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

[TRANSLATION]

Citation: *G. C. v Minister of Employment and Social Development*, 2019 SST 446

Tribunal File Numbers: AD-18-435
AD-19-164

BETWEEN:

G. 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: May 14, 2019

Canada

DECISION AND REASONS

DECISION

[1] The applications for leave to appeal are refused.

OVERVIEW

[2] In November 2015, G. C. (Applicant) applied for a disability pension under the *Canada Pension Plan* (CPP). A few months later, the Minister of Employment and Social Development denied his application. The Applicant asked the Minster to reconsider its decision, but the Minister would not reverse its initial decision.

[3] The Applicant appealed the Minister's decision to the General Division, but the General Division dismissed his appeal in a decision dated May 30, 2018 (First GD Decision). The Applicant then applied for leave to appeal the First GD Decision; this application was given the file number AD-18-435.

[4] As part of that file, the Applicant submitted new evidence. The Tribunal let him know that the Appeal Division does not accept such evidence except in limited situations. However, he was given another option, which was to apply to rescind or amend the General Division decision in the light of new evidence.

[5] The first file was placed on hold to allow the Applicant to pursue his application with the General Division to rescind or amend the First GD Decision. In the end, the General Division dismissed that application in a decision dated December 21, 2018 (Second GD Decision). The Applicant then applied for leave to appeal the Second GD Decision; that application was given the file number AD-19-164.

[6] This is a decision about the files AD-18-435 and AD-19-164; a copy of the decision will be placed in the two files.

[7] For these files to move forward, I must first decide whether to grant leave to appeal one or both of the General Division decisions. I refuse leave to appeal for the reasons stated below.

ISSUES

[8] I must first consider whether the new evidence in the file AD-18-435 can be accepted. Then, I will consider the arguments that the Applicant raised in the two files.

[9] From the First GD Decision, I must determine whether the Applicant has raised an arguable case that:

a) he was deprived of his right to a hearing in French; or

b) the General Division failed to consider how his illness affected his daily activities.

[10] From the Second GD Decision, I must determine whether the Applicant has raised an arguable case that the General Division:

a) overlooked Dr. Hassan and Dr. Moien-Afshari's medical reports;[1] or

b) based its decision on the wrong legislation.

[11] Finally, if all the Applicant's arguments are bound to fail, is there another arguable case on which the Applicant's appeal might succeed?

ANALYSIS

The Appeal Division and its Legal Framework

[12] At the Appeal Division, the emphasis is on determining whether the General Division made at least one 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).[2] Generally, the Appeal Division examines whether the General Division:

a) breached a principle of natural justice or made an error relating to its jurisdiction;

[1] RA1-8 to RA1-12.
[2] The relevant statutory provisions appear in the annex below.

b) made 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.

[13] Most cases before the Appeal Division follow a two-step process: the leave to appeal stage and the merits stage. These appeals are at the leave to appeal stage, meaning that permission must be granted for them to move forward. This is a preliminary hurdle aimed at filtering out cases that have no reasonable chance of success.[3] The legal test that applicants need to meet at this stage is a low one: Is there any arguable case on which the appeal might succeed?[4]

New Evidence

[14] As a general rule, the Appeal Division reviews evidence, as set out in section 58(1) of the DESD Act, by relying exclusively on the information before the General Division. The Federal Court teaches us that the Appeal Division considers new evidence only in limited circumstances.[5]

[15] As I mentioned above, the Applicant submitted new evidence in support of his case as part of the file AD-18-435.[6] However, the limited circumstances discussed in the Federal Court decisions do not exist in this case, and I was able to consider this new evidence only in the file AD-19-164.

First GD Decision

[16] The Applicant claims that I must rescind the First GD Decision because the General Division deprived him of his right to a hearing in French and because it did not consider how his illness affected his daily activities.

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[3] *Department of Employment and Social Development Act*, s 58(2).
[4] *Osaj v Canada (Attorney General)*, 2016 FC 115; *Ingram v Canada (Attorney General)*, 2017 FC 259.
[5] *Marcia v Canada (Attorney General)*, 2016 FC 1367; *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Belo-Alves v Canada (Attorney General)*, 2014 FC 1100.
[6] AD1C-2 and AD1D-2 to AD1D-3.

[17] I find that these arguments have no reasonable chance of success. Here are the reasons for this decision.

[18] To qualify for a CPP disability pension, the Applicant had an obligation to establish, on a balance of probabilities, that he had a severe and prolonged disability on or before December 31, 2010.

[19] Under section 42(2)(a) of the CPP, a person is considered to have a severe disability if they are incapable regularly of pursuing any substantially gainful occupation. Furthermore, a disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

[20] Beyond the documentary record, the General Division held a teleconference hearing and listened to the Applicant's oral evidence before deciding the appeal. The hearing started on November 14, 2017, but it was postponed because of an important document the Applicant was waiting to receive from the Canada Revenue Agency.

[21] The hearing resumed on April 5, 2018, and the General Division later dismissed the Applicant's appeal. In short, the General Division recognized the Applicant's illnesses (epilepsy, anxiety, and depression), but it found that the Applicant had some work capacity on December 31, 2010 (as well as after this date), and that his health later deteriorated.

[22] First, I cannot accept the argument that the General Division deprived the Applicant of his language rights because he never asked for a hearing in French. Moreover, I saw absolutely nothing in the record or heard anything on the audio recordings of the hearings that should have alerted the Tribunal member to the fact that a hearing in French was necessary. On that topic, I note the fact that:

a) The application for a disability pension, the notice of appeal, and the reconsideration file, as well as the medical reports, are all in English.[7] In the pension application and

[7] GD1 and GD2.

the notice of appeal, the Applicant also chose English as his preferred language or correspondence language;[8]

b) The Applicant had a representative who, I assume, did not speak French but who could have also advised him on his language rights and raised the need for a hearing in French;

c) Twice, the Tribunal sent the Applicant's representative a hearing information form in which they could have mentioned the need for a hearing in French, but the form was never filled out or returned to the Tribunal;[9]

d) Even though the Applicant has a French accent, he testified eloquently in English and answered the questions he was asked without any apparent difficulty.

[23] Simply put, the Applicant's appeal would have been conducted in French if he had just asked. It is too late to claim now that the General Division breached a principle of natural justice by proceeding in English.[10]

[24] As for the Applicant's testimony about how his illness affects his daily activities, I note that the General Division need not refer to every piece of evidence before it. Rather, it is presumed to have reviewed all of the evidence.[11]

[25] Furthermore, the General Division is authorized to give precedence to certain evidence over other evidence. It is not the Appeal Division's role to reassess or reweigh the evidence to reach a different conclusion.[12]

[26] In this case, the relevant period was around December 31, 2010. As for this period, the General Division placed particular weight on the Applicant's ability to drive a vehicle, to be the primary caregiver for his children, and to meet the requirements for getting a Master's degree.

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[8] GD1-4 and GD2-25.
[9] See the Tribunal's letters from February 14, 2017, and June 19, 2017.
[10] *Sharma v Canada (Attorney General)*, 2018 FCA 48 at para 11.
[11] *Simpson v Canada (Attorney General)*, 2012 FCA 82 at para 10.
[12] *Tracey v Canada (Attorney General)*, 2015 FC 1300 at para 46; *Canada (Attorney General) v Tsagbey*, 2017 FC 356.

[27] I find that the Applicant's argument amounts to a request that I reweigh the evidence in the hope that I reach a different finding, but this is not the role of the Appeal Division.

[28] Therefore, I find that the arguments the Applicant raised in support of his application for leave to appeal the First GD Decision have no reasonable chance of success.

Second GD Decision

[29] The Second GD Decision relates to the Applicant's application to have the First GD Decision rescinded or amended in the light of new evidence. This application was submitted in French and was decided by a different General Division member.

[30] The Applicant argues that the Second GD Decision must be rescinded because the General Division overlooked Dr. Hassan and Dr. Moien-Afshari's medical reports and because it based its decision on the *Employment Insurance Act* rather than on the CPP.

[31] Once again, I find that the Applicant's arguments have no reasonable chance of success.

[32] First, it is abundantly clear that the General Division did not overlook the relevant medical reports.[13] At the same time, the General Division found that these reports did not meet the highly restrictive tests for evidence to be admissible as a new fact.[14]

[33] Regarding the relevant legislation, the General Division correctly referred to the applicable legislative provision—section 66(1)(b) of the DESD Act. However, I admit that this provision was misquoted at paragraph 5 of the Second GD Decision. Nevertheless, the important thing is that the legislation be applied properly, and it is clear that this is what happened in this case.[15]

[34] On that topic, I note that the General Division's decision was based on an interpretation of section 66(1)(b) of the DESD Act set out by the Federal Court of Appeal.[16] In that binding decision, the Federal Court of Appeal set out two tests that must be met for evidence to be

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[13] Second GD Decision at paras 6 and 11.
[14] Second GD Decision at paras 12 and 13.
[15] *Osei v Canada (Minister of Employment and Immigration)*, [1990] FCJ No 940 at para 3 (CA).
[16] *Canada (Attorney General) v MacRae*, 2008 FCA 82 at paras 15 and 16.

admissible as a new fact; they are the discoverability and the materiality tests. However, the General Division found that the evidence the Applicant presented did not meet the discoverability test.

[35] The Applicant did not dispute this part of the Second GD Decision in any way. Furthermore, the Appeal Division is not entitled to intervene where there is merely a disagreement on the application of settled law to the facts of the case.[17]

[36] Therefore, I find that the Applicant's arguments against the Second GD Decision have no reasonable chance of success.

Another Arguable Case on which the Appeal Might Succeed

[37] Although it is up to an applicant to raise an arguable case on which their appeal might succeed, I cannot stop at the precise grounds of appeal that they raise in their application for appeal. Indeed, if the General Division could have misconstrued or failed to consider some evidence, leave to appeal would normally be granted, regardless of technical deficiencies in the application for appeal.[18]

[38] After reviewing the file, listening to the audio recordings of the November 14, 2017, and April 5, 2018, hearings, and reviewing the decisions under appeal, I am satisfied that the General Division considered the relevant evidence.

CONCLUSION

[39] This may not be the answer that the Applicant was hoping for, but the Tribunal is a legislative entity that has only the powers that the law gives it. The Tribunal interprets and applies the legislative provisions as they are set out and cannot use the principles of equity or consider extenuating circumstances to grant applications for leave to appeal.

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[17] *Garvey v Canada (Attorney General)*, 2018 FCA 118 at para 9.
[18] *Tracey v Canada (Attorney General)*, 2015 FC 1300 at para 31; *Griffin v Canada (Attorney General)*, 2016 FC 874 at para 20; *Karadeolian v Canada (Attorney General)*, 2016 FC 615 at para 10.

[40] The applications for leave to appeal are refused.

Jude Samson
Member, Appeal Division

REPRESENTATIVE:	G. C., self-represented

Annex

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.

Criteria

(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

Decision

(3) The Appeal Division must either grant or refuse leave to appeal.

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Amendment of decision

66 (1) The Tribunal may rescind or amend a decision given by it in respect of any particular application if

(a) in the case of a decision relating to the *Employment Insurance Act*, new facts are presented to the Tribunal or the Tribunal is satisfied that the decision was made without knowledge of, or was based on a mistake as to, some material fact; or

(b) in any other case, a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

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