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

[TRANSLATION]

Citation: *Minister of Employment and Social Development v L. D.*, 2020 SST 591

Tribunal File Number: AD-19-535

BETWEEN:

Minister of Employment and Social Development

Appellant

and

L. D.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: January 16, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] L. D. is the Claimant in this case. She stopped working as a personal service worker in March 2017. She then applied for a disability pension under the *Canada Pension Plan* (CPP). The application describes the Claimant's main disabling condition as necrotizing fasciitis and anemia.

[3] The Minister of Employment and Social Development Canada found that the Claimant was not eligible for a disability pension under the CPP. The Claimant appealed the Minister's decision to the Tribunal's General Division, and it reversed the Minister's decision. The Minister therefore appealed the General Division's decision to the Appeal Division.

[4] I am not persuaded that the General Division made any of the errors to which the Minister referred. As a result, I am dismissing the appeal. These are the reasons for my decision.

ISSUES

[5] As part of this decision, I focused on the following issues:

a) Did the General Division make an error of fact by failing to analyze Dr. Robert's report?

b) Did the General Division make an error of law in its application of the legal test to determine whether a person's disability is severe?

ANALYSIS

[6] The *Department of Employment and Social Development Act* (DESD Act) assigns the Appeal Division a limited role. More specifically, the Appeal Division may intervene in a

decision of the General Division only if the appellant establishes that the General Division committed at least one of three relevant errors.[1]

[7] In this case, I focused on whether the General Division had made an error of law or fact. According to the words set out in the DESD Act, any error of law could justify my intervention in this case.[2]

[8] However, not all factual errors can justify my intervention in this case.[3] To intervene based on this type of error, the General Division must have based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the evidence before it.

[9] This means that I cannot intervene based on an error that the General Division made regarding an irrelevant detail. However, I can intervene in a case if, for example, the General Division based its decision on a finding of fact that is clearly contradicted by the evidence or not supported by any evidence.[4]

Issue 1: Did the General Division make an error of fact by failing to analyze Dr. Robert's report?

[10] No, the Minister did not establish that the General Division made such an error.

[11] In its decision, the General Division found that the Claimant could not function in the labour market and that she had a severe disability.[5] In other words, she is incapable regularly of pursuing any substantially gainful occupation.[6]

[12] However, the Minister submits that the report by Dr. Robert, the Claimant's family doctor, does not support the General Division's conclusions.[7] The General Division was of the opinion that the Claimant could no longer work in her usual field of employment. However, it

---

[1] Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) specifies the three relevant errors (also known as grounds of appeal).
[2] DESD Act, s 58(1)(b).
[3] DESD Act, s 58(1)(c).
[4] *Garvey v Canada (Attorney General)*, 2018 FCA 118 at para 6.
[5] General Division decision at paras 20 and 22.
[6] *Canada Pension Plan* (CPP), s 42(2)(a).
[7] GD2-75 and 2-76.

did not give an opinion about the Claimant's capacity to work in jobs that are more sedentary. The General Division summarized Dr. Robert's report at paragraph 10 of its decision:

> [Translation]
> Based on a November 2, 2017, report, Dr. Robert indicated that, after intensive treatment for necrotizing fasciitis, and despite regular physiotherapy, the mobility and strength of [the Claimant's] shoulder, elbow, and left wrist remained limited. The illness and surgeries caused constant pain that requires the continued use of medication. Dr. Robert was of the opinion that [the Claimant] would never fully recover and that her limitations, particularly the contractures (permanent shortening of a muscle or joint) and weakness, would prevent her from working in her usual field.

[13] The Minister therefore submits that the General Division based its decision on a finding of fact that does not take into account the evidence before it. Furthermore, given the importance of this evidence, the General Division was required to explain why it accepted Dr. Robert's opinion or not.[8]

[14] I cannot accept the Minister's arguments on this point. First, I acknowledge that Dr. Robert's report alone would not be enough to establish a severe disability. However, I am not persuaded that it contradicts the Claimant's statements either.

[15] To reach the relevant conclusion, the General Division considered all of the evidence, including Dr. Robert's report, other medical evidence, and the Claimant's sworn testimony. Although Dr. Robert focused on the Claimant's limitations regarding her left arm in his report, further evidence revealed additional conditions and limitations. For example, the General Division also discussed how the Claimant is limited due to significant pain, constant fatigue, and psychological effects.[9]

[16] I cannot find that the General Division based its decision on an error of fact that meets the criteria set out in section 58(1)(c) of the DESD Act. On the contrary, I find that the General Division considered all of the evidence in reaching the relevant conclusion.

---

[8] *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) at paras 15 to 17.
[9] See, for example, General Division decision at paras 7 to 16.

Issue 2: Did the General Division make an error of law in its application of the legal test to determine whether a person's disability is severe?

[17] No, the Minister has not established that the General Division made an error of law by misapplying the test to determine whether a person's disability is severe.

[18] Under the CPP, "a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation."[10] Furthermore, the Federal Court of Appeal teaches that in cases where there is evidence of work capacity, a person claiming disability benefits must show that efforts at obtaining and maintaining employment were unsuccessful because of the health condition.[11]

[19] In this case, the Minister submits that the General Division misapplied this legal test because it failed to address the Claimant's capacity to perform any substantially gainful employment. According to the Minister, the General Division addressed the Claimant's capacity to perform her usual work as well as the work of a pharmaceutical technician, career for which the Claimant returned to school in 2016. Furthermore, the fact that the Claimant attempted to return to her usual work is evidence of work capacity (even if it ended in failure).

[20] I cannot accept the Minister's arguments because they ignore the General Division's broader finding at paragraph 20 of its decision: The Claimant could not function in the labour market.

[21] I acknowledge that the General Division considered certain occupations more specifically, but, in my opinion, these examples do not diminish its more important finding that the Claimant does not maintain any residual work capacity.

[22] Since the Claimant did not have any residual capacity to work, she was also not required to make efforts to obtain and maintain employment.

---

[10] CPP, s 42(2)(a)(i).
[11] *Inclima v Canada (Attorney General)*, 2003 FCA 117 para 3.

[23] I therefore find that the General Division did not make the error in law to which the Minister referred.

[24] I note in passing that the Minister's arguments represent, at some level, a disagreement about the application of settled law to the facts of the case. However, the Federal Court of Appeal teaches that the Appeal Division cannot intervene based on this type of argument.[12]

CONCLUSION

[25] Overall, the Minister has not established an error that would allow me to intervene in this case. As a result, I am dismissing the appeal.

Jude Samson
Member, Appeal Division

HEARD ON:	November 28, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Stéphanie Pilon, Representative for the Appellant L. D., Respondent

[12] *Garvey v Canada (Attorney General)*, 2018 FCA 118 at para 9.