



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. W. v Minister of Employment and Social Development*, 2019 SST 690

Tribunal File Number: AD-18-622

BETWEEN:

L. W.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: July 31, 2019

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] L. W. (Claimant) has degrees in science and education. She worked as a teacher until she was in a car accident in 2012. She also worked as a spiritual teacher and psychic. After the car accident, the Claimant completed reflexology and reiki training. She finds this work very difficult, and she continues to do some work as a psychic. The Claimant applied for a Canada Pension Plan disability pension and claimed that she was disabled by injuries from the car accident, including post-concussion syndrome, post-concussion vision syndrome, light and sound sensitivity, cognitive issues and mental illness.

[3] The Minister of Employment and Social Development refused the application. The Claimant appealed this decision to the Tribunal. The Tribunal's General Division dismissed the Claimant's appeal. The Claimant's appeal to the Tribunal's Appeal Division is also dismissed because the General Division did not make an error in law or base its decision on an erroneous finding of fact under the *Department of Employment and Social Development Act* (DESD Act).

PRELIMINARY MATTER

[4] The Claimant has returned to using her maiden name, W. . Therefore, the title of proceedings in the decision is changed to reflect the Claimant as L. W..

ISSUES

[5] Did the General Division make an error in law by failing to consider whether the Claimant's work was a substantially gainful occupation and court decisions on what substantially gainful means?

[6] Did the General Division make an error in law by failing to consider the Claimant's vision condition and its impact on her capacity regularly to pursue any substantially gainful occupation?

[7] Did the General Division base its decision on an erroneous finding of fact under the DESD Act regarding the Claimant's hours of work; or

[8] Did the General Division base its decision on an erroneous finding of fact without regard to the occupational therapy report?

ANALYSIS

[9] The DESD Act governs the Tribunal's operation. It provides rules for appeals to the Appeal Division. An appeal is not a re-hearing of the original claim, but a determination of whether the General Division made an error under the DESD Act. The Act also states that there are only three kinds of errors that can be considered. They are that the General Division failed to observe a principle of natural justice, made an error in law, or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.¹ If one of these errors was made, the Appeal Division can intervene.

[10] The Claimant's grounds of appeal are considered below in this context.

Issue 1: Substantially gainful occupation

[11] To be disabled under the *Canada Pension Plan* a claimant must have a disability that is both severe and prolonged. A disability is severe if it renders the claimant incapable regularly of pursuing any substantially gainful occupation.² The *Canada Pension Plan Regulations* state that substantially gainful income is equivalent to the maximum amount of disability pension that would be paid in a year.³ The General Division decision refers to this and states that the Claimant earned less than the defined amount, however, it was still satisfied that the Claimant was capable of regularly pursuing any substantially gainful occupation.⁴

[12] The General Division's conclusion that the Claimant was capable regularly of pursuing any substantially gainful occupation was based on all of the evidence before it, including that the Claimant completed reiki and reflexology training after the car accident, that she ran her own

¹ DESD Act s. 58(1)

² *Canada Pension Plan* s. 42(2)(a)

³ *Canada Pension Plan Regulations* s. 68.1

⁴ General Division decision at para. 17

psychic business, and that she worked approximately 25 hours per week at the date of the hearing.⁵ The General Division also considered the Claimant's income. It decided that this was not determinative of whether she has a severe disability.

[13] The General Division did not specifically refer to any court decisions that have considered what "substantially gainful" means under the *Canada Pension Plan*. These decisions say that when deciding whether an occupation is substantially gainful, the work conditions, performance expectations, and whether the claimant was paid a reasonable wage for the work done must be considered. However, the General Division applied the legal principles from these decisions. It considered what the Claimant earned for the work performed (\$125 for a one-hour psychic reading; \$180 for 1.5 hours),⁶ the hours she worked, and that she could control her working conditions. There was no evidence that performance expectations were modified or reduced because the Claimant is self-employed.

[14] The fact that the Claimant did not earn enough money to support her family was not considered by the General Division. However, this is not an error because socio-economic factors are irrelevant when deciding whether a claimant is disabled.⁷

[15] Therefore, the General Division did not make an error in law when it decided that the Claimant was capable regularly of pursuing any substantially gainful occupation.

Issue 2: the Claimant's vision

[16] The Claimant also argues that the General Division made an error in law because it failed to consider her vision condition. The Federal Court of Appeal instructs that when deciding if a claimant is disabled, all of their medical conditions must be considered, not just the main one(s).⁸ The General Division decision summarizes the evidence about the Claimant's post-traumatic vision syndrome,⁹ and considered this as well as her light sensitivity in making its decision.

⁵ General Division decision at para. 24

⁶ General Division decision at para. 14

⁷ *Canada (Minister of Human Resources Development) v. Rice*, 2002 FCA 47

⁸ *Bungay v. Canada (Attorney General)*, 2011 FCA 47

⁹ General Division decision at para. 9, 22

Therefore, the appeal fails on the basis that the General Division failed to consider all of the Claimant's medical conditions.

Issue 3: Hours of work

[17] In addition, the Claimant argues that the General Division based its decision on an erroneous finding of fact regarding the number of hours that she spends working. The General Division decision finds as fact that the Claimant spends 25 hours per week working.¹⁰ The Claimant argues that she misunderstood the questions posed by the General Division member, and thought he was asking about the maximum number of hours that she had worked in a week since the accident.

[18] I have listened to the portions of the General Division hearing recording when this issue was discussed.¹¹ On three different occasions during the hearing the Claimant stated that she worked 20 or 25 hours per week. She also testified that she would like to work more hours, and that she takes what work comes in.¹² Therefore, the General Division's finding of fact that the Claimant worked 25 hours each week was not erroneous. It has an evidentiary basis. The appeal cannot succeed on this basis.

Issue 4: Occupational therapy report

[19] Finally, the Claimant argues that the appeal should be allowed because the General Division did not consider the occupational therapy report that supported her legal position. However, the General Division specifically considered the Transferrable Skills/Employability Assessment written by the occupational therapist that concluded that the Claimant was not competitively employable.¹³ The decision states that the Tribunal Member could not understand how the occupational therapist reached this conclusion in light of the Claimant's testimony that she worked 25 hours per week, she pursued and completed coursework, and she was working at her own business.¹⁴ The decision explains why it gave little weight to this evidence. That the

¹⁰ General Division decision at para. 19, 24

¹¹ General Division hearing recording at approximate time 1:00, 1:05 and 1:29

¹² General Division hearing recording at approximate time 1:29

¹³ General Division decision at para. 24

¹⁴ *Ibid.*

Claimant disagrees with how this evidence was weighed is not a reason for the appeal to be allowed.

CONCLUSION

[20] I am sympathetic to the Claimant's circumstances. However, for the reasons set out above, the appeal must be dismissed.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	July 29, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. W., Appellant Stéphanie Pilon, Representative for the Respondent