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

Citation: *D. H. v Minister of Employment and Social Development*, 2019 SST 774

Tribunal File Number: AD-19-445

BETWEEN:

D. H.

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 20, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] D. H. (Claimant) worked as a machinist until 2009 when he injured his left shoulder. For several years beginning in 2010, he agreed to do retraining though the Workplace Safety and Insurance Board (WSIB). He completed a program in mechanical engineering technology. He worked briefly after that in sales. He has chronic pain in his back that became worse in 2014. He also has pain in his shoulder and right foot. His doctor explains he also has a depressed mood and experiences fatigue.

[3] The Claimant applied for a disability pension under the *Canada Pension Plan* (CPP) in January 2018. He explained that he had not been able to work since June 2017 because of severe back pain. The Minister denied his application initially and on reconsideration. The Claimant appealed to this Tribunal. On May 19, 2019, the General Division decided that the Claimant was not eligible for a disability pension under the CPP. The Claimant has asked for permission (leave) to appeal that decision.

[4] 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.

[5] There is no arguable case for an error. The application for leave to appeal is refused.

PRELIMINARY MATTER

[6] In support of this appeal, the Claimant gave Appeal Division some new evidence.[1] The new evidence that was not available to the General Division member when they made their decision.

[7] With some limited exceptions, the Appeal Division does not consider new evidence when deciding whether to grant leave to appeal.[2] No exception applies in this case. I will not consider the new evidence.

ISSUE

[8] Is there an arguable case that the General Division made an error of fact by finding that the Claimant's disability did not exist during the minimum qualifying period (MQP)?

Reviewing General Division Decisions

[9] 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]

[10] At the leave to appeal stage, a claimant has to show that the appeal has a reasonable chance of success.[4] A claimant needs to show only that there is some arguable ground on which the appeal might succeed.[5] This is a low test to meet.

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[1] A letter from Dr, Issa dated June 21, 2019 (AD1-6) and some photographs the Claimant explains are from 1973 (AD1-10). The rest of the documents attached to the appeal are duplicates of evidence already in the record at the General Division.
[2] Explained in a case called *Parchment v Canada (Attorney General)*, 2017 FC 354.
[3] DESDA, s 58(1).
[4] DESDA, s 58(2).
[5] Explained in a case called *Fancy v Canada (Attorney General)*, 2010 FCA 63.

[11] The DESDA says that there are three kinds of errors. The General Division makes an error when it fails to provide a fair process,[6] when it makes an error of law,[7] or when it makes an error of fact.[8]

CPP Disability Pension Rules

[12] To get a CPP disability pension, the claimant must have a disability that is severe and prolonged on or before the end of the minimum qualifying period (MQP). The MQP is calculated based on the claimant's contributions to the CPP.

[13] Claimants have a severe disability when they are incapable regularly of pursuing any substantially gainful occupation.[9] To figure out if a disability is severe according to the CPP, the General Division has to consider whether the Claimant had functional limitations that affect capacity to work.[10]

ANALYSIS

Is there an arguable case that the General Division made an error of fact by finding that the Claimant's disability did not exist during the minimum qualifying period (MQP)?

[14] The Claimant has not raised an arguable case for an error of fact. The General Division did not make the finding that the Claimant alleges the General Division made. The General Division found that there was no evidence to show that the Claimant **experienced limitations** due to back pain by the end of the MQP (the Claimant's MQP ended on December 31, 2011). This is different from the Claimant's allegation that the General Division found that he did not have a disability at all during the MQP.

[15] The General Division decision discussed the medical evidence about the Claimant's disability like this:

> The case law is clear that medical evidence is required to support a claim that a disability is severe.[18] The first medical evidence of the Claimant's

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[6] DESDA, s 58(1)(a): "failed to observe a principle of natural justice."
[7] DESDA, s 58(1)(b).
[8] DESDA, s 58(1)(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."
[9] *Canada Pension Plan*, s 42(2).
[10] This is explained in a case called *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

> back pain is a November 2017 X-ray of the lumbar spine showing moderate degenerative disc disease at L5-S1 and degenerative facet changes at L4-L5 and L5-S1.19 There is no evidence to show that the Claimant experienced limitations due to back pain by December 2011.[11]

[16] The General Division decided that the Claimant's back pain did not meet the definition of a severe disability under the CPP during the MQP. The General Division reached that conclusion by considering that:

a) A medical report on file stated that the Claimant's restriction was sustained use of his left arm at or above chest level; the medical reports on file did not note restrictions relating to the Claimant's back pain during the MQP;[12] and

b) the Claimant participated in retraining during the MQP and his hours matched those of a full-time work week;[13] and

c) the Claimant testified that his back pain only limited his ability to work starting in 2014 (after the end of the MQP).[14]

[17] The Claimant argues that the General Division made an error by finding that his disability did not exist before the end of the MQP. In support of his appeal, the Claimant relies on the medical documents that reference the fact that he had struggled with continuous severe back pain and generalized join pain for many years, and has a history of a significant back injury when he was a child.[15]

[18] In my view, there is no arguable case for an error of fact here. There is no arguable case that General Division made an erroneous (or wrong) finding of fact about the Claimant's disability during the MQP. The General Division's decision does not deny that the Claimant had a disability during the MQP. Instead, the General Division's finding was that the Claimant's disability was not severe within the meaning of the CPP during that time. The General Division reached that conclusion about the severity of the Claimant's disability by applying the facts (see

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[11] General Division decision, para 22.
[12] General Division decision, paras 18 and 22.
[13] General Division decision, para 19.
[14] General Division decision, para 21.
[15] AD1-7, but also in the record at the General Division, see GD10-2.

a through c, above) to the law. The General Division found that while the Claimant certainly had a condition that resulted in back pain, he also had the capacity to work during the MQP when he was retraining at full-time hours.

[19] The Claimant also checked a box in his application for leave to appeal stating that the General Division also made an error by failing to observe a principle of natural justice or otherwise acting beyond or refusing to exercise its jurisdiction.[16] However, the Claimant has provided no arguable case about how the General Division might have made that error. I see no evidence of that type of error in the record.

[20] I have reviewed the record, including listening to the hearing from the General Division. I am satisfied that the General Division did not ignore or misconstrue any evidence when it made the decision.[17]

[21] A final note: there is no doubt that the Claimant has been in a difficult position and has found CPP disability pension application to be a long and confusing process. As he testified at the General Division hearing, he has tried to "follow the rules" set out by the government agencies that help people with disabilities. When he injured his shoulder at work, the WSIB offered to retrain him. He "followed the rules" and agreed to that retraining. While he was retraining, he did not earn income and contribute to the CPP. By 2017, the Claimant explains that his back was too painful -- he could not work all. He applied to CPP for a disability pension. One of the reasons the Minister gave for denying his application was that his participation in the retraining starting in 2010 (during the MQP) showed that his disability was not severe.[18]

[22] The Claimant argues that the years participating in retraining under WSIB should be dropped out of the contributory period for the purpose of calculating the MQP for a CPP disability pension.[19] The General Division noted that in his particular case, even if he was able to

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[16] AD1-3.
[17] This review of the record is consistent with the requirement set out by the Courts in *Karadeolian v. Canada (Attorney General)*, 2016 FC 615.
[18] GD2-7.
[19] GD6-4.

drop the years he was retraining out of his contributory period, his MQP would not have changed.[20]

[23] Regardless, the Claimant's policy idea might better support people with disabilities to increase their access to disability pensions if their conditions deteriorate after a period of retraining. This is an idea that the Claimant may decide to raise in other ways. However, as the General Division explained, this Tribunal does not have the power to drop those years out of his contributory period.

CONCLUSION

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

Kate Sellar
Member, Appeal Division

REPRESENTATIVE:	D. H., self-represented

[20] General Division decision, para 15.