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

Citation: *G. W. v. Minister of Employment and Social Development*, 2018 SST 241

Tribunal File Number: AD-16-1350

BETWEEN:

G. W.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: March 16, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, G. W. (Claimant), has a Grade 11 education and has worked in warehouses. In July 2011, he was diagnosed with congestive heart failure and stopped working. He had bypass surgery but indicates that his shortness of breath, swelling in his legs and feet, diabetes, and high blood pressure prevent him from working.

[3] The Claimant applied for the Canada Pension Plan disability pension and was denied by the Respondent, (Minister) both initially and upon reconsideration. The Claimant had to show the General Division of this tribunal that he had a severe disability on or before December 31, 2014, when his minimum qualifying period (MQP) ended. The General Division denied his appeal, finding that he had failed to look for alternative employment even though he had a capacity to do so.

[4] The Appeal Division granted leave to appeal in September 2017.

[5] The Appeal Division concludes that, while there was an arguable case for error, no error has been proven on a balance of probabilities, and therefore the appeal is dismissed.

ISSUES

[6] The issues are:

1. Did the General Division make an error of fact by deciding the Claimant had a capacity to work without considering Dr. Van Dorsser's conclusion on that issue?

2. Did the General Division make an error of law by failing to consider the totality of the medical impairments?

3. Did the General Division make an error of law by failing to provide sufficient reasons as to why Dr. Ball's evidence was preferred over Dr. Van Dorsser's?

ANALYSIS

Appeal Division's review of the General Division's decision

[7] The Appeal Division does not provide an opportunity for the parties to re-argue their case in full at a new hearing. Instead, the Appeal Division conducts a review of the General Division's decision to determine whether it contains errors. That review is based on the wording of the *Department of Employment and Social Development Act* (DESDA), which sets out the grounds of appeal for cases at the Appeal Division.[1]

[8] The Appeal Division must show some deference to the General Division on factual errors. The DESDA says that a factual error occurs 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. For an appeal to succeed at the Appeal Division, the DESDA requires that the finding of fact at issue from the decision be material (one the General Division "based its decision on"), incorrect ("erroneous"), and made in a perverse or capricious manner or without regard for the evidence. By contrast, the DESDA simply says that a legal error occurs when the General Division makes an error of law, whether or not the error appears on the face of the record. There is no language in that description that requires the Appeal Division to show deference to the General Division on errors of law.

[9] According to s. 58(1) of the DESDA, the only grounds of appeal are the following:

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

[1] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, at paras 29, 46 and 49.

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.

Issue 1: Did the General Division make an error of fact by deciding the Claimant had a capacity to work without considering Dr. Van Dorsser's conclusion on that issue?

[10] The General Division found that the Claimant had a capacity to work (para. 57). The failure to reference Dr. Van Dorsser's conclusion on that issue did not result in an error of fact. The finding was made with sufficient regard to the content of Dr. Van Dorsser's evidence as a whole, even if the General Division did not restate Dr. Van Dorsser's conclusion in its decision.

[11] The General Division was tasked with determining whether the Claimant has proven that he had a severe disability on or before the end of his MQP, which was December 31, 2014. Where there is evidence of work capacity, a claimant must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition.[2] If the General Division makes a material finding without regard for the evidence before it, that finding will be an error of fact under the DESDA. The General Division is presumed to have considered all the evidence before it, but that presumption can be rebutted if the evidence is probative such that it should have been discussed.[3]

[12] The Claimant (who was represented on leave to appeal) did not provide submissions after the Appeal Division issued the decision granting leave to appeal. The time to provide submissions has expired. However, in the application for leave to appeal, the Claimant argued that the General Division had made an error in ignoring Dr. Van Dorsser's conclusion that the Claimant was disabled from pursuing any gainful employment.

[13] The Minister argues that the General Division was not required to specifically reference Dr. Van Dorsser's conclusion and that the failure to reference it does not meet the high threshold required to establish an error of fact. The Minister argues that, in light of the General Division's approach in analyzing each of the Claimant's limitations described by Dr. Van Dorsser in his June 2014 opinion, the General Division did have regard for the content of Dr. Van Dorsser's

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[2] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.
[3] *Lee Villeneuve v. Canada (Attorney General)*, 2013 FC 498; *Kellar v. Canada (Minister of Human Resources Development)*, 2002 FCA 204; and *Litke v. Canada (Human Resources and Social Development)*, 2008 FCA 366.

opinion on the issue of capacity to work, even though it did not expressly state or ultimately share his conclusion.

[14] The General Division's decision did not reference Dr. Van Dorsser's conclusion that the Claimant was disabled from pursuing any gainful employment. However, the Minister notes that the General Division did expressly review the underlying clinical findings that supported Dr. Van Dorsser's opinion, including the following:

a) the Claimant's limited ability to exert himself, even for light work (paras. 40, 51, and 55);

b) his peripheral edema (paras. 50 and 55);

c) his breathing difficulties (paras. 50, 51 and 55);

d) his education level and past work experience (para. 56); and

e) the likelihood that the limitations would substantially change (paras. 40 and 55).

[15] There is no error of fact here. The finding that the Claimant had some capacity for work was made with regard for Dr. Van Dorsser's opinion, even if Dr. Van Dorsser's conclusion was not expressly stated in the decision.

Issue 2: Did the General Division make an error of law by failing to consider the totality of the medical impairments?

[16] The General Division did consider the totality of the medical conditions, so there is no error of law. The General Division put great weight on the evidence from Dr. Ball (a cardiologist), who was not responsible for treating all of the Claimant's conditions, but Dr. Ball's opinion did not ignore the existence of other conditions. There is ample evidence in the decision that the General Division considered the totality of the medical conditions.

[17] In determining whether a disability is severe within the meaning of the *Canada Pension Plan* (CPP), the General Division is required to assess a claimant's condition in its totality. All

possible impairments are to be considered, not just the biggest impairments or the main impairment.[4]

[18] In the application, the Claimant argued that the General Division failed to consider the totality of the medical evidence because it put great weight on the evidence of Dr. Ball, a cardiologist, and Dr. Ball's report was based only on the Claimant's cardiac condition and not on the totality of the Claimant's conditions. However, the Minister identifies evidence in the record before the General Division that shows Dr. Ball considered the Claimant's diabetes (GD-67 to 69) and did not ignore the Claimant's concerns about exertion symptoms (GD2-227 to 229 and GD2-88 to 92).

[19] Where there are multiple conditions and the evidence of a specialist is preferred over the evidence of a family physician, there is a risk that the General Division will fail to take into account the totality of the impairments as is required in law. However, in this case, the General Division expressly set out the requirement from *Bungay* that a claimant's condition is to be assessed in its totality and all possible impairments are to be considered, not just the biggest impairments or the main impairment (para. 49).

[20] There is ample evidence in paras. 50 through 55 of the decision that the General Division went on to apply the test and consider all possible impairments. At para. 55, the General Division expressly concluded that the "cumulative effects of the Appellant's shortness of breath, swelling in his legs and feet, diabetes, high blood pressure, and sleep apnea did not render him incapable regularly of pursing [*sic*] any substantially gainful employment." The General Division did put great weight on Dr. Ball's evidence, and Dr. Ball is a specialist. However, there is evidence in the record that the specialist did not consider the cardiac condition in a vacuum. The General Division's reliance on Dr. Ball's evidence does not amount to an error of law by failing to consider the totality of the impairments.

Issue 3: Did the General Division make an error of law by failing to provide a reason as to why Dr. Ball's evidence was preferred over Dr. Van Dorsser's?

[21] The General Division decision did provide some reasons as to why Dr. Ball's evidence was preferred over Dr. Van Dorsser's. The reasons do lack clarity to some extent, but they are

[4] *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

not so insufficient that they constitute an error of law. It is still possible for both the Appeal Division and the Claimant to see that the General Division grappled with the medical evidence. Where that evidence conflicted, the decision provides a reason why Dr. Ball's report was preferred over that of Dr. Van Dorsser's—Dr. Ball is a specialist and Dr. Van Dorsser is not.

[22] The General Division's decision should show that it grappled with the medical evidence to determine whether the claimant meets the legal test for a severe disability under the CPP. The reasons should be sufficient for the Appeal Division to understand how the decision maker made the decision they did based on the medical record before them.[5] But reasons should also be sufficient so that the claimant can understand how the General Division made its decision based on the evidence before it, especially when the case does not go the claimant's way.[6]

[23] The General Division must analyze relevant conflicting evidence, state which evidence has been rejected or given less weight and explain why.[7] The Minister argues that the General Division's choice to prefer the medical evidence from Dr. Ball, a cardiologist, over that of Dr. Van Dorsser, a family physician, cannot amount to an error of law as it is justified by the record and founded in law. The Minister notes that the General Division did explain at para. 51 that it "places great weight on the evidence of Dr. Ball, Cardiologist, because the Appellant was under his care from 2012 until 2014 and his evidence was objective."

[24] It is an error of law to fail to provide reasons sufficient for the reader to understand how the General Division determined what weight to assign to conflicting evidence. The General Division is the trier of fact, and it is entitled to assign weight to medical evidence because it is "objective." It is not entirely clear from the reasons why exactly Dr. Ball's evidence was characterized as "objective" and to what extent we can infer that the General Division found that Dr. Van Dorsser's evidence was less "objective." Since it is not clear what it was about Dr. Van Dorsser's evidence that may have been less objective, a more detailed or nuanced explanation from the General Division would have been preferable, but it is not an error. For example, it is not clear what the General Division means by objective in this instance, i.e. based on objective testing, more dispassionate, etc.

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[5] *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, para. 11.
[6] *Ibid*., *D'Errico*, para. 13.
[7] *Atri v. Canada (Attorney General)*, 2007 FCA 178; *Canada (Attorney General) v. Ryall*, 2008 FCA 164; and *Canada (Minister of Human Resources Development) v. Quesnelle*, 2003 FCA 92.

[25] The General Division also stated that Dr. Ball's evidence was assigned great weight because the Claimant was under his care from 2012 to 2014. This does not help explain why Dr. Van Dorsser's evidence was assigned less weight since Dr. Van Dorsser knew the Claimant for 26 years and started treating the Claimant for the main medical condition in 2011. (GD2-254)

[26] The General Division's decision does not expressly discuss what weight it gave to the content of Dr. Van Dorsser's opinion. The reasons for assigning great weight to Dr. Ball's evidence based on "objectivity" and the fact that Dr. Ball treated the Claimant at the relevant time raise some questions, but the reasons are not so insufficient that they constitute an error.

[27] The Appeal Division accepts the Minister's argument that the General Division preferred Dr. Ball's evidence in part because he is a specialist. The General Division expressly noted, when assigning weight to Dr. Ball's evidence, that he is a cardiologist (para. 51). It is clear from the record that Dr. Van Dorsser is not a specialist. The General Division has therefore explained why Dr. Van Dorsser's evidence was given less weight than Dr. Ball's evidence—the General Division preferred the evidence of a specialist over that of a family physician.

[28] It is not for the Appeal Division to re-weigh the evidence. The Appeal Division accepts that a plain reading of the decision indicates the General Division preferred the evidence of Dr. Ball in part because he is a specialist, and both the Appeal Division and the Claimant can understand that reason based on the decision, such that there is no error of law arising from a failure to explain how conflicting evidence was weighed.

CONCLUSION

[29] The appeal is dismissed.

Kate Sellar
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
APPEARANCES:	G. W., Appellant Paul Sacco, Representative for the Appellant Minister of Employment and Social Development, Respondent Jean-François Cham, Representative for the Respondent