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

Citation: *C. W. v Minister of Employment and Social Development*, 2019 SST 765

Tribunal File Number: AD-19-377

BETWEEN:

C. W.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Kate Sellar

Date of Decision: August 15, 2019

Canada

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] C. W. (Claimant) worked for the federal government. He had difficulty following a schedule due to fatigue, and caring for his ill child.

[3] The Claimant applied for a disability pension under the *Canada Pension Plan* (CPP) in November 2017. The Minister denied the application initially and on reconsideration. The Claimant appealed to this Tribunal.

[4] On April 24, 2019, the General Division dismissed the Claimant's appeal. The General Division decided that the Claimant was not entitled to a disability pension.

[5] I must decide whether there is an arguable case that the General Division made an error under the *Department of Employment and Social Development Act* (DESDA) that would justify granting leave to appeal.

[6] I find that there is no arguable case for an error. The application for leave to appeal is refused.

PRELIMINARY MATTER

[7] The Claimant gave the Appeal Division a document called "Client Communication Record." [1] This is new evidence that was not available to the General Division member when they made their decision.

[8] With some limited exceptions, the Appeal Division does not consider new evidence when deciding whether to grant leave to appeal.[2]

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[1] AD1-14 to 17. The document is dated May 2019.
[2] *Parchment v Canada (Attorney General)*, 2017 FC 354.

[9] No exception applies in this case. I will not consider the new evidence.

ISSUE

[10] Has the Claimant raised an arguable case for an error that would justify granting leave to appeal?

ANALYSIS

[11] The Appeal Division does not give people a chance to re-argue their case in full at a new hearing. Instead, the Appeal Division reviews the General Division's decision to decide whether there is an error. That review is based on the wording of the DESDA, which sets out the grounds of appeal.[3] The Appeal Division can review a General Division decision when the General Division has: failed to provide a fair process, made an error of law, or based its decision on an erroneous finding of fact (made in a way that is perverse or capricious, or by ignoring the evidence).[4]

[12] At the leave to appeal stage, a claimant must show that the appeal has a reasonable chance of success.[5] To meet this requirement, the claimant needs to show only that there is some arguable ground on which the appeal might succeed.[6] That is a low test to meet.

Has the Claimant raised an arguable case for an error that would justify granting leave to appeal?

[13] In my view, the Claimant has not raised an arguable case for an error under the DESDA that would justify granting leave to appeal.

[14] The Claimant argues that the Minister should have granted his application for the disability pension. The Tribunal wrote to the Claimant's representative to explain that at the Appeal Division, the Claimant should provide an argument about whether the General Division

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[3] DESDA, s 58(1).
[4] DESDA, s 58(1).
[5] DESDA, s 58(2).
[6] This idea comes from a case called *Fancy v Canada (Attorney General)*, 2010 FCA 63.

made an error under the DESDA. The Tribunal gave the Claimant's representative time to provide those arguments. The Claimant's representative did not provide those arguments.

[15] These are the Claimant's arguments, as I understand them:

a) The fact that the Claimant stopped work for family caregiver reasons is not relevant. The evidence shows that his condition worsened since he stopped work in December 2017 and the MQP is in the future.

b) The Claimant's evidence shows a history of being incapable regularly for work at his government job.

c) The CPP medical report on file is evidence that the kind of accommodations the Claimant needs means that he is not actually capable of work (he would need to be working for what is sometimes called a "benevolent" employer).

d) The Claimant's testimony showed that his disability negatively affects his activities of daily living.

e) The Claimant's evidence about his failed attempt to work as a cashier shows that his efforts to get and keep employment were unsuccessful because of his disability.

[16] In my view, the Claimant has not raised an arguable case for an error under the DESDA.

a) The reason why the Claimant stopped working

[17] The General Division found that the Claimant stopped working to care for his child, and not because of a medical condition.[7] The Claimant argues that the reason he stopped work is not particularly important, since: (a) his minimum qualifying period (MQP) is in the future, and (b) he says his medical situation worsened after he stopped working.

[18] In my view, there is no arguable case for an error relating to the General Division's decision about why the Claimant stopped work.

[7] General Division decision, para 18.

[19] There is no arguable case for an error of fact. The Claimant is not arguing that he stopped work for any other reason.

[20] There is no arguable case for an error of law, either. The law requires the General Division to weigh all the available evidence and come to a decision about whether the Claimant had a severe disability as of the day of the hearing. In this case, the General Division noted that the Claimant did not leave work for medical reasons, but then also considered a range of other factors in deciding that the Claimant had capacity for some work, even if that work was not at his former workplace.[8] There is no arguable case for an error of law here.

b) The Claimant's work history

[21] The Claimant says his work history shows that he is incapable regularly for work at his government job.

[22] In my view, there is no arguable case that the General Division made an error when considering the Claimant's work history.

[23] There is no arguable case for an error of fact. There is no evidence that the General Division ignored or misunderstood any evidence about the Claimant's work history. The General Division specifically considered that work history.[9] The General Division decided that the Claimant had some residual capacity for work, even if it was not at his previous government job.

[24] There is no arguable case for an error of law, either. The General Division did not have to decide whether the Claimant was incapable regularly of work at his government job. The General Division needed to (and did) decide whether the Claimant was incapable regularly of pursuing any substantially gainful occupation.[10] The Claimant has not raised an arguable case for an error of law or an error of fact.

c) The Claimant's accommodations

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[8] General Division decision, para 19.
[9] General Division decision, para 11.
[10] Canada Pension Plan, s 42(2).

[25] The Claimant argues that his need for accommodations means that he is capable only of work for a benevolent employer. The letter attached to the CPP medical report does describe that it would be good for the Claimant to have some flexibility in terms of his schedule at work.[11] The General Division did consider the need for workplace accommodations in medical reports. The General Division specifically considered the February 2017 report from Dr. Lazareck, which suggested a graduated return to work, as well as some flexibility in terms of reasonable modifications of his work schedule to accommodate when caregiving demands come up.[12]

[26] In my view, there is no arguable case for an error.

[27] There is no arguable case for an error of fact because there is no evidence of an accommodation that the General Division ignored or misunderstood.

[28] There is no arguable case for an error of law because the General Division did consider what the Claimant's functional limitations were (as outlined in medical reports) as is required by law.[13] Those functional limitations did not raise the question as to whether the Claimant could only work for a benevolent employer.

d) The Claimant's activities of daily living

[29] The Claimant argues that his disability has negatively affected his activities of daily living.

[30] In my view, the Claimant does not raise an arguable case for an error here.

[31] To decide whether the Claimant's disability was severe, the General Division needed to focus on whether the Claimant had capacity for work. Activities of daily living can be one way of determining whether there is capacity for work.

[32] The General Division described and considered the Claimant's evidence about how he believed his disability effects his ability to work.[14] The General Division decided that the

[11] GD2-46 to 51.
[12] GD2-62 and 63.
[13] General Division decision, para 17.
[14] General Division decision, paras 9 and 11.

medical evidence did not support the Claimant's conclusions about his ability to work. The General Division gave considerable weight to the medical evidence in the file, particularly the statement from Nurse Hopps stated that she is hopeful that with appropriate treatment and engagement in treatment plans, the Claimant's prognosis will improve and his functioning will return to baseline.[15]

[33] The Claimant would like the General Division to have reached a different conclusion based on all the evidence. However, there is no arguable case for an error based on the way the General Division considered the evidence about the Claimant's activities of daily living. The General Division gave more weight to the medical evidence about his limitations and his treatment, and the Appeal Division will not interfere with that weighing of evidence here.

e) The Claimant's failed work attempt

[34] The Claimant argues that his failed work attempt as a cashier shows that his efforts to get and keep a job have been unsuccessful because of his disability.

[35] In my view, the Claimant has not raised an arguable case for an error under the DESDA.

[36] The General Division needed to decide whether the work as a cashier showed that the Claimant's efforts to get and keep work were unsuccessful by reason of health condition.[16] The General Division applied that test as is required by law.

[37] In applying that test, there is no arguable case that the General Division ignored or misunderstood the evidence about the cashier's work.[17] The General Division decided that this work might not have been suitable for the Claimant because it was fast-paced and involved dealing with customers, which can be highly stressful.

[38] The Appeal Division does not have the ability to re-weigh the evidence about the cashier's job and come to a different conclusion. There is no arguable case that the General Division made an error of fact or an error of law in relation to the cashier's job. The Claimant's

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[15] General Division decision, para 23.
[16] That test is outlined in *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[17] General Division decision, para 29.

issue is with the way the General Division applied the law to these facts.[18] The Appeal Division does not have the ability to identify and fix that type of error.

General Division Did Not Ignore or Misconstrue Evidence

[39] It is the Claimant's role to raise all of the arguments that support his application for leave to appeal.[19] However, I have reviewed the record. I am satisfied that the General Division did not ignore or misconstrue any evidence when it made the decision.[20]

[40] The evidence suggests that the Claimant may improve with treatment. The medical evidence does not support the kinds of functional limitations that would make the Claimant incapable regularly of pursuing any substantially gainful job.

The MQP is in the Future, The Claimant Might Decide to Re-apply

[41] To access the disability pension, you must be disabled within the meaning of the CPP on or before the end of the MQP. The MQP is calculated based on the Claimant's contributions to the CPP. The General Division found that at the time of the hearing in March 2019, the Claimant was not entitled to a disability pension. Based on the information at the time of the General Division's decision, the Claimant's minimum qualifying period (MQP) ends on December 31, 2019.

[42] If the Claimant wishes to re-apply in future for a disability pension, he would still need to show that he is disabled within the meaning of the CPP on or before the end of the MQP. The General Division's decision that the Claimant does not meet the requirements for a disability pension does not cover the period after it is issued. This is important information for the Claimant in case he decides to re-apply for the disability pension with any updated evidence might have after the hearing and before the end of the MQP.

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[18] The Appeal Division's role in this regard is described in a case called *Garvey v Canada (Attorney General)*, 2018 FCA 118.
[19] This idea is described in a case called *Tracey v. Canada (Attorney General)*, 2015 FC 1300.
[20] That review of the record is consistent with the principles in the Federal Court decision *Karadeolian v Canada (Attorney General)*, 2016 FC 615.

CONCLUSION

[43] The application for leave to appeal is refused.

Kate Sellar
Member, Appeal Division

REPRESENTATIVE:	Krystal Lee, for the Applicant