



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. P. v Minister of Employment and Social Development*, 2020 SST 95

Tribunal File Number: AD-20-67

BETWEEN:

S. P.

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: February 10, 2020

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] S. P. (Claimant) applied for a disability pension under the *Canada Pension Plan* (CPP) in October 2009. In her disability questionnaire, she stated that she had been unable to work full-time since January 2007 because of unipolar depression and generalized anxiety disorder with panic. She also suffered from several physical conditions including fibromyalgia, asthma, gastroesophageal reflux disease (GERD), and hypothyroidism.¹

[3] In February 2010, the Minister granted the Claimant a CPP disability pension. Her disability was considered to be severe and prolonged starting in December 2008.²

[4] The Claimant is a registered massage therapist. In October 2016, the Minister suspended payment of the Claimant's disability pension because her earnings were under review. The Claimant's income tax returns revealed gross earnings of \$18,907 in 2010 and \$17,697 in 2011. The Claimant had not filed tax returns for 2012 to 2015.³ The Claimant was working at a day spa in 2014 for 11 to 14 hours per week. She earned \$45 per hour, and later that increased to \$55 per hour.⁴

[5] In July 2014, the Minister decided to end payment of the Claimant's CPP disability pension as of June 2014 because of unreported work activity. The Minister claimed an overpayment of \$19,175.50.

[6] The Claimant asked the Minister to reconsider the decision. The Minister denied the Claimant's request for reconsideration. The Claimant appealed to this Tribunal. On October 28,

¹ GD2-153.

² GD2-143.

³ GD2-31 to 32, 89.

⁴ Claimant's testimony at the General Division hearing, at about the 39:00 minute mark.

2019, the General Division decided that the Claimant was entitled to end the Claimant's CPP disability pension as of June 2014.⁵

[7] 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 giving the Claimant permission (leave) to appeal.

[8] In my view, there is no arguable case that the General Division made an error that would justify giving permission to appeal. The Claimant has no reasonable prospect of success.

ISSUE

[9] Is there an arguable case that the General Division made an error that would justify giving permission to appeal?

ANALYSIS

Reviewing General Division Decisions

[10] 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.⁶

[11] 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."⁷ A mistake involving the facts has to be important enough that it could affect the outcome of the decision (that is called a "material" fact). The error needs to result from ignoring evidence, willfully going against the evidence, or from reasoning that is not guided by steady judgement.⁸

⁵ General Division decision, at ADN1A in the Appeal Division record.

⁶ DESDA, s 58(1).

⁷ DESDA, s 58(1)(c).

⁸ The Federal Court has considered these ideas about perverse and capricious findings of fact in a case called *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319.

[12] At the leave to appeal stage, a claimant must show that the appeal has a reasonable chance of success.⁹ To meet this requirement, a claimant needs to show only that there is some arguable ground on which the appeal might succeed.¹⁰

Stop Benefits

[13] A CPP disability pension stops (ceases) to be payable with the payment for the month in which the claimant stops (ceases) being disabled.¹¹

[14] A person who is incapable regularly of pursuing any substantially gainful occupation has a severe disability within the meaning of the CPP.¹²

[15] The Minister is responsible for proving that it is more likely than not that the claimant ceased to be disabled at the time the CPP disability pension is terminated.¹³

Is there an arguable case that the General Division made an error?

[16] There is no arguable case that the General Division made an error that would justify giving permission for the Claimant to appeal.

[17] To decide whether the Minister proved the Claimant stopped being disabled in 2014, the General Division considered several key pieces of evidence:

- The Claimant testified that in 2014 she was working 11 to 14 hours per week, earning \$45 per hour.¹⁴
- Dr. Turner's progress report from May 2014 stated that the Claimant had returned to work at a spa, that she was doing much better, and that she was not on any medication.

⁹ DESDA, s 58(2).

¹⁰ The Federal Court of Appeal explained this in a case called *Fancy v Canada (Attorney General)*, 2010 FCA 63.

¹¹ *Canada Pension Plan*, s 70(1)(a).

¹² *Canada Pension Plan*, s 42(2).

¹³ *Atkinson v Canada (Attorney General)*, 2014 FCA 187.

¹⁴ General Division decision, paras 9, 10 and 12 discuss the evidence about the Claimant's work at the spa. Note that during the General Division hearing, starting at about the 39:00 minute mark, the Claimant testified that for a time the employer deducted HST from that pay but that issue was resolved. The Claimant also testified that the amount she made later increased to \$55 per hour.

Dr. Turner diagnosed ADHD (adult attention hyperactivity deficit disorder) and generalized anxiety disorder, improved.”¹⁵

- Dr. Gottschalk acknowledged in 2015 that the Claimant felt totally disabled and has chronic pain, but Dr. Gottschalk was not able to make that diagnosis. He stated that she is a busy person who works at “two massage therapy places as well as running her own home business.”¹⁶

[18] The General Division decided that the Claimant still has several medical conditions, but she has been able regularly to pursue substantially gainful employment since 2014. The General Division decided that the Minister met the burden of showing the Claimant’s disability was no longer severe within the meaning of the CPP in 2014.¹⁷

[19] The Claimant argues that the General Division made several errors of fact.¹⁸ Specifically, she states that the General Division was incorrect:

- To state that she was completing studying or reading online for her personal interest. She says she does not have regular access to the internet but that any reading she is doing is necessary to remain current at work and is not simply pursuing an interest.
- To note that she worked at two massage therapy locations and ran her own home business. She states that in fact, she did work at two locations but the hours were insignificant to her income. She explains that her home business was really only established in 2017.
- To conclude that she has been able to regularly pursue substantially gainful employment since 2014. She states that she could do substantially gainful work if there were available employment supports but that the work she did without supports meant that it was not substantially gainful.

¹⁵ General Division decision, para 11. Dr. Turner’s report is at IS12.

¹⁶ General Division decision, para 14. Dr. Gottschalk’s report is at IS14-2 to 4.

¹⁷ General Division decision, paras 16 and 17.

¹⁸ ADN1-1. On her form, the Claimant checked the boxes alleging that the General Division failed to provide a fair process, made an error of law, and made an error of fact. The information she provided seems to amount to alleged errors of fact, so that is how I describe them in this decision.

[20] In my view, there is no arguable case that the General Division made an error of fact. The General Division did state that the Claimant spent time “on-line reading and pursuing her interest in Chinese and herbal medicine.” Even if the General Division was wrong about the fact that the reading was not actually on-line, or misstated the purpose of that reading, this error is not material. In other words, the error is not important enough that it could change the outcome of the decision. The General Division relied on the Claimant’s work activity and the medical progress report from Dr. Turner to reach its decision.

[21] Similarly, the General Division member was only quoting from Dr. Gottschalk’s report when he stated that the Claimant worked at two massage therapy clinics in addition to her home business. However, even if the General Division did get this fact wrong about the location of the Claimant’s work, it would not change the outcome in the case. The General Division based its decision on the Claimant’s testimony and the questionnaire about the Claimant’s hours and pay at the spa, as well as Dr. Turner’s 2014 report.

[22] Finally, I am satisfied that there is no arguable case that the General Division made an error about whether the Claimant was capable of substantially gainful work starting in 2014. The Claimant’s work at the spa starting in 2014 was key to the General Division’s decision. That evidence, coupled with the progress report from Dr. Turner, showed that the Claimant no longer had a severe disability within the meaning of the CPP when she was working at the spa in 2014.

[23] I have reviewed the record. I am satisfied that the General Division did not ignore or misunderstand the evidence. The Claimant was clear that she needed her disability pension benefits to pay for medical costs including her prescription medication. It seems that the Claimant wants a benefit that would help her to afford some disability-related costs while she works.¹⁹ The requirements for accessing the CPP disability pension do not fit well with what the Claimant seems to be looking for.

[24] The work that the Claimant did starting in 2014 (and the medical report from the same time) shows that she was no longer eligible for the disability pension. Claimants must be

¹⁹ GD3-3.

incapable regularly of pursuing any substantially gainful occupation. The General Division concluded the Claimant no longer met that definition when she was working at the spa.

CONCLUSION

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

Kate Sellar
Member, Appeal Division

REPRESENTATIVE:	S. P., self-represented
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