



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *T. P. v. Minister of Employment and Social Development*, 2018 SST 161

Tribunal File Number: AD-17-893

BETWEEN:

T. 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 15, 2018

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] Ms. T. P. (Claimant) worked in the mental health field for 20 years. She has multiple health conditions, including advanced osteoarthritis (in her knees, hips, and back), diabetes, and neuropathy in her legs. She left her career when she felt she could no longer physically perform her duties. She explains that she has worked several different jobs but was let go or had to leave because of her disabilities. She worked as a bank teller for about five years but stopped working when she realized it was no longer physically possible.

[3] The Claimant applied for a disability pension under the *Canada Pension Plan* (CPP) in 2015. The Minister denied her application initially and upon reconsideration. She appealed the Minister's decision to the Tribunal, and the General Division dismissed her appeal in August 2017. The Claimant is now seeking leave to appeal the General Division's decision. The Appeal Division must decide whether it is arguable that the General Division made errors in its decision such that the Claimant should be granted leave to appeal.

ISSUE

[4] Is there an arguable case that the General Division's decision contains an error of law because it failed to consider all of the Claimant's medical impairments in order to make a finding about her work capacity?

ANALYSIS

[5] The *Department of Employment and Social Development Act* (DESDA) sets out the grounds that allow for appeal of General Division decisions. Subsection 58(1) lists the following grounds:

- a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

- b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- c) The General Division based 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.

[6] An applicant on leave to appeal has to show that the appeal has a reasonable chance of success. To meet that requirement, the Claimant needs only to show that there is some arguable ground on which the appeal might succeed.

Does the General Division’s decision contain an error of law?

[7] The Claimant argues that the General Division made factual errors, but the Appeal Division is granting leave to appeal on a potential error of law. It is arguable that the General Division’s decision contains a legal error because it fails to analyze the medical evidence to identify impairments and to make a finding on whether the Claimant had residual work capacity.

[8] The General Division had to decide whether the Claimant’s disability was severe in accordance with the CPP. That meant determining whether the Claimant was incapable regularly of pursuing any substantially gainful occupation on or before the minimum qualifying period (MQP) date.¹ The General Division was required to consider whether there was a serious health condition that impacted the Claimant’s work capacity. At paragraph 24, the General Division referred to the legal principle that a claimant’s condition is to be assessed in its totality and that all of the possible impairments are to be considered, not just the biggest impairments or the main impairment.²

[9] However, it seems that the General Division failed to consider the Claimant’s possible impairments. The General Division merely recognized generally that the Claimant has “a long list of medical conditions,” but failed to identify those conditions, analyze the relevant medical evidence, and make a finding on how the conditions or impairments affected her work capacity. The General Division’s conclusion that the Claimant “may have limitations due to her medical conditions” (para. 21) seems to fall short of the analysis required to support a finding of work

¹ s. 42(2)(a) *Canada Pension Plan*

² *Bungay v. Canada (Attorney General)*, 2011 FCA 47

capacity. The General Division had to decide whether the Claimant's disability was severe within the meaning of the CPP, and work capacity is an integral part of that analysis. The failure to consider a required element of a legal test is an error of law.³ In the absence of any analysis of the Claimant's impairments, there can be no legal decision about the severity of the disability in accordance with the CPP.

Other Possible Issues for Appeal

[10] Given that the Appeal Division has identified a possible error of law, it does not need to consider any other grounds raised by the Claimant at this time. Subsection 58(2) of the DESDA does not require that individual grounds of appeal be considered and accepted or rejected.⁴ The Claimant is not restricted in her ability to pursue the grounds raised in her application for leave to appeal.

[11] At the next stage, the Appeal Division welcomes submissions from the parties with respect to whether the General Division's decision contains:

- an error of law in that it required that all treatment options be exhausted and that the Claimant show that her condition may not improve in the future when considering whether the Claimant's disability was severe;
- an error of fact in that it concluded that the Claimant's condition may improve in the future without regard for the material before it from Dr. Hildebrand, who characterized the Claimant's condition not only as "chronic" and "stable," but also "expected to exacerbate" (GD2-48);
- an error of fact in that it did not mention or discuss the Claimant's depression, which is mentioned in the record, including in Dr. Hildebrand's medical report (GD2-48) as one of the diagnoses and in the Claimant's medical information (GD2-42);
- an error of fact in that it concluded that the bank teller job required the Claimant to stand for "extended periods of time" and then noted that she did not seek a position that

³ *Housen v. Nikolaisen*, 2002 SCC 33

⁴ *Mette v. Canada (Attorney General)*, 2016 FCA 276

would have allowed her the flexibility to “sit or stand as needed” (the Claimant argues that she could sit and stand as needed at the bank teller job);

- an error of law in that it appears to require the Claimant to show that efforts at obtaining and maintaining employment were unsuccessful by reason of her health condition⁵ without first making a clear finding that there was evidence of capacity to work;
- an error of law in that it failed to consider the Claimant’s reason for ceasing her employment at the bank when deciding whether her efforts at obtaining and maintaining employment were unsuccessful by reason of her health condition.⁶ The record (GD2-40) stated that the Claimant left the bank because she “frequently missed work due to illness,” which is relevant to whether the Claimant’s capacity for work was regular.

CONCLUSION

[12] The application for leave to appeal is granted. This means that the Claimant has a reasonable chance of success in her appeal (which is a low standard to meet). At the next stage of the appeal, the Appeal Division will decide whether it is more likely than not that the General Division’s decision contained an error (this is a higher standard). Since the next stage of the appeal involves a higher standard of proof, the outcome of this decision does not determine the outcome of the next decision.

Kate Sellar
Member, Appeal Division

REPRESENTATIVES:	T. P., self- represented
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⁵ *Inclima v. Canada (Attorney General)*, 2003 FCA 117

⁶ *Ibid.*