.

[4] When the file returned to the General Division, it was assigned to the same Tribunal member, and she dismissed the appeal again. Her second decision is dated August 10, 2018 (Second General Division Decision). The Appellant is now challenging the Second General Division Decision. I have already granted leave to appeal in this case. Now, I am allowing the appeal and giving the decision that the General Division should have given: the Appellant's entitlement to a CPP disability pension is restored.

PRELIMINARY MATTERS

[5] On January 2, 2019, after the date of my second leave to appeal decision, the Appellant submitted a new note from his family physician.[1] Then, on March 25, 2019, after the Appeal Division hearing, he submitted a psychiatric assessment.[2] The Appellant said that this information was demanded of him, though it is unclear who made this demand, and I was unable to find any trace of it.

[6] The Minister argued that these documents amount to new evidence and that I should not consider them.[3] I agree.

[7] As I will explain in more detail below, the Appeal Division's role is normally limited to deciding whether the General Division made an error based on the information that the General Division had in front of it. As a result, the courts have concluded that the Appeal Division should not normally consider new evidence.[4] In keeping with those decisions, I have decided not to consider the new evidence that the Appellant has filed in this case.

ISSUES

[8] As part of this decision, I focused on the following issues:

a) Did the General Division make an error of law by failing to analyze the evidence in a meaningful way?

b) What is the appropriate remedy in this case?

c) Has the Minister established that, as of November 2013, the Appellant no longer met the requirements for obtaining a CPP disability pension?

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[1] ADN2.
[2] ADN8.
[3] ADN3 and ADN9.
[4] *Bartlett v Canada (Attorney General)*, 2018 FCA 165 at para 4; *Marcia v Canada (Attorney General)*, 2016 FC 1367 at paras 20 and 34; *Parchment v Canada (Attorney General)*, 2017 FC 354 at para 23.

ANALYSIS

[9] To succeed at the Appeal Division level, 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).[5]

[10] In this case, I concentrated on whether it is more likely than not that the General Division committed an error of law when making its decision. According to the words set out in the DESD Act, any error of law could justify my intervention in this case.[6]

The General Division failed to analyze the evidence in a meaningful way

[11] The Minister awarded a CPP disability pension to the Appellant, with effect from January 2002.[7] Before awarding this benefit, the Minister requested an independent medical report, which confirmed the Appellant's somatization disorder (chronic pain, especially in the right shoulder), social phobia, and learning disabilities compounded by an attention deficit disorder.[8]

[12] At the time, therefore, the Minister was convinced that the Appellant met the requirements for receiving a disability pension. Among those requirements, the Appellant needed to have a severe and prolonged disability. 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.[9]

[13] In August 2011, however, the Appellant returned to work as a seasonal, part-time driver transporting children to and from school in a minivan and later in a small bus. He earned under $4,000 in 2011 and just over $8,400 in 2012. He contacted the Minister on March 1, 2013, to report his earnings, which triggered a reassessment of his case. About a week later, however, the

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[5] Relevant legal provisions can be found in the annex at the end of this decision.
[6] DESD Act, s 58(1)(b); *Canada (Attorney General) v Jean*, 2015 FCA 242 at para 19; *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93.
[7] Second General Division Decision at para 7; GD2-201 to 209.
[8] GD2-251 to 256.
[9] CPP, s 42(2)(a).

Appellant stopped working again because of a workplace accident. More specifically, he reports that the bus he was driving developed transmission issues, which caused it to jolt aggressively, resulting in back and neck pain, along with frequent headaches.

[14] The Appellant never returned to work after the March 2013 accident. He said that he could not drive long distances and could barely walk.[10] Nevertheless, the Minister concluded that, by the end of November 2013, the Appellant could no longer be considered to have a severe disability within the meaning of the CPP. As a result, the Minister ended the Appellant's disability pension as of December 1, 2013.

[15] In the Second General Division Decision—the one that is currently before me—the General Division correctly noted that it was the Minister's duty to prove that the Appellant no longer met the eligibility requirements for receiving a CPP disability pension.[11]

[16] In a nutshell, the General Division found that the Appellant's mental health issues and right shoulder pain were largely resolved when he returned to work in August 2011. Then, relying especially on a questionnaire completed by the Appellant's former employer,[12] the General Division concluded that the Appellant had regained the capacity to work in the sense that he was a productive, profitable, and reliable employee.[13]

[17] Though the Appellant accepted that his mental health issues and right shoulder pain were reduced to the point that he could work as a driver from 2011 to 2013, he maintained that his ability to work was still limited by back pain, a problem that dated back many years. Indeed, he claimed that his back pain became much worse after the March 2013 accident and that it has prevented him from working ever since.

[18] Nevertheless, the General Division concluded that the Appellant had recovered from the March 2013 accident and was cleared to return to work in May 2013.[14] As part of its second decision, the General Division referred almost exclusively to evidence from Ontario's Workplace

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[10] First General Division Decision at para 24.
[11] Second General Division Decision at para 9; *Atkinson v Canada (Attorney General)*, 2014 FCA 187.
[12] GD2-67 to 74.
[13] Second General Division Decision at para 10.
[14] Second General Division Decision at para 11.

Safety and Insurance Board (WSIB), which had taken charge of the Appellant's rehabilitation after the March 2013 accident.

[19] In particular, the General Division relied on the May 16, 2013, report of a physiotherapist, Ms. Miulescu. Ms. Miulescu concluded that the Appellant could return to work on alternate days, subject to these restrictions: "able to walk up to 500 metres; able to stand; able to sit up to 2.5 hours; able to climb stairs/ladders; able to use public transit to travel to work; able to drive a car for short periods; and no prolonged exposure to vibrations."[15]

[20] Concerning the Appellant's restrictions, however, the medical evidence contained several different opinions.[16] Importantly, the Appellant's family physician, Dr. Courchesne, wrote that it was unlikely the Appellant could do any job because of his long-standing chronic pain.[17] In November 2013—the critical period in this appeal—Dr. Courchesne confirmed that the Appellant was unable to do any work that involved prolonged sitting, standing, twisting, bending, or lifting.[18] In this letter, Dr. Courchesne acknowledged that an MRI of the Appellant's back done in May 2013 was unable to explain his symptoms, but she noted that subjective pain symptoms could still be present.

[21] However, the Second General Division Decision does not refer to any of this important but conflicting evidence.

[22] I recognize that the General Division does not have to refer to every piece of evidence that it has in front of it. Instead, it is presumed to have reviewed all of the evidence.[19] However, the General Division can commit an error of law if it fails to analyze the evidence in a meaningful way. This can happen if, for example, the General Division does not mention sufficiently important pieces of evidence or ignores significant contradictions in the evidence.[20]

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[15] Second General Division Decision at para 11 (referring to GD2-85).
[16] GD2-86; GD2-101 to 102; GD2-104 to 109; GD2-117; GD2-149.
[17] GD2-135 to 136. See also GD2-158.
[18] GD2-178 to 179. See also GD1-12.
[19] *Simpson v Canada (Attorney General)*, 2012 FCA 82 at para 10.
[20] *Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498 at para 51; *Canada (Minister of Human Resources Development) v Quesnelle*, 2003 FCA 92 at paras 7–9; *Oberde Bellefleur v Canada (Attorney General)*, 2008 FCA 13 at paras 3 and 7; *Yantzi v Canada (Attorney General)*, 2014 FCA 193 at para 4.

[23] In my view, the Second General Division Decision does not contain a meaningful analysis of the evidence. For example, the General Division did not mention the reports of the Appellant's family physician and did not deal with the contradictory evidence regarding the Appellant's functional limitations. In addition, the Second General Division decision features little or no discussion of the Appellant's own evidence regarding his inability to return to work after the March 2013 accident. Both orally and in writing, for example, the Appellant described having intense pain in his back and neck, frequent headaches, significant mobility issues, and an inability to sit, stand, or walk for prolonged periods.[21]

[24] At the hearing before me, the Minister argued that the Second General Division Decision should be upheld because the General Division had thoroughly analyzed the evidence in its first decision. The Minister carried on by arguing that, when I returned the matter to the General Division for reconsideration because it had inappropriately shifted the burden of proof from the Minister to the Appellant, the General Division had little to do but apply the correct burden of proof and render a new decision.

[25] In addition, since the General Division was not required to consider all of the evidence afresh, the Minister argued that I should not fault the General Division for highlighting just those pieces of evidence that best supported its decision and for not mentioning the balance of the evidence.

[26] I am unable to accept the Minister's arguments for the following reasons:

a) If the General Division had considered that it had a narrower mandate at the time it made its second decision, then it should have clearly said so. Instead, the issue in the Second General Division Decision is framed broadly: "Did the Minister establish that the [Appellant] ceased to be disabled by the end of November 2013?"[22] This is similar to the way the issue was framed in the First General Division Decision and does not indicate that the General Division interpreted my earlier decision as narrowing the scope of its enquiry;

[21] Audio recording of General Division hearing starting at approximately 29:45; GD1-1.
[22] Second General Division Decision at para 5.

b) Similarly, if the General Division was going to assess some but not all of the evidence, then it should have explained why. But the General Division gave no such explanation. Indeed, the General Division had the option of expressly adopting some or all of the findings that it made in the First General Division Decision into the Second General Division Decision. Instead, however, the Second General Division Decision barely mentions the First General Division Decision at all; and

c) The Second General Division Decision appears incomplete at first glance. For example, the General Division made no mention of the Appellant's personal circumstances, though binding decisions from the Federal Court of Appeal require it to do so.[23] Again, I should not have to accept the Minister's theories as to why these gaps might exist; it was for the General Division to explain the apparent gaps in its decision.

[27] Overall, therefore, I concluded that the Second General Division Decision contains an error of law because it fails to include a meaningful analysis of the evidence. In addition, I am unable to use the First General Division Decision to cure the failings of the Second General Division Decision.

[28] Since the General Division committed an error of law as described in section 58(1)(b) of the DESD Act, I have the power to intervene in this case.

It is appropriate to give the decision that the General Division should have given

[29] The remedies available to me are set out under section 59(1) of the DESD Act. Among the available options, I mostly considered whether to send the matter back to the General Division for reconsideration or to give the decision that the General Division should have given.

[30] In this case, the Minister submitted that the General Division made no error. Alternatively, any error the General Division might have made was of little or no significance, and I should confirm the Second General Division Decision regardless of that error.

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[23] *Villani v Canada (Attorney General)*, 2001 FCA 248.

[31] In any case, both parties agreed that the evidence in the file was complete and that there was little to be gained by sending the matter back to the General Division a third time.

[32] While the Appeal Division should focus on the best and most efficient way of correcting the errors that it has identified, the error in this case goes to the core of the matter. As a result, I recognize that I will have to reweigh the evidence in order to correct the General Division's error.

[33] Nevertheless, I have decided that this is an appropriate case in which to give the decision that the General Division should have given because:

a) CPP disability pensions are intended to help people who are unable to work because of a serious medical condition, yet the uncertainty surrounding the Appellant's entitlement to a disability pension has continued since November 2013;

b) the delays in this case are significant and its procedural history is long;

c) the CPP provides for an administrative regime that is intended to deliver quick determinations;[24]

d) the power to determine whether a benefit is payable to a person is given to the entire Tribunal and not just to one of the Tribunal's particular Divisions;[25] and

e) doing so promotes the goals of quick and cost-efficient decision-making and is supported by sections 2 and 3(1)(a) of the *Social Security Tribunal Regulations*.

[34] It is also worth highlighting that both parties have filed extensive submissions—at both the General and Appeal Divisions—explaining why the Appellant is or is not entitled to a CPP disability pension. I have also listened to the audio recording of the General Division hearing. As a result, there is little benefit in sending the appeal back to the General Division for yet another member to review the file.

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[24] *D'Errico v Canada (Attorney General)*, 2014 FCA 95 at paras 18–19.
[25] DESD Act, ss 64(1) and 64(2).

[35] For all of these reasons, I have decided to give the decision that the General Division should have given.

The Appellant's entitlement to a CPP disability pension is restored

[36] To succeed in this case, the Minister had to prove that, by the end of November 2013, the Appellant no longer met the requirements for obtaining a CPP disability pension. In my view, the Minister failed to do so.

[37] In a nutshell, the Minister is arguing that the Appellant's work as a driver from 2011 to 2013 shows that he no longer had a severe disability within the meaning of the CPP. Further, while the Minister recognizes that the Appellant was involved in a workplace accident in March 2013, it submits that he had fully recovered from that accident by the end of November 2013, if not earlier.

[38] In support of its arguments, the Minister relies heavily on the following pieces of evidence:

a) the Appellant's earnings;[26]

b) a questionnaire completed by the Appellant's former employer;[27]

c) a medical examination report completed in 2016 by Dr. Courchesne in support of the Appellant's efforts to renew his driver's licence;[28] and

d) medical reports prepared by or for WSIB.[29]

[39] According to the Minister, this evidence proves that, since late November 2013, the Appellant has been capable regularly of pursuing a substantially gainful occupation. I disagree. Let me explain why.

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[26] GD2-59.
[27] GD2-67 to 68, with missing page at GD10-1.
[28] GD4.
[29] GD2-77 to 90; GD2-101 to 109.

[40] First, I acknowledge that the Appellant's satisfactory work as a driver from 2011 to 2013 demonstrates that the Appellant had some capacity to work. However, I do not accept that this work demonstrates that the Appellant was capable regularly of working **at the substantially gainful level**.

[41] For example, 2012 was the Appellant's top year of earnings. In that year, he had just one month's medical leave, but his income remained below $8,500.[30] Indeed, with earnings of just $236/week, the Appellant's annual income would remain below $12,000, even if he were able to work 50 weeks in a year.[31] In my view, these figures do not amount to a substantially gainful occupation.[32]

[42] I also considered whether the Appellant might be able to earn more money, either by working more hours or by working elsewhere.

[43] In this case, the Appellant worked about 22 hours per week. Additional hours were available to him if he had taken a longer route, but he refused to do so because of his health. He said that he was normally the last driver out of the yard and the first one back.[33] Somewhat uniquely, this job allowed the Appellant to work for a bit in the morning and a bit in the afternoon, with considerable time to rest in between, which the Appellant found essential.

[44] In terms of his earnings, there is no suggestion that the Appellant was underpaid for the work that he was doing or that he would have been paid better elsewhere.[34] For reasons described more fully below, I also find it unlikely that the Appellant could have found another, higher-paying job that was better suited to his condition.

[45] To summarize, therefore, I see the Appellant's 2012 earnings as being near his maximum potential earnings, though they remain comfortably below the substantially gainful level.

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[30] GD2-59; GD2-67.
[31] GD10-1.
[32] Though not directly applicable to this case, the term "substantially gainful" has now been defined in section 68.1 of the *Canada Pension Plan Regulations*. In 2014, the first year in which this new provision applied, the threshold was set at $14,836.20 (and has since risen by roughly $325/year).
[33] Audio recording of General Division hearing starting at approximately 18:15.
[34] GD2-76.

[46] Second, I acknowledge Dr. Courchesne's medical report from April 2016, which was prepared in support of the Appellant's efforts at renewing his driver's licence.[35] That report was prepared in a very specific context, however, and I do not read it as commenting on the Appellant's ability to work, or as a contradiction to Dr. Courchesne's earlier letters, which clearly state that the Appellant is extremely unlikely to return to work at his previous job or at any other job.[36]

[47] Third, I acknowledge that medical reports prepared for WSIB suggest that the Appellant could safely return to work and that he had or would soon recover from the physical effects of the March 2013 accident.[37] Particularly in the case of a person with chronic pain, however, this is very different from saying that the person is able to return to work, let alone saying that they are capable regularly of performing a substantially gainful occupation.

[48] Importantly, WSIB's focus was on the specific effects that the workplace accident had on the Appellant's ability to work. In particular, that focus appears to have been on the physical effects of the accident, with little regard for the Appellant's history of chronic lower back pain.

[49] For CPP purposes, however, the source of the Appellant's pain is not relevant. As Dr. Courchesne wrote, the Appellant's chronic pain symptoms would likely persist even after he recovered from any physical injuries caused by the March 2013 accident and even if the source of his pain could not be seen on medical images.[38] Indeed, the Appellant's more recent use of alcohol as a form of pain relief speaks to his deteriorating condition.[39]

[50] On the subject of chronic pain, I note that the Appellant was diagnosed as having a chronic pain disorder as early as in March 2000 and that the Minister's independent expert, Dr. Hamilton, diagnosed the Appellant as having a somatization disorder in 2006.[40] The Appellant's pain was centred around his right shoulder and lumbar spine.[41]

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[35] GD4.
[36] GD2-135 to 136.
[37] See, for example, GD2-78, GD2-89, GD2-102, and GD2-109.
[38] GD2-45 to 46.
[39] First General Division decision at paras 26 and 55.
[40] GD2-251 to 256; GD2-275 to 280.
[41] GD2-391.

[51] In light of the long and well-documented history of chronic pain in this case, I attach little weight to the suggestion in some of the WSIB reports that the Appellant was faking his symptoms. Indeed, even Ms. Miulescu recognized that there were non-organic factors at play, that these presented barriers to the Appellant's recovery, and that his score on the Roland-Morris Disability Questionnaire showed little improvement over the course of his treatment.[42]

[52] Ms. Miulescu's reports need to be addressed in greater detail, however, because the Minister relies on them as proof of the Appellant's ability to work after the March 2013 accident. Significantly, the Appellant participated in a treatment program at Ms. Miulescu's clinic from April 9 to May 30, 2013. According to the Appellant, that program was of little benefit. In contrast, Ms. Miulescu noted significant improvements.

[53] For example, when Ms. Miulescu first assessed the Appellant in early April 2013, she reported that the Appellant was significantly limited in his ability to walk, stand, sit, and lift more than five kilograms.[43] At the end of the program, however, on May 30, 2013, she reported that the Appellant had no functional limitations whatsoever, other than his own report of being unable to walk more than 200 metres.[44]

[54] In my view, Ms. Miulescu's reports are not reliable as they present an overly optimistic view of the Appellant's overall condition. In some cases, her reports also appear internally inconsistent. In one report, for example, Ms. Miulescu reported that the Appellant had no restrictions on driving or using public transit, but also said that the Appellant should avoid prolonged exposure to vibrations.[45] It is unclear to me how a person could avoid vibrations while riding in a car or on a bus. In the same document, Ms. Miulescu observed that the Appellant had been able to sit on a physiotherapy ball for up to 30 minutes at a time, but then reported that the Appellant's sitting tolerance was over two and a half hours.

[55] Importantly, Ms. Miulescu's opinion that the Appellant had no functional limitations is contradicted by other medical reports in the file. For example, WSIB reports prepared in April and May 2013 by Dr. Raynor, an orthopaedic surgeon, and Dr. Somers, a chiropractor, list the

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[42] GD2-81; GD2-117
[43] GD2-86.
[44] GD2-80 to 81.
[45] GD2-85.

Appellant's return to work restrictions as including limited forward bending and reaching, lifting, driving, carrying, pushing, and pulling, along with prolonged sitting and standing.[46] Similarly, Dr. Courchesne, wrote that the Appellant was unable to do any job that involved prolonged sitting, standing, twisting, or bending or any lifting.[47]

[56] In my view, these restrictions are more consistent with the Appellant's evidence and impose serious limits on the Appellant's employability.

[57] Further undermining the Minister's position in this case are the Appellant's personal circumstances, which significantly hurt his chances of re-entering the workforce. I raise the Appellant's personal circumstances because the courts have said that the severity requirement under the CPP must be assessed in a real-world context.[48] This means that I must consider the Appellant's medical condition in its totality, along with factors such as his age, level of education, language proficiency, and past work and life experience.[49]

[58] In this case, I would highlight the following relevant factors:

a) The Appellant was 55 years old when his disability benefits were cut off;

b) His relevant conditions include chronic lower back pain, along with a learning disorder, attention deficit disorder, and somatization disorder;[50]

c) He finished Grade 12 at a school for those with learning disabilities but did not complete a later program at X College;[51] and

d) The Appellant's most recent work experience is as a school custodian from 1984 until 1998 and as a van and small bus driver from 2011 to 2013 (as described above).

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[46] GD2-101; GD2-109; GD2-110.
[47] GD1-12; GD2-45 to 46.
[48] *Villani*, *supra* note 23.
[49] *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[50] GD2-125; GD2-135 to 136; GD2-251 to 256.
[51] GD2-254.

[59] These factors indicate that the Appellant will face significant barriers to re-entering the workforce. To underline a few, the Appellant has little recent work experience, few transferable skills, and his potential for being successfully retrained is low.

[60] I also note that the Appellant's previous job had a particularly accommodating schedule, as it allowed him to work for a bit in the morning and a bit in the afternoon, with a long period of rest in between. If the Appellant is unable to return to that job, he may find it difficult to find another employer who can be quite so accommodating.

[61] Overall, therefore, the Minister has failed to prove that, by November 2013, the Appellant was capable regularly of performing a substantially gainful occupation. As a result, the Minister was not entitled to cut off the Appellant's CPP disability pension, and his benefits should now be reinstated.

CONCLUSION

[62] I am allowing this appeal because the General Division failed to analyze the evidence in a meaningful way. It therefore committed an error of law, as set out under section 58(1)(b) of the DESD Act. For example, the General Division overlooked important and contradictory reports written by the Appellant's family physician, among others.

[63] As part of this decision, I have also decided to give the decision that the General Division should have given. In that respect, I find that the Minister failed to prove that it was entitled to terminate the Appellant's CPP disability pension when it did. As a result, the Appellant's entitlement to a CPP disability pension is restored.

Jude Samson
Member, Appeal Division

HEARD ON:	March 6, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. C., Appellant Tiffany Glover and Marcus Dirnberger (observer), Representatives for the Respondent

Annex

Canada Pension Plan

When person deemed disabled

42 (2) For the purposes of this Act,

(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,

(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and

(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and

(b) a person is deemed to have become or to have ceased to be disabled at the time that is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person — including a contributor referred to in subparagraph 44(1)(b)(ii) — be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.

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When pension ceases to be payable

70 (1) A disability pension ceases to be payable with the payment

(a) for the month in which the beneficiary ceases to be disabled…

Department of Employment and Social Development Act

Grounds of appeal

58 (1) The only grounds of appeal are that

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) the General Division 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.

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Decision

59 (1) The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

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Powers of tribunal

64 (1) The Tribunal may decide any question of law or fact that is necessary for the disposition of any application made under this Act.