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

Citation: *L. B. v Minister of Employment and Social Development*, 2019 SST 999

Tribunal File Number: AD-19-205

BETWEEN:

L. B.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: October 9, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, L. B., has scoliosis, a congenital condition characterized by curvature of the spine. She worked as a bartender until 2008, when she returned to school to complete her high school education. She later made two attempts to work as a home care provider, but she claims that, on each occasion, she had to quit because of back pain.

[3] The Appellant is now 49 years old. In September 2017, she applied for a Canada Pension Plan (CPP) disability pension. The Respondent, the Minister of Employment and Social Development (Minister), refused the application, because it found that the Appellant's disability was not "severe and prolonged," as defined by the *Canada Pension Plan*, during the minimum qualifying period (MQP), which it determined had ended on December 31, 2008.

[4] The Appellant appealed the Minister's decision to the General Division of the Social Security Tribunal. The General Division conducted a hearing by teleconference and, in a decision dated December 31, 2018, found that, more likely than not, the Appellant was capable regularly of performing substantially gainful work during the MQP and after. In particular, the General Division found that the Appellant was capable of sedentary employment, pointing to the two years of classwork that she completed in upgrading her education.

[5] On March 25, 2019, the Appellant requested leave to appeal from the Tribunal's Appeal Division, expressing her disagreement with the General Division's decision. She specifically alleged that the General Division took a simplistic approach to chronic back pain, failing to appreciate that every individual's problems are unique. She also suggested that the General Division ignored evidence that she could not offer an employer regular performance.

[6] In a decision dated April 8, 2019, I granted leave to appeal because I saw a reasonable chance of success on appeal for at least one of the Appellant's reasons for appealing. Now,

having reviewed the record and considered the parties' oral and written submissions, I have concluded that neither of the Appellant's reasons for appealing would justify overturning the General Division's decision.

ISSUES

[7] According to section 58(1) of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: the General Division failed to observe a principle of natural justice, erred 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.

[8] I must answer the following questions:

Issue 1: Did the General Division adequately consider the Appellant's subjective evidence about the impact of her chronic back pain on her functional capacity?

Issue 2: Did the General Division misapply the test for severity, in particular the requirement to consider the Appellant's capacity to offer "regular" performance?

ANALYSIS

Issue 1: Did the General Division adequately consider the Appellant's subjective evidence about the impact of her chronic back pain on her functional capacity?

[9] The Appellant alleges that the General Division ignored her subjective evidence about the effect of her increasing back pain on her capacity to work as of the MQP:

> […] [T]he attitude is that everyone with a specified health issue is thrown into the same bin as all others with the same health problem. Everyone who has chronic back pain problems is exactly the same as anyone else with back pain problems. There is no accounting for the individual.[1]

[1] Application for leave to appeal dated March 20, 2019, AD1.

[10] I have carefully considered the Appellant's submissions on this point. In the end, I found that the Appellant's argument does not have enough merit to justify overturning the General Division's decision.

[11] One of the General Division's primary functions is to establish facts by examining, analyzing, and weighing the available evidence. The General Division may draw logical conclusions from that evidence so long as it does not stray into error. In fulfilling its role as finder of fact, the General Division is allowed a measure of deference, as reflected in the wording of section 58(1) of the DESDA, which permits intervention only if a factual error has been made in a "perverse or capricious manner" or "without regard for the material."

[12] As the General Division notes, the Appellant did not present any written medical evidence dating from the time of MQP. For this reason, it was particularly important for the General Division to consider the Appellant's testimony with care.

[13] In my view, it did.

[14] The General Division based its decision, in part, on findings that the Appellant (i) left bartending for reasons other than her physical impairments and (ii) completed high school after the MQP without special accommodations

> The Claimant worked as a bartender for 5 years until 2008 when she ended this employment, because **she wanted to return to school to upgrade her education** and get a better job. She advised me that she went to school full-time every day from 9:00 am to 4:00 pm from 2008 to 2010 taking upgrading courses. Although the Claimant advised the Respondent in December 2017 that she had trouble when attending school and missed some classes, she testified that she graduated with honours and attended school full-time for three years. **Further, there is no evidence that the Claimant required any accommodations or special considerations to complete her classes** [Emphasis added].[2]

[15] The Appellant insists that she clearly told the General Division that she left her job as a bartender because of increasing back pain, not because she wanted to explore new opportunities. However, the recording of the hearing tells a slightly different story:

[2] General Division decision, para 14.

> I was still well when I worked as a bartender for X.[3]
>
> I was still feeling good [as a bartender], so I said to myself, I'm going back to school, make something of myself. Well, that was my downfall.[4]
>
> General Division member: Why did you quit bartending to go back to school?
> Appellant: I wanted to make something better of myself.[5]

[16] This testimony is consistent with what the Appellant wrote in the December 2017 letter that accompanied her notice of appeal to the General Division: "I did return to school from 2008–2010 to complete my high school education, hoping to be able to find employment where I could cope with the pain."[6]

[17] The evidence suggests that, while increasing back pain led the Appellant to quit a job that required her to be on her feet at all times, she was still able to mange her duties as a bartender but was also attracted by the more promising economic opportunities offered by sedentary work. Whatever else it does, her testimony indicates that, as of 2008, she was willing, and felt able, to work—if not in a physically demanding job, then in a role that required her to sit at a desk or counter for extended periods. The General Division did not err in drawing logical and reasonable inferences from the Appellant's own statements.

[18] The General Division also inferred capacity from the fact that the Appellant managed to complete high school. The Appellant alleges that the General Division ignored her evidence that she was only able to do so because she received accommodations and special considerations.

[19] I have listened to the segment of the audio recording of the hearing in which the Appellant discussed her return to school. In my view, the General Division' decision accurately relayed the substance of her testimony.

[20] As the General Division noted, the Appellant testified that she attended full-time classes for three years and graduated with honours. The presiding General Division member asked the

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[3] Recording of General Division hearing, 10:35.
[4] Recording of General Division hearing, 11:25.
[5] Recording of General Division hearing, 28:00.
[6] Applicant's letter dated December 2, 2017, GD1-9.

Appellant whether she benefitted from classes that "worked differently," and she agreed that she was permitted to work at her own pace.[7] In my view, this response did not constitute evidence of "accommodations or special considerations," since a significant portion of schoolwork—which includes doing homework, writing assignments, and studying for tests—typically permits students to "work at their own pace." The General Division did not specifically ask the Appellant about accommodations or special considerations, but since the burden of proof lay with the Appellant, it was not required to do so. The Appellant was certainly given an opening to describe whatever special accommodations she might have received, such as extended break periods, extra time to take tests, or assistive devices, but I did not hear her volunteer any information to that effect.

[21] In short, I am satisfied that the General Division distorted or misrepresented the Appellant's evidence surrounding her decision to quit bartending and go back to school. In that regard, I do not see how the General Division based its decision on an erroneous finding of fact, much less one that was "capricious or perverse" or "without regard for the record."

Issue 2: Did the General Division misapply the test for severity, in particular the requirement to consider the Appellant's capacity to offer "regular" performance?

[22] The Appellant suggests that the General Division ignored evidence that she could not offer an employer regular performance:

> Are there times when the pain is tolerable? Yes, indeed there are. Are there rare occasions when the pain is tolerable for a full eight hours? Yes, rarely there are. But the bottom line is this. When your ability to work the next day is no better than the flip of a coin, you are of little use to an employer.[8]

[23] Again, having carefully considered the parties' submissions, I have concluded that the General Division did not err in law when it considered the severity of the Appellant's disability.

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[7] Recording of General Division hearing, 13:40.
[8] Appellant's letter, dated March 20, 2019, appended to her leave to appeal application, AD1-5.

[24] According to section 42(2)(a) of the *Canada Pension Plan*, a disability is severe if a claimant is "incapable regularly of pursuing any substantially gainful occupation." Each word in this definition has meaning and significance.[9]

[25] On matters of legal interpretation, the Appeal Division holds the General Division to a strict standard. In this case, the General Division inferred capacity from the Appellant's post-MQP return to school, but it also placed weight on her final job as a home care aide in 2011:

> After completion of her upgrading in 2010, the [Appellant] found work as a home care aid [*sic*]. She initially worked on a "call-in basis", which she testified did not work out because it was so few shifts. She found steady work for 6 months caring for an elderly woman. **She stated that this work allowed her to be able to sit and work, which helped her. This further supports my finding that the [Appellant] retained capacity for sedentary work.** The [Appellant] stopped working for this client about September 2011, because her back was causing her pain [Emphasis added].[10]

The relatively moderate physical demands of the home care job led the General Division to conclude that the Appellant had the capacity to work in a lighter occupation. In my leave to appeal decision, I wondered whether the General Division had given adequate consideration to the fact that, light though her last job may have been, she still had to leave it.

[26] In the end, I decided that the General Division committed no error in how it assessed the Appellant's final job as a home care worker, nor, as a result, applied the wrong test for regularity.

[27] First, having found the Appellant's back condition had deteriorated after the MQP, the General Division wrote:

> Whether the [Appellant] had capacity to work when she stopped working in September 2011, or whether she has capacity to work today is not the issue before me. I must decide if the [Appellant] was incapable regularly of performing any substantially gainful occupation at December 31, 2008 and continuously thereafter.[11]

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[9] *Villani v Canada (Attorney General)* 2001 FCA 248.
[10] General Division decision, para 17.
[11] General Division decision, para 18.

It must be remembered that the Appellant's most recent attempts to work came more than two years after the end of her MQP. In the interim, the Appellant experienced what appears to be a dramatic decline in her health—as indicated by the August 2016 x-ray showing spinal degeneration, as compared with a prior x-ray from May 2009, and by the Appellant's own testimony that returning to school in 2008 was her "downfall."

[28] Second, whether the Appellant's brief stint as a home care worker was evidence of capacity or incapacity is immaterial. As noted, it came well after the MQP and, more importantly, it was only one of several factors in the General Division's reasoning. On the whole, the General Division placed more weight on (i) the absence of any medical evidence from the MQP; (ii) the Appellant's statement that she left bartending for reasons other than her health; and (iii) her three years of full-time attendance at school. I am aware that the Appellant's final job involved little more than minding a senior citizen and therefore imposed few physical demands on her. I am also aware that she lasted only six months in that role and earned only a few thousand dollars from it. However, the Appellant's inability to manage a job in 2011 does not say much about her capacity in 2008—especially when there was evidence to suggest that her condition deteriorated in the intervening three years.

CONCLUSION

[29] I know that the Appellant will be disappointed by my decision, just as she was with the General Division's. Over the years, she has paid into the CPP, but her most recent contributions were years ago, and when they ended, so did her disability coverage. When the Appellant went back to school, she did not realize that she would be limiting her eligibility for benefits, but there is nothing that the General Division or I can do about that now. The *Canada Pension Plan* sets out a rigid formula for calculating the MQP, and unfortunately for the Appellant, the General Division did not find enough evidence to indicate that she had a severe and prolonged disability as of December 31, 2008.

[30] For the reasons discussed above, the Appellant has not demonstrated to me that, on balance, the General Division committed an error that falls within the grounds of appeal listed in section 58(1) of the DESDA.

[31] The appeal is therefore dismissed.

Member, Appeal Division

HEARD ON:	September 30, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. B., Appellant Nathalie Pruneau, representative for the Respondent