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

Citation: *P. P. v. Minister of Employment and Social Development*, 2018 SST 662

Tribunal File Number: AD-17-361

BETWEEN:

P. P.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: June 8, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] P. P. (Claimant), has arthritis, anxiety, and depression. He stopped working in March 2015. He started receiving a retirement pension from the Canada Pension Plan (CPP) in May 2016. His long-term disability insurer asked him to apply for the disability pension under the CPP, and he did. The Minister denied his application for the disability pension both initially and upon reconsideration.

[3] The General Division of this Tribunal denied the Claimant's appeal in February 2017, finding that he had capacity to work and that the Claimant did not show that efforts to obtain and maintain employment were unsuccessful by reason of his health condition. The Appeal Division granted the Claimant leave to appeal the General Division decision.

[4] The Appeal Division must now decide whether to allow the Claimant's appeal. To succeed, the Claimant must show, on a balance of probabilities (which is a higher standard than the arguable case), that the General Division made an error under the *Department of Employment and Social Development Act* (DESDA).

[5] The General Division did not make an error under the DESDA in its decision. The General Division considered the totality of the Claimant's impairments, it considered the evidence from Dr. Paulovic, and it considered the Claimant's personal circumstances. In addition, the General Division did not ignore evidence of the Claimant's medications. The appeal is therefore dismissed.

ISSUES

1. Did the General Division make an error of law by failing to consider the totality of the Claimant's impairments in assessing his capacity to work?

2. Did the General Division make an error of fact by ignoring Dr. Paulovic's opinion that the Claimant was completely unable to function in any reasonable capacity at work and at home?

3. Did the General Division make an error of fact by failing to have regard for the evidence about the impact of the Claimant's medications on his capacity to work?

4. Did the General Division make an error of law by failing to consider the Claimant's age and low education level in assessing his personal circumstances?

ANALYSIS

Appeal Division Review of the General Division Decision

[6] 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 decision to determine whether it contains certain errors. That review is based on the wording of the DESDA, which sets out the grounds of appeal for cases at the Appeal Division.[1]

[7] 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 legislation requires that the finding of fact at issue from the General Division decision be material ("based its decision on"), incorrect ("erroneous"), and made in a perverse or capricious manner or without regard for the evidence.[2]

[8] 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.[3]

Issue 1: Did the General Division make an error of law in failing to consider the totality of the Claimant's impairments in assessing his capacity to work?

[9] The General Division did not make an error of law in failing to consider the totality of the Claimant's impairments.

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[1] DESDA, s. 58(1)
[2] DESDA, s. 58(1)(*c*)
[3] DESDA, s. 58(1)(*b*)

[10] The General Division determines whether the Claimant has a severe disability as defined in the CPP. A person with a severe disability is incapable regularly of pursuing any substantially gainful occupation.[4] The General Division must consider all of the claimant's possible impairments that affect employability, not just the biggest impairments or the main impairment. The General Division must assess the claimant's medical condition in its totality.[5]

[11] In his application for leave to appeal, the Claimant seemed to argue that the General Division failed to consider all of his conditions, namely his heart condition, arthritis, depression, and anxiety. The Claimant did not provide any further written submissions on this issue after the Appeal Division granted leave to appeal. The Minister argues that it was the Claimant who alleged that he could not work, primarily for mental health reasons, and that there is "insufficient evidence that the [Claimant's] heart condition impacts upon his ability to work."[6]

[12] The Minister argues that because the test for a severe disability centres on the ability to work, it is reasonable for the General Division to "focus upon the crux of the issues which involves the [Claimant's] functional limitations due to anxiety and depression."[7] The Minister notes that the General Division mentions the Claimant's arthritis multiple times throughout the decision and that there is insufficient evidence to support that the Claimant's arthritis is a severe disability under the CPP.

[13] The General Division acknowledged that the Claimant listed "right bundle branch block in heart" as one of his health-related conditions in his application for a disability pension in 2015.[8] In the evidence section of its decision, the General Division noted that "[the Claimant] testified that he is on medication for his right bundle branch block and he gets pains in his heart area. He carries nitroglycerin and baby aspirin but that condition did not prevent him from doing his desk job."[9]

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[4] *Canada Pension Plan*, s.42(2)(*a*)(i)
[5] *Bungay v. Canada (Attorney General)*, 2011 FCA 47
[6] AD2-10, para. 26
[7] *Ibid*., para. 26
[8] General Division decision, para. 43
[9] *Ibid*., para. 12

[14] In its analysis, the General Division did not identify the heart condition as a medical basis on which the Claimant applied for a disability pension.[10] The General Division appropriately cited the legal requirement to consider all of the possible impairments, not just the biggest impairments or the main impairment.[11] The General Division considered the medical basis for the application to be "anxiety, depression and psoriatic arthritis."[12] The medical report from the Claimant's family physician stated that he was "physically well" and focussed instead on psychological factors in its detailed account of the Claimant's conditions and limitations.[13] Given the Claimant's testimony that the heart condition did not impact his capacity to work in a desk job and the fact that there was no other medical evidence in the file linking that condition to any incapacity for work, it was not an error for the General Division to choose to omit this condition from its assessment of the totality of the conditions.

[15] The General Division is to consider all of the impairments that affect employability, not just the biggest impairments or the main impairment. It is possible that a claimant could have an impairment that, on its own, does not impact employability, but when it is considered along with all other conditions in their totality, may affect that claimant's employability. This is not the case with the Claimant's heart condition, particularly given the medical report indicating that he was physically well. The General Division decision did not fail to consider the totality of the Claimant's conditions.

Issue 2: Did the General Division make an error of fact in its decision by ignoring Dr. Paulovic's opinion that the Claimant was completely unable to function in any reasonable capacity at work and at home?

[16] The General Division reached its conclusions having regard for the evidence from Dr. Paulovic. No error of fact arises from the General Division's assessment of Dr. Paulovic's evidence.

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[10] *Ibid*., para. 74
[11] *Ibid*., para. 74
[12] *Ibid*., para. 74
[13] GD2-50 to 53

[17] The General Division is presumed to have considered all of the evidence before it.[14] This presumption is overturned only when the probative value of the evidence that is not discussed is such that it should have been addressed.[15]

[18] In the application for leave to appeal, the Claimant states that the General Division failed to take into account Dr. Paulovic's opinion, who stated that the Claimant was unable to function in any reasonable capacity at work and at home.

[19] In March 2015, Dr. Paulovic prepared a report for the Claimant's employer. In the evidence section of the decision, the General Division noted that Dr. Paulovic's report stated that the Claimant was assessed only when he "finally became so disabled that he was completely unable to function in any reasonable capacity at work and at home".[16] In the same report, Dr. Paulovic also stated that the Claimant would require three to six months "conservatively" to regain competency to resume work, and that it was difficult to know when the Claimant's condition would be stable enough to allow a transition back to work.[17] The General Division also reviewed Dr. Paulovic's medical statement in which he stated the Claimant was unfit for work from February 18, 2015, to "unknown." In response to the question "Complete Recovery Expected?" Dr. Paulovic again stated "unknown."[18]

[20] In the analysis section of the decision, the General Division concluded that while the Claimant has both anxiety and depression, he did not prove that he is incapable regularly of pursuing any substantially gainful employment. The General Division noted that "a substantial portion of the medical evidence filed with the Tribunal including that of Drs. Paulovic, Lo, Kershner and Frazer contemplate the [Claimant's] return to work at some point despite the diagnosis of anxiety and depression."[19] The General Division also relied on the fact that when the Claimant was asked during the hearing what caused Dr. Paulovic to change his prognosis to state that the Claimant was incapable of working, the Claimant answered that he did not know.[20]

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[14] *Simpson v. Canada (Attorney General)*, 2012 FCA 82
[15] *Lee Villeneuve v. Canada (Attorney General)*, 2013 FC 498
[16] General Division decision, para. 33
[17] *Ibid*., para. 34
[18] *Ibid*., paras. 35, 36
[19] *Ibid*., para. 65
[20] *Ibid*., para 65

[21] The General Division did not make an error of fact; it did not ignore Dr. Paulovic's evidence. The General Division expressly referred in the evidence section to the part of Dr. Paulovic's letter that stated that the Claimant sought an assessment only when he finally became so disabled that he was completely unable to function in any reasonable capacity at work and at home. It did not reference that particular part of Dr. Paulovic's evidence again in the analysis. However, the failure to do so does not mean that the General Division ignored this evidence.

[22] The General Division considered Dr. Paulovic's evidence in its totality—including the various statements that he made about the Claimant's prognosis—rather than simply his description of the Claimant's condition when the Claimant first stopped working. The General Division is presumed to have considered Dr. Paulovic's evidence in its totality. The probative value of this particular line in Dr. Paulovic's evidence (about the Claimant's inability to function when he first sought assessment) is not such that it ought to have been discussed in the analysis. The evidence of prognosis has greater probative value in determining capacity for work than a description of the Claimant's condition when he first stopped work.

[23] The General Division weighed Dr. Paulovic's evidence along with the evidence of the other physicians who provided their opinions and determined that the Claimant had capacity to work as of April 2016, even if he was not able to return to his old job.[21] The Claimant would like the evidence to have been weighed differently, but it is not the role of the Appeal Division to re-weigh that evidence. The General Division member was clearly aware of the precise part of Dr. Paulson's evidence that the Claimant argues is important, but the member weighed that evidence along with other evidence about the Claimant's prognosis that suggested he had capacity to work. There is no error of fact here in terms of failing to have regard for Dr. Paulovic's evidence.

[21] *Ibid*., para. 72

Issue 3: Did the General Division make an error of fact in its decision without regard for the evidence about the impact of the Claimant's medications on his capacity to work?

[24] The Claimant argues that he takes pain medication and antidepressants to control his conditions. He states that the side effects of these medications include fatigue and dizziness and that the side effects were evident prior to the end of his MQP.

[25] The Appeal Division does **not** provide new hearings on the merits (*de novo* hearings) in which claimants are expected to present all their evidence for the Appeal Division to weigh and consider. The general rule is that the evidence the Appeal Division uses to make its decision is the same evidence that was available to the General Division.[22]

[26] It is unclear from the application for leave to appeal whether the Claimant argues that the evidence about the side effects of his medications was before the General Division and the General Division ignored that evidence or whether the Claimant is providing this information about side effects for the first time at the Appeal Division level. The Claimant did not provide any further submissions on this question after the Appeal Division granted leave to appeal.

[27] The Claimant did not testify during the General Division hearing about the impact of his medications on his capacity to work. He referenced medication changes more than once and provided information about which medications he was taking at the time, but he did not indicate that he experienced medication-related dizziness and fatigue that has impacted his ability to work. At the end of the hearing, Claimant's counsel did not make a submission about the side effect of medications resulting in the Claimant's incapacity to work. Dr. Paulovic's medical report of July 3, 2015, references fatigue as a symptom of the Claimant's depressed mood.[23] Dr. Frazer's August 21, 2015, report also references the Claimant's report of fatigue.[24]

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[22] *Parchment v. Canada (Attorney General)*, 2017 FC 354
[23] GD2-50
[24] GD5-4

[28] It does not appear that the evidence before the General Division showed a connection between medication side effects and the Claimant's ability to work, and therefore the Appeal Division cannot conclude that the General Division made an error of fact in ignoring that connection. The Claimant has not pointed to any evidence that was before the General Division on this question that was overlooked or misconstrued. If this evidence is new and made only in the Application for leave to appeal, it is new evidence and the Appeal Division will not consider it here.

Issue 4: Did the General Division make an error of law in failing to consider the Claimant's age and low education level in assessing his personal circumstances?

[29] The General Division did not make an error of law—it assessed the Claimant's personal circumstances as required.

[30] When the General Division is determining whether a Claimant is incapable regularly of pursing any substantially gainful employment, the hypothetical occupations the General Division must consider cannot be divorced from the Claimant's personal circumstances. These personal circumstances include the Claimant's age, education level, language proficiency, and past work and life experience.[25] The Appeal Division does not have the jurisdiction to decide mixed questions of fact and law.[26]

[31] In the Application for leave to appeal, the Claimant states that the General Division did not take into account his age and low education level in its analysis of his personal circumstances.

[32] The General Division analyzed the Claimant's personal circumstances as required. It stated the need to consider the Claimant's personal circumstances, including such factors as age, level of education, language proficiency, and past work and life experience.[27] In its analysis, it stated that the Claimant was 59 years old at the time of his application for the disability pension under the CPP and that he had a college education and many years' experience as a procurement officer and working in accounting with various employers. The General Division noted that the

[25] *Villani v. Canada (Attorney General)*, 2001 FCA 248
[26] see DESDA, s. 58(1); *Quadir v. Canada (Attorney General)*, 2018 FCA 21
[27] General Division decision, para. 69

Claimant is fluent in English and that "despite his flare-up of psoriatic arthritis," he was a suitable candidate for retraining as of the end of his MQP.[28]

[33] The General Division expressly considered both the Claimant's age and his education level in its analysis of the Claimant's personal circumstances. The Claimant may actually take issue with the conclusion the General Division drew from its consideration of his age and his education level, but that is a question of mixed fact and law over which the Appeal Division does not have jurisdiction.

CONCLUSION

[34] The appeal is dismissed.

Kate Sellar
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVES:	P. P., Appellant Paul Sacco, Representative for the Appellant Minister of Employment and Social Development, Respondent Sandra Doucette, Representative for the Respondent

[28] *Ibid*., para. 69