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

Citation: *A. J. v Minister of Employment and Social Development*, 2019 SST 1041

Tribunal File Number: AD-19-663

BETWEEN:

A. J.

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: October 17, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] A. J. (Claimant) broke her ankle in 2015. She had surgery. She had a desk job using a computer. She was off work until August 2016, when she returned to work on reduced hours. In February 2018, she stopped working completely. The Claimant applied for a disability pension under the *Canada Pension Plan* (CPP) on January 11, 2017. The Minister denied the application initially and on reconsideration. The Claimant appealed to this Tribunal.

[3] On July 8, 2019 the General Division dismissed the Claimant's appeal, finding that she did not prove that her disability was "severe" within the meaning of the CPP. The Claimant is asking the Appeal Division to grant leave (permission) to appeal the General Division's 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* (DESDA) that would justify granting leave to appeal.

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

ISSUE

[6] Is there an arguable case that the General Division made an error of fact that would justify granting leave to appeal?

ANALYSIS

[7] The Appeal Division does not give people a chance to re-argue their case in full at a new hearing at this level. 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 (or reasons for) appeal.[1]

[8] The DESDA says that it is an error when the General Division "bases 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."[2] Mistakes involving the facts have to be important enough that they could affect the outcome of the decision. The error needs to result from ignoring evidence, willfully going against the evidence, or from reasoning that is not guided by steady judgement.[3]

[9] At the leave to appeal stage, a claimant must show that the appeal has a reasonable chance of success.[4] To meet this requirement, a claimant needs to show only that there is some arguable ground on which the appeal might succeed.[5]

Is there an arguable case that the General Division made an error of fact that would justify granting leave to appeal?

[10] There is no arguable case that the General Division made an error of fact that would justify granting leave to appeal.

[11] The Claimant argues that the General Division ignored her medical reports. She explains that she has been in severe pain for more than four years. She states that the General Division made an error by challenging her doctor's opinion about her ability to work. The Claimant described these problems as errors of law. The Claimant has not pointed to a legal principle or test that the General Division did not follow. As a result, it is better to analyze the Claimant's concerns as possible errors of fact.

[12] The General Division is required to consider all the evidence (including medical reports and the Claimant's own testimony about her condition). The General Division weighs the evidence. The General Division makes findings of fact about the Claimant's functional

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[1] DESDA, s 58(1).
[2] DESDA, s 58(1)(c).
[3] The Federal Court has considered these ideas about perverse and capricious findings of fact in a case called *Raha v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319.
[4] DESDA, s 58(2).
[5] This idea is explained in a case called *Fancy v Canada (Attorney General)*, 2010 FCA 63.

limitations, personal circumstances, and her treatment history. Ultimately, the General Division must decide whether the Claimant meets the requirements for a disability pension.

[13] There is no arguable case that the General Division ignored the medical reports. The General Division discussed the key medical reports. The General Division considered the information from Dr. Haider (a specialist), who prescribed Naproxen and Tylenol and recommended she elevate her foot.[6] In September 2015, Dr. Haider suggested that the Claimant should work a four-hour day for three more weeks. The General Division also considered the note that Dr. Haider wrote in January 2018 stating that the Claimant could not return to work due to osteoarthritis.[7] The General Division considered the information from Dr. Sue-A-Quan (another specialist) who noted that the Claimant walked normally and was able to hop on her leg.[8] The General Division considered the X-Ray reports from 2015, 2016 and 2018.[9]

[14] There is no arguable case that the General Division ignored the Claimant's evidence about her pain. The General Division member specifically stated in the decision that she accepted that the Claimant had pain.[10] The General Division member stated in the decision that she agreed with Dr. Rahman that the Claimant has suffered and would continue to suffer for an indefinite period.[11] The General Division member did not reach the conclusion the Claimant wanted her to reach about the impact of her pain on her capacity to work. However, there is no arguable case that the General Division ignored the evidence about the Claimant's pain.

[15] There is no arguable case that the General Division made an error of fact or of law by "challenging" the family doctor's conclusion about the Claimant's ability to work. The General Division decided that it could not accept Dr. Rahman's opinion that she was "not fit to work in any environment."[12] The General Division member gave reasons for rejecting Dr. Rahman's conclusion. The General Division concluded that Dr. Rahman's opinion was not supported by the clinical findings in the medical reports, which showed mild osteoarthritis. The General Division also made note of other evidence that contradicted Dr. Rahman's conclusions, including

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[6] General Division decision, para 14.
[7] General Division decision, paras 33, 34, and 36.
[8] General Division decision, para 18.
[9] General Division decision, paras 10, 18, and 19.
[10] General Division decision, para 27.
[11] General Division decision, para 42.
[12] General Division decision, para 27.

the nature of the work the Claimant had been doing in her sedentary job, and the kinds of treatments she was receiving for her pain.[13]

[16] I have reviewed the record at the General Division. I am satisfied that the General Division did not ignore or misunderstand the evidence.[14] The Claimant had to show that her disability was severe and prolonged (within the meaning of the CPP) by the date of the hearing. The hearing was on June 24, 2019. A person with a severe disability, according to the CPP, is incapable regularly of pursuing any substantially gainful occupation.[15] The General Division considered the medical evidence (including the Claimant's treatment history), the Claimant's testimony about the pain and swelling in her ankle; and the Claimant's personal circumstances (including her age, education level, language proficiency, and past work and life experience). The General Division did not reach the conclusion about her ability to work that the Claimant wanted, but there is no arguable case for errors of fact or of law in the decision.

CONCLUSION

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

Kate Sellar
Member, Appeal Division

REPRESENTATIVE:	A. J., self-represented

[13] General Division decision, para 42.
[14] This review is consistent with the kind of review endorsed by the Federal Court in *Karadeolian v Canada (Attorney General)*, 2016 FC 615.
[15] *Canada Pension Plan*, s 42(2).