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

Citation: *D. G. v. Minister of Employment and Social Development*, 2018 SST 269

Tribunal File Number: AD-17-589

BETWEEN:

D. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: March 26, 2018

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] D. G. (Claimant) first worked in a medical office as a secretary. When the doctor she worked for retired, she worked at a daycare, and obtained training as an early childhood education assistant while doing so. When she could no longer keep up with the job requirements because of her health, she retrained and returned to work as a medical secretary on a part-time basis. She last worked in 2013. The Claimant applied for a Canada Pension Plan disability pension and claimed that she was disabled by irritable bowel syndrome (IBS), fibromyalgia and chronic fatigue syndrome. The Minister of Employment and Social Development refused the application. The Claimant appealed this decision to the Social Security Tribunal. The Tribunal's General Division dismissed her appeal. The appeal of the decision is allowed because the General Division erred in law and based its decision on erroneous findings of fact regarding the Claimant taking medication for her conditions and her receipt of regular Employment Insurance benefits. It also failed to consider the totality of the evidence before it.

PRELIMINARY MATTER

[3] At the hearing of the appeal, the Claimant's representative requested that I listen to the recording of the General Division hearing. I did so prior to making the decision in this document.

ISSUES

[4] Did the General Division make an error in law by applying the incorrect test for severe disability under the *Canada Pension Plan*?

[5] Did the General Division base its decision on an erroneous finding of fact made without regard to all of the material before it:

a) regarding the Claimant's receipt of regular Employment Insurance benefits;

b) by failing to consider that the Claimant did not take medication due to the side effects;

c) by failing to consider that the Claimant did not take medication due to a fear of addiction;

d) by failing to consider the totality of the evidence before it; or

e) by relying only on the written evidence and not giving weight to the Claimant's testimony?

[6] Did the General Division make an error in law by considering the date that the Claimant was diagnosed with her conditions rather than the impact that her conditions had on her capacity regularly to pursue any substantially gainful occupation?

ANALYSIS

[7] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It provides only three grounds of appeal that can be considered, namely, that the General Division failed to observe a principle of natural justice or made a jurisdictional error, made an error in law, or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it. To succeed on the appeal, the Claimant must therefore establish that the General Division made one of these errors.

Issue 1: Did the General Division apply the correct legal test?

[8] The *Canada Pension Plan* states that, for a claimant to be disabled, they must have a condition that is both severe and prolonged. A person is considered to have a severe disability if they are incapable regularly of pursuing any substantially gainful occupation.[1] The General Division set out this legal test correctly at the beginning of the decision's analysis section.[2] However, when it considered the evidence before it, the General Division states:

> [81] There is no evidence to support that the [Claimant] is *incapable of working at any job*.

[1] Paragraph 42(2)(*a*) of the *Canada Pension Plan*.
[2] Paragraph 57 of the decision.

> [82] The Tribunal accepts that the [Claimant] suffers from fibromyalgia and IBS and is managing her conditions conservatively with exercise, dietary modifications and non-prescription medications. While her conditions may cause her to have limitations[,] she has not proved she is *incapable of working at any job* by reason of these conditions.[3] (emphasis mine)

In addition, at the opening of the oral hearing, the General Division member explained that the Claimant had to demonstrate that *it was impossible for her to work at anything*[4] (emphasis mine). Therefore, when the General Division examined the evidence before it, it considered whether the Claimant was able to work at any job, not whether she was capable regularly of pursuing any substantially gainful occupation. It applied the wrong legal test to the evidence.

[9] The Minister's representative argues that the General Division applied the correct legal test because it referred to "suitable employment" in the decision,[5] and "suitable employment" must mean employment within her limitations given the context of these sentences. In this portion of its analysis,[6] however, the General Division considered the legal principle set out in the *Villani*[7] decision, which is that, when deciding whether a claimant is disabled, one must examine them in light of their personal characteristics, including age, education, language skills and work and life experience. While I agree that this includes considering what work would be suitable for the Claimant given her circumstances, it is not the same as deciding whether she is capable regularly of pursuing any substantially gainful occupation. A claimant could, for example, be capable of working on a part-time basis. While this might be within their limitations, it might not be a substantially gainful occupation because of the income earned or for other reasons.

[10] The General Division made an error in law. The DESD Act suggests that the Appeal Division should not show any deference to the General Division when an error in law is made. The appeal must therefore succeed on this basis.

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[3] Paragraphs 81 and 82 of the decision.
[4] 4:55 of the hearing recording, although the exact time may be slightly different depending on what device is used to listen to the recording.
[5] Paragraphs 73 and 77 of the decision.
[6] Paragraphs 71 through 73 of the decision.
[7] *Villani v. Canada (Attorney General)*, 2001 FCA 248.

Issue 2: Did the General Division base its decision on an erroneous finding of fact?

[11] One ground of appeal under the DESD Act is that the General Division based its decision on an erroneous finding of fact made without regard for the material before it.[8] To succeed on this basis, the Claimant must establish three things: that the General Division made an erroneous finding of fact, that the finding was made without regard for the material before the General Division, and that the decision was based on this finding of fact. Each of the Claimant's arguments on this ground is considered below.

a) Receipt of Employment Insurance benefits

[12] The Claimant received regular Employment Insurance benefits when she stopped working in 2012. The General Division found that receiving those benefits was "the most compelling evidence of work capacity."[9] However, the Claimant testified that she applied for Employment Insurance when she stopped working with the hope that, after surgery in September 2012, she would be able to return to work. In addition, the Pension Appeals Board did not place any weight on the receipt of Employment Insurance as establishing that a claimant was capable of working.[10] While this decision is not binding on this Tribunal, it is persuasive. It demonstrates that the receipt of this benefit, on its own, does not establish that a claimant has capacity regularly to pursue any substantially gainful occupation. I am satisfied that the General Division finding that the receipt of Employment Insurance was the most compelling evidence of capacity to work was erroneous. It was made without regard to all of the material that was before the General Division. The decision was based on this finding of fact. Therefore, it was an error under the DESD Act, and the appeal must be allowed.

b) Reasons for not taking medication

[13] The General Division found that the Claimant managed her IBS and bowel issues with conservative measures (e.g. high-fibre diet, over-the-counter remedies).[11] It also found that she has received no treatment for fibromyalgia since the support groups and has not tried all of the

[8] Paragraph 58(1)(*c*) of the DESD Act.
[9] Paragraph 76 of the decision.
[10] *Taylor v. Minister of Human Resources Development*, CP04434, July 4, 1997.
[11] Paragraph 75 of the decision.

recommended medications for this condition.[12] The decision cites no explanation for the Claimant not taking medication. Only one medical report refers to side effects of medication.[13] However, the Claimant testified that over the years she has tried a number of medications but suffered side effects from them. The General Division decision does not mention this.

[14] While the General Division need not mention each and every piece of evidence that is presented, it should consider all the evidence on an issue prior to making a finding of fact related to it. In this case, the General Division found as fact that the Claimant managed her conditions without prescribed medication. However, there was evidence that she chose not to take prescribed medication because of the side effects, not because they weren't necessary to control the conditions. Therefore, the General Division's finding was erroneous and made without regard to all of the material, including testimony, that was before it. The decision was based, in part, on this finding of fact. It was an error under the DESD Act.

c) Failure to consider the totality of the evidence

[15] The Claimant argues that the General Division erred because, although it considered each of the diagnoses the Claimant received and the treatment administered, it failed to consider the totality of the evidence before it. In this regard, the decision states the following:

- "It is reasonable that the pain she was suffering at the time of leaving work was due to the fibroids causing her pelvic and abdominal pain, along with some bowel issues."[14] This statement ignores the Claimant's testimony that she suffered from different pain, including joint pain and pain in her hands.

- "There is no indication prior to [*sic*] that she required anything more than a small dose of Metamucil from Dr. Duffy in 2011."[15] This also is contrary to the evidence that pain medications were suggested and taken.

- "Dr. McCarthy is a specialist in fibromyalgia. It is unlikely he would recommend the common medications for this condition without consideration of their affect [*sic*] on the

[12] Paragraph 68 of the decision.
[13] Dr. McCarthy's letter of April 2014, GD1-19.
[14] Paragraph 62 of the decision.
[15] Paragraph 64 of the decision.

other symptoms or conditions associated with fibromyalgia."[16] There was no evidence, oral or written, to support this finding of fact.

- That the Claimant testified that she suffered from exhaustion for years. After she stopped working, she was diagnosed with anemia, hypothyroidism and low blood pressure, which would also cause exhaustion. The Claimant has successfully managed these conditions with treatment.[17] However, the decision fails to mention that the Claimant continues to suffer from exhaustion.

- That when the Claimant stopped working, her pain was mainly abdominal, and it is reasonable to assume that it was due to fibroids, which were later treated by surgery.[18] Again, this finding does not refer to the Claimant's widespread pain.

It is clear from the above that the General Division considered the Claimant's symptoms individually and speculated about causation or resolution. It did not consider the totality of her symptoms and the impact they would have cumulatively on her capacity regularly to pursue any substantially gainful occupation. The decision was based on these erroneous findings of fact, which is an error under the DESD Act.

d) Reliance only on written evidence

[16] The General Division must consider all of the evidence that is presented to it, both in writing and orally. However, as the decision maker, the General Division must weigh the evidence to reach its decision.[19] The General Division summarized the Claimant's testimony[20] and her written evidence.[21] It states that less weight was given to dates as recalled by the Claimant because her recollection of them was unreliable given the passage of time.[22] It considered the Claimant's evidence along with the medical records for each of her conditions. While the Claimant may be unhappy with how the General Division weighed the evidence, I am not persuaded that it made any error in doing so. It did not overlook or misconstrue any

[16] Paragraph 69 of the decision.
[17] Paragraph 70 of the decision.
[18] Paragraph 75 of the decision.
[19] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.
[20] Paragraphs 6 through 31 of the decision.
[21] Paragraphs 49 through 51 of the decision.
[22] Paragraph 66 of the decision.

important evidence and explained why greater weight was given to documentary evidence. The appeal cannot succeed on this basis.

e) Fear of Addiction

[17] The Claimant also argues that the General Division erred because it failed to consider that, given her aboriginal heritage, the Claimant was afraid that she would become addicted to prescribed medication, so she did not take it. I have listened to the recording of the General Division hearing. There was no testimony on this issue. The medical records also do not mention it. Therefore, the General Division made no error. It could not consider something for which there was no evidence.

Issue 3: Did the General Division err by considering the date of diagnosis?

[18] The Federal Court of Appeal teaches that it is not a diagnosis of a condition that renders a claimant disabled, but the effect of the condition on their capacity to work. The Claimant contends that she suffered from fibromyalgia symptoms for a number of years, received a number of different diagnoses, and tried different treatments without success before she was formally diagnosed with fibromyalgia. The General Division found as fact that the Claimant did not suffer from fibromyalgia at the time of the minimum qualifying period or the prorated minimum qualifying period (the date by which the claimant must be found to be disabled to be eligible to receive the disability pension) and that she received no treatment for it until 2014. The decision then examines the other medical conditions that were diagnosed and their treatment. I am not persuaded that the General Division focussed on the date of the fibromyalgia diagnosis, because it concentrated on the Claimant's treatment for this and other conditions. The General Division did not err in this regard.

CONCLUSION

[19] The appeal is allowed because the General Division erred in law and based its decision on erroneous findings of fact under the DESD Act.

[20] The DESD Act sets out the remedies that the Appeal Division can give.[23] This matter is referred back to the General Division for reconsideration. The parties' evidence will have to be weighed, and this is at the heart of the General Division's mandate.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	March 20, 2018
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	D. G., Appellant Keith Poulson, Representative for the Appellant Nathalie Pruneau, Representative for the Respondent

[23] Section 59 of the DESD Act.