



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. G. v Minister of Employment and Social Development*, 2019 SST 1468

Tribunal File Number: AD-19-682

BETWEEN:

D. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: December 30, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The matter is referred back to the General Division for reconsideration.

OVERVIEW

[2] D. G. (Claimant) completed Grade 11 before he entered the workforce. He has worked in different jobs, including at a mine and a bank. In 2015 he worked as a customer service manager at a bank. He left this position when he was hospitalized for pneumonia, sepsis and a liver abscess. These conditions have resolved. However, the Claimant now has anxiety, depression and back and muscle pain. In 2017, he applied for a Canada Pension Plan disability pension and claimed that he was disabled by these conditions.

[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 appeal. It decided that the Claimant did not have a severe disability because had work capacity.

[4] I granted leave to appeal the General Division decision to the Tribunal's Appeal Division because the appeal had a reasonable chance of success on the basis that the General Division made an error in law when it considered whether the Claimant had work capacity, not capacity regularly to pursue any substantially gainful occupation. The appeal is allowed because the General Division made this error. The matter is referred back to the General Division because the record is incomplete.

GROUND OF APPEAL

[5] The *Department of Employment and Social Development Act* (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. Instead, I must decide whether the General Division:

[6] failed to provide a fair process;

[7] failed to decide an issue that it should have, or decided an issue that it should not have;

[8] made an error in law; or

[9] based its decision on an important factual error.¹

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

ISSUES

[10] Did the General Division make an error in law when it considered whether the Claimant had work capacity, and not whether he had capacity regularly to pursue any substantially gainful occupation?

[11] Did the General Division base its decision on an important factual error for the same reason?

[12] If the General Division made one of these errors, what remedy should the Appeal Division give?

ANALYSIS

Work capacity

[13] For a person to be disabled, they 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 This is set out correctly in the General Division decision.³ The decision then examines the medical evidence and testimony that was presented, including that the Claimant occasionally does small painting jobs⁴ and completes yard work for seniors,⁵ all of which is casual or part-time work. In addition, in 2018, the Claimant worked from October to February processing online tickets in a fundraising campaign,⁶ although there was no evidence about how often he worked or what he earned doing this. The General Division then concludes that since

¹ This paraphrases the grounds of appeal set out in s. 58(1) of the DESD Act

² *Canada Pension Plan* s. 42(2)(a)

³ General Division decision at para. 8

⁴ *Ibid.* at para. 14

⁵ *Ibid.*

⁶ General Division hearing recording at approximate minute 30:00 although the exact time may vary depending on what device is used to listen to the recording

the Claimant continues to work he is capable regularly of pursuing substantially gainful employment.⁷ The Claimant says this is an error because the Claimant's work was casual, part-time and did not produce sufficient income to be substantially gainful.

[14] I have reviewed the materials filed with the Appeal Division and have listened to the entire recording of the General Division hearing. There is no evidence regarding what income, if any, the Claimant earned from his work painting, doing lawn maintenance or processing fundraising tickets.⁸ The Claimant testified that when he processed tickets he listened to meditation music, and had to remove himself from certain office encounters to manage his anxiety.⁹ He also testified that his work painting and doing yard work was casual.

[15] The General Division did not consider whether the Claimant's work was substantially gainful. The term "substantially gainful occupation" is not defined in the *Canada Pension Plan*. However, the Federal Court of Appeal teaches that it does not require that "an applicant be incapable at all times of pursuing any conceivable occupation". Rather, an individual needs to be "incapable of pursuing with consistent frequency any truly remunerative occupation".¹⁰ One must decide whether the claimant is capable of predictably attending at work that has not been modified beyond what is acceptable in the modern workplace,¹¹ and whether they are paid an appropriate reward for the work done.¹² The General Division decision does not discuss how the Claimant was accommodated by the employer when processing tickets (eg. how performance expectations were changed, his income was different than others), or if he scheduled his painting and lawn work to manage his conditions.

[16] In addition, the *Canada Pension Plan Regulations* provide a mathematical formula for substantially gainful.¹³ Although it is for the Claimant to present evidence on this topic, the General Division did not refer to his failure to do so, or to the record of earnings¹⁴ that sets out

⁷ General Division decision at para. 17

⁸ Claimant's counsel indicated what amount the Claimant may have earned processing tickets at the Appeal Division hearing. I disregarded this because it was not sworn testimony, and new evidence is not generally permitted at the Appeal Division (*Canada (Attorney General) v. O'Keefe*, 2016 FC 503)

⁹ General Division hearing recording at approximate minute 30:00

¹⁰ *Villani v. Canada (Attorney General)*, 2001 FCA 248

¹¹ *Atkinson v. Canada (Attorney General)*, 2014 FCA 187

¹² *G. T. v. Minister of Human Resources and Skills Development*, 2013 SSTAD 5

¹³ *Canada Pension Plan Regulations* s. 68.1

¹⁴ GD2-4

some income information. The General Division failed to consider this.

[17] Therefore, the General Division made an error in law when it decided that the fact that the Claimant worked showed that he had capacity regularly to pursue substantially gainful employment.

[18] In addition, the General Division did not turn its mind to whether the charity or the Claimant himself was a benevolent employer as that term has been used in relevant court decisions.¹⁵ The Federal Court of Appeal teaches that a claimant may be disabled and still work if they work for a benevolent employer. This issue was before the General Division because there was evidence that, perhaps, the Claimant`s work at the charity was modified to accommodate him. Similarly, self-employment doing yard work or painting could fall into this category, and thereby not be a substantially gainful occupation.

[19] For these reasons, the General Division made an error in law, and the appeal must be allowed.

[20] The Claimant argued that the General Division`s failure to consider whether his work was a substantially gainful occupation was also an important factual error. However, it is better framed as an error in law. I need not consider whether the General Division based its decision on an erroneous finding of fact because I have considered it as an error in law.

Remedy

[21] The DESD Act sets out what remedies the Appeal Division can give when an appeal is allowed.¹⁶ In this case it is appropriate for the matter to be referred back to the General Division for reconsideration. The record is incomplete. Further evidence is needed to decide whether the Claimant`s work is any substantially gainful occupation.

CONCLUSION

[22] The appeal is allowed.

¹⁵ See *Atkinson v. Canada (Attorney General)*, 2014 FCA 187

¹⁶ DESD Act s. 59(1)

[23] The matter is referred back to the General Division for reconsideration.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	December 19, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. G., Appellant Kathleen Erin Cullin, Counsel for the Appellant Tiffany Glover, Counsel for the Respondent