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

Citation: *T. Z. v. Minister of Employment and Social Development*, 2018 SST 242

Tribunal File Number: AD-16-662

BETWEEN:

T. Z.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: March 16, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed and the matter is referred back to the General Division for reconsideration by a different member.

OVERVIEW

[2] The Appellant, T. Z., has a long-standing history of inflammatory disease. In 2011, she injured her right shoulder in a workplace accident. Then, on December 10, 2012, she was involved in a motor vehicle accident (MVA). Following the MVA, the Appellant took a few months to recover, and then tried to return to her previous job as a sales associate at a large retail store, but was unable to do so. Since that time, the Appellant has also been diagnosed with fibromyalgia, irritable bowel syndrome, myofascial pain, and migraines. She also complains of anxiety, depression, and cognitive difficulties.

[3] The Appellant applied for a disability pension under the *Canada Pension Plan* (CPP) in October 2013, when she was just 33 years old. For her application to be accepted, the Appellant had to show that she had a severe and prolonged disability, as those terms are defined under the CPP, on or before the end of her minimum qualifying period (which, in this case, is in the future).

[4] The Respondent, the Minister of Employment and Social Development (Minister), denied the Appellant's application for a disability pension, and the Tribunal's General Division dismissed an appeal from that decision. In short, the General Division concluded that the medical information was insufficient to support the Appellant's claims and that she had failed to make efforts at obtaining suitable alternative employment.

[5] A different Appeal Division member granted the Appellant's request for leave to appeal from the General Division's decision. And for the reasons set out below, I have now concluded that the General Division's decision was based on an erroneous finding of fact and should be set aside.

PRELIMINARY MATTERS

[6] As part of the materials filed with the Appeal Division, the Appellant submitted new medical reports that were not available at the time of the General Division hearing. These included:

a) a May 2, 2016, psychological assessment report and treatment plan prepared by Drs. Hutchinson and Storrie (AD2-2 to 16);

b) a November 2, 2016, vocational situational assessment report and functional capacity evaluation summary report prepared by Ms. Ross and Ms. Cloudt (AD1B-3 to 47); and

c) a July 27, 2016, medico-legal report prepared by Dr. Kean, consultant in rheumatology and internal medicine (AD3-18 to 29).

[7] On July 6, 2017, the Minister asked for a preliminary ruling on the admissibility of new evidence (AD4). In its letter, the Minister made specific reference to Dr. Kean's report (AD3-18 to 29) and, perhaps through inadvertence, to an April 22, 2013, clinical note by Dr. Matsos (AD3-30 to 33). Specifically, the Minister asked for an order under section 4 of the *Social Security Tribunal Regulations* confirming that:

a) only the evidence before the General Division would form part of the Appeal Division's record;

b) any of the Appellant's submissions referring to inadmissible new evidence would be struck from the Appeal Division's record; and

c) the appeal was proceeding under sections 58 and 59 of the *Department of Employment and Social Development Act* (DESD Act).

[8] On July 10, 2017, one of my colleagues wrote a decision reviewing the relevant case law and granting the order that the Minister had requested.

[9] Three days later, on July 13, 2017, the Tribunal received submissions from the Appellant in response to the Minister's request to exclude new evidence, but they could not be taken into account since a decision had already been made.

[10] At the hearing before me, the Appellant's representative asked whether the Appeal Division's earlier decision could be revisited, stressing that the new documents were being advanced for a limited purpose only. The Appellant's representative described this limited purpose as simply illustrating or substantiating evidence that was already before the General Division.

[11] The Minister's representative argued that the role of the Appeal Division is limited to reviewing the General Division's decision, based on the record that it had before it. Appeals to the Appeal Division are not designed to provide unsuccessful parties with the opportunity to cure defects in the evidence.

[12] Whether or not I am entitled to revisit my colleague's earlier decision, I agree with it and would have come to the same conclusion. My colleague's July 2017 decision is well supported by case law from the Federal Court. While there are some exceptions to the rule against considering new evidence, such as when the new evidence supports a claim that the decision maker was biased or that the principles of natural justice were breached, I am not convinced that any of those exceptions apply in this case.[1]

[13] The Appellant's representative has not provided me with case law to suggest that the Appeal Division can consider new documents for limited purposes, nor has she persuaded me that the new documents in this case are, in fact, being submitted for such limited purposes. Rather, the new documents that she has submitted appear to be a direct response to concerns raised in the General Division's decision. In *Marcia,* for example, the Federal Court rejected the applicant's attempt to characterize a doctor's note as a letter of clarification rather than as new evidence.[2]

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[1] *Marcia v. Canada (Attorney General)*, 2016 FC 1367, at paragraphs 34 to 41; *Paradis v. Canada (Attorney General)*, 2016 FC 1282, at paragraphs 20–25.
[2] *Marcia*, *supra*, at paragraphs 35–41.

[14] To be clear, therefore, I have not considered any of the three medical reports listed in paragraph 6 above. I have, however, considered the April 22, 2013, clinical note by Dr. Matsos, which was in evidence before the General Division (GD3-66 to 67).

ISSUES

[15] Briefly, the Appellant is challenging the General Division's decision on the basis that its reasons are insufficient, it failed to apply binding legal authorities and the correct legal test, it did not deal appropriately with contradictions in the evidence, it based its decision on erroneous findings of fact, and it relied on evidence that was not before it.

[16] In reaching my decision, I have focused on one issue: Did the General Division base its decision on an error of fact, as described in paragraph 58(1)(*c*) of the DESD Act, when it concluded that the evidence of the Appellant, and of her supporting witnesses, was not corroborated by the medical evidence?

ANALYSIS

[17] For the Appellant to succeed, she must show that the General Division committed at least one of the three errors (grounds of appeal) set out in subsection 58(1) of the DESD Act. Among those is whether 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.

[18] When considering the degree of scrutiny with which I should review the General Division's decision, I have focused on the language set out in the DESD Act.[3] In this respect, it is not just any error of fact that will justify my intervention. Rather, it must be one on which the General Division's decision is based and one that the General Division made in a perverse or capricious manner or without regard for the material before it. I have described findings of fact that meet these criteria as "reviewable findings of fact."

[3] *Canada (Attorney General) v. Jean*, 2015 FCA 242, at paragraph 19; *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93.

Did the General Division base its decision on a reviewable finding of fact? Yes

[19] Generally speaking, the General Division need not refer to every piece of evidence that it has in front of it. Rather, it is presumed to have reviewed all of the evidence.[4] However, the General Division can fall into error if it fails to assess evidence that is sufficiently relevant or it ignores important contradictions in the evidence.[5]

[20] According to the Appellant's testimony, she has numerous symptoms, including pain in her neck and shoulders, numbness in her fingers and toes, unpredictable flare-ups and deteriorations of her condition, severe fatigue, migraine headaches, and memory issues, along with depression and anxiety. As a result of her various symptoms, the Appellant said that she is unable to do overhead work; to sit, stand, walk, or look down for long periods; to lift, bathe, or do activities with her children; to drive; to do any hobbies, like gardening; or to do household work, like cooking, laundry, and cleaning.[6]

[21] The Appellant's evidence was corroborated by that of her husband and mother-in-law.[7] The Appellant's husband also described her symptoms as unpredictable, meaning that a good day can turn into a bad day with no notice.

[22] The General Division conclusion that the Appellant's representative attacked most vigorously was this one (at paragraph 44): "While the testimonies of the Appellant and the witnesses were compelling, the Tribunal was unable to find that the testimony was backed up by the medical information in the file."

[23] The Appellant says that in reaching this conclusion, the General Division did not consider the totality of the evidence and, while it is entitled to prefer some pieces of evidence over others, it must set out its reasons for doing so. Finally, she says that to the extent that the General Division did articulate certain principles regarding the assessment of the evidence, those principles were applied inconsistently. I agree.

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[4] *Simpson v. Canada (Attorney General)*, 2012 FCA 82, at paragraph 10.
[5] *Lee Villeneuve v. Canada (Attorney General)*, 2013 FC 498; *Canada (Minister of Human Resources Development) v. Quesnelle*, 2003 FCA 92; *Canada (Attorney General) v. Ryall*, 2008 FCA 164.
[6] General Division decision at paragraphs 10 to 17.
[7] General Division decision at paragraphs 18 to 22.

[24] In support of her arguments, the Appellant relied on *M. N. v. Minister of Employment and Social Development*,[8] a leave to appeal decision in which it was held that the General Division's reasons may be deficient and prevent meaningful appellate review when they do not address why certain reports were relied on and others were not. This can amount to an error of law.

[25] The Minister argues that the General Division's reasons do not need to be perfect or comprehensive, but that they should be read together with the outcome.[9] The Minister maintains that the General Division set out a detailed explanation for concluding that the Appellant did not have a severe condition that prevented her from performing any substantially gainful employment. In particular, the Minister argues that the General Division's conclusion is justified because:

a) following a careful review of the evidence regarding the Appellant's condition, her limitations, and the impacts on her capacity, the General Division reasonably concluded that she retained some capacity to work; and

b) based on this finding, the Appellant had an obligation to try and find work within her limitations, but she failed to do so.

[26] The Minister also underlines that it is not all errors of fact that warrant the Appeal Division's intervention. Rather, the DESD Act establishes that, for an error of fact to be reviewable, it must be one on which the decision is based and one that was made by the General Division in a perverse or capricious manner or without regard for the material before it. According to the Minister, this is a high threshold. It is not the Appeal Division's role to reweigh the evidence. Rather, for a finding of fact to be reviewable, it must be:

a) inconsistent with the evidentiary record;[10]

b) made without any evidence in the record to support it;[11] or

c) made without appropriately considering significant facts.[12]

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[8] 2014 SSTAD 250, relying on *Doucette v. Canada (Minister of Human Resources Development)*, 2004 FCA 292.
[9] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.
[10] *Canada (Attorney General) v. MacLeod*, 2010 FCA 301, at paragraph 5.
[11] *Canada (Attorney General) v. McCarthy*, [1994] F.C.J. No. 1158, at paragraphs 18 and 22 (FCA).

[27] As can be seen from the parties' submissions, the failure to deal with relevant evidence or important contradictions in the evidence has been characterized both as a problem related to the sufficiency of reasons, which can lead to an error of law, and as a reviewable finding of fact.[13] In this case, I have decided to focus on the language of the DESD Act and to characterize the issue as a potentially erroneous finding of fact made by the General Division without regard for the material before it.

[28] Cases such as this one are, in my experience, particularly challenging due to the multi-factorial nature of the Appellant's condition and the presence of symptoms that defy explanation. As the General Division correctly noted, however, the focus when assessing eligibility for a CPP disability pension is on the claimant's capacity to work, rather than on any particular diagnosis.[14] Similarly, how a person became disabled (e.g. illness, motor vehicle accident, workplace injury, or victim of crime) is irrelevant to the question of that person's entitlement to a CPP disability pension.

[29] The Appellant and her supporting witnesses gave evidence of significant functional limitations with which she must cope on a daily basis. While the General Division found that evidence to be compelling, it concluded that it was not backed up by the medical evidence in the file. With respect to the medical evidence, it is important to note that much of it was generated as part of a claim arising from the 2012 MVA and that those reports focus on the much narrower question of how the MVA specifically impacted the Appellant's ability to work.

[30] The parties agree that the General Division is entitled to weigh and assess the evidence, and in that respect it decided that:

a) subjective assessments would be given less weight;[15] and

b) the opinions of treating doctors and therapists would be preferred over those of non-treating doctors and therapists.[16]

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[12] *Vincent v. Canada (Attorney General)*, 2007 FC 724, at paragraph 38.
[13] *Quesnelle*, *supra*, at paragraph 8; *Doucette*, *supra*, at paragraphs 4–6; *Joseph v. Canada (Attorney General)*, 2017 FC 391, at paragraphs 47–48.
[14] *Klabouch v. Canada (Minister of Social Development)*, 2008 FCA 33.
[15] GD5-2; General Division decision at paragraph 43.

[31] Following its conclusion that the Appellant's evidence was not supported by the medical evidence, the General Division noted (in paragraph 44) that Dr. Ismail, Dr. Baker, and Ms. Galbraith had all concluded that the Appellant does not suffer from a substantial inability to perform the essential tasks of employment *as a result of the MVA*.

[32] On the one hand, Ms. Galbraith, an occupational therapist, expressed no such conclusion in her report (GD5-2 to 30). Indeed, Ms. Galbraith's report does not speak directly to the Appellant's ability to work. Rather, the purpose of her assessment was to outline the Appellant's need for occupational therapy intervention, her need for related devices and services, and her attendant care needs following the injuries she sustained in the MVA. In this regard, Ms. Galbraith concluded as follows:

> [The Appellant] is experiencing functional impairments and limitations due to the injuries she sustained in the motor vehicle accident of December 10, 2012. [The Appellant's] high levels of pain, reduced physical tolerances, headaches / migraines, fatigue, sleep disturbance, emotional problems, and cognitive difficulties are negatively affecting her ability to perform basic self-care tasks and instrumental activities of daily living.

[33] Ms. Galbraith also noted that the Appellant rarely left her home, was neglecting her personal hygiene, and had withdrawn from all pre-accident social and recreational activities.

[34] On the other hand, Dr. Ismail and Dr. Baker are physiatrists whose opinions were solicited by the Appellant's insurers for the purpose of establishing how the MVA had affected the Appellant's capacity to work. As non-treating physicians, their opinions were, presumably, deserving of less weight. In addition, their conclusions have limited relevance since the General Division was not restricted to considering the impacts of the MVA on the Appellant's ability to work. Nevertheless, Dr. Ismail's report was cited again in paragraph 49 of the General Division's analysis.

[35] The General Division then noted that the Appellant's family physician, Dr. Turner, completed a Fitness for Work Assessment in July 2013 (GD8-88). According to that assessment, the Appellant's restrictions were related to lifting, repetitive movements, and above- and below-

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[16] General Division decision at paragraph 44.

shoulder activities (GD8-88). The General Division gave considerable weight to this assessment, saying that these were the only restrictions to which the Appellant was subject, though I would note that she stopped working at around this time so, presumably, she did not need any further such assessments.

[36] However, the General Division did not mention Dr. Turner's opinion, as expressed on the second page of his Fitness for Work Assessment, where he noted that the Appellant's impairments were permanent, that he expected her condition to prevent her "from attending work on a consistent basis and / or meeting the physical, psychological or mental demands of [her] job," and that her medical condition was chronic and unlikely to improve (GD8-89).

[37] Similarly, the General Division's analysis made no mention of clinical notes from the Appellant's current family physician, Dr. Bursey (and her colleagues). For example:

a) on October 5, 2015, the Appellant complained of worsening headaches, both in terms of severity and duration (GD10-11);

b) on December 3, 2015, she complained of vertigo (GD10-13); and

c) on January 18, 2016, the Appellant asked for certain disability forms to be filled out. To that end, she described significant difficulty performing her activities of daily living, accomplishing household chores, driving, and parenting her children. She also complained of almost daily migraine headaches with vision loss, pain in her neck and shoulders, and increased anxiety, all of which had worsened since the MVA (GD10-14 to 15).

[38] In paragraph 48 of its decision, the General Division then highlighted these generally positive aspects of the Appellant's March 23, 2015, consultation with Dr. Bhavsar, though it omitted her complaint of depression (GD10-41 to 43):

> The Appellant was examined on March 23, 2015 by Dr. S. Bhavsar, Rheumatologist, who noted that the MRI of October, 2014 was normal. There was no evidence of spondyloarhtritis or sacroiilitis [*sic*]. Dr. Bhavsar further noted no signs of peripheral inflammatory arthritis. Her most recent MRI shows no signs of active spondyloarhtrathy [*sic*]. Only conservative treatment has been recommended by Dr. Bhavsar and her other threating [*sic*] physicians.

[39] However, the General Division made no mention of the following encounter between the Appellant and Dr. Bhavsar, on June 1, 2015, when the following was recorded (GD10-29):

> She has been having multiple symptoms. She describes depression and anxiety. She has had difficulty sleeping and staying asleep. She has had weight gain. She feels her memory is poor. She has had these symptoms for years but they have worsened. She is more stressed than usual. Her [irritable bowel syndrome] is also an issue for her. She has been having more headaches than usual. She takes Tylenol no. 3 which she finds helpful.
>
> Her back pain has been ok. However, her neck pain is more bothersome.

[40] Dr. Bhavsar's clinical note concluded by saying that the Appellant was experiencing significant myofascial pain and that she had many other symptoms associated with chronic myofascial pain and fibromyalgia (GD10-30). On an attached page, the Appellant reported having severe fatigue, moderate cognitive symptoms, and a large number of somatic symptoms, including muscle pain, irritable bowel syndrome, fatigue/tiredness, cognitive difficulties, muscle weakness, headaches, pain/cramps in the abdomen, numbness/tingling, depression, constipation, nervousness, blurred vision, ringing in ears, loss of/change in taste, dry eyes, hearing difficulties, and hair loss (GD10-31). Indeed, the General Division's analysis makes no mention of the Appellant's fibromyalgia, other than to say that she has not attended a fibromyalgia support program, even though the diagnosis came just about eight months prior to the hearing.

[41] The Appellant followed up with Dr. Bhavsar on October 5, 2015, a consultation that is also omitted from the General Division's decision (GD10-24 to 25). In the consultation note, Dr. Bhavsar provided the following diagnoses: psoriatic arthritis and ankylosing spondylitis (previous diagnoses), 2013 MVA with worsening axial pain, and fibromyalgia. Dr. Bhavsar noted some improvement in the Appellant's condition, but questioned the benefits that she was

obtaining from the medication Humira, each dose of which caused long-lasting fatigue (GD10-24 to 25).

[42] In my view, therefore, when the General Division concluded that the oral testimony of the Appellant and of her supporting witnesses was unsupported by the medical evidence, it based its decision on an erroneous finding of fact that it made without regard for the material before it. In particular, the General Division ignored important parts of the evidence that contradicted its conclusion. For example, the General Division:

a) did not assess important aspects of Dr. Turner's July 2013 Fitness for Work Assessment;

b) did not assess the clinical notes of Dr. Bursey and of her colleagues;

c) misconstrued the conclusion in Ms. Galbraith's report; and

d) highlighted only favourable aspects of Dr. Bhavsar's reports, while ignoring the ongoing symptoms with which the Appellant struggled, as well as her fibromyalgia diagnosis.

[43] By making several references to Dr. Ismail's report while selectively referring to Dr. Bhavsar's reports, the General Division also appeared to give more weight to the evidence of Dr. Ismail, a non-treating physician, than to the evidence of the Appellant's treating physicians. This is contrary to the principle that the General Division had set out earlier in its decision.

[44] Since the Appellant's symptoms are poorly understood, the testimony of the Appellant and of her supporting witnesses was very important. The General Division's finding that this evidence was unsupported by the medical evidence was at the heart of its analysis and conclusion. As a result, I am satisfied not only that this finding of fact was made without regard for the evidence before it, but also that it is a finding on which the General Division's decision was based.

[45] To be clear, I am not finding that the Appellant is entitled to a CPP disability pension. Rather, I have concluded that the matter should be sent back to the General Division for redetermination by a different member. This other General Division member might come to the same conclusion as the first, but before doing so, they must carefully assess all of the important evidence, including significant contradictions in the evidence.

CONCLUSION

[46] The appeal is allowed. To avoid any possible concern of bias, I am referring the matter back to the General Division for reconsideration by a different member.

Jude Samson
Member, Appeal Division

HEARD ON:	January 9, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	T. Z., Appellant Tara Sciara and Crystal Watson (law student), Representatives for the Appellant Jean-François Cham, Representative for the Respondent