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

Citation: *E.T. v. Minister of Employment and Social Development*, 2018 SST 700

Tribunal File Number: AD-18-179

BETWEEN:

E. T.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: June 26, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed. The General Division decision is confirmed.

OVERVIEW

[2] E. T. (Claimant) completed her education in Hungary and ran a dog grooming business there before moving to Canada. In Canada, the Claimant took English as a Second Language classes for approximately six months. She then worked in a number of factory and other physically demanding positions. The Claimant stopped working after she broke her left wrist and could no longer use her left hand for work. She applied for a Canada Pension Plan disability pension and claimed that she was disabled by this injury, its resulting physical limitations, and mental illness.

[3] The Minister of Employment and Social Development (Minister) refused the application. The Claimant appealed this decision to the Tribunal. The Tribunal's General Division dismissed the appeal, finding that the Claimant's physical limitations did not preclude her regularly from pursuing any substantially gainful occupation.

[4] Leave to appeal to the Appeal Division was granted on the basis that the General Division may have based its decision on an erroneous finding of fact made without regard for all of the material that was before it because it dismissed evidence regarding the Claimant's mental health without considering her mental health's impact on her capacity regularly to pursue any substantially gainful occupation. The appeal is dismissed and the General Division decision is confirmed. Although the General Division erred by failing to consider the Claimant's mental illness and its impact on her capacity regularly to pursue any substantially gainful occupation, considering this condition does not change the outcome of the appeal.

PRELIMINARY MATTER

[5] This appeal was decided on the basis of the documents filed with the Tribunal for the following reasons:

a) The legal issue to be decided is straightforward;

b) The Minister has conceded that the appeal should be allowed and requests that the matter be referred back to the General Division for reconsideration;

c) The Claimant requests that the appeal be allowed and that the Appeal Division give the decision that the General Division should have given;

d) Neither party requested an oral hearing; and

e) The *Social Security Tribunal Regulations*[1] require that appeals be conducted as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

ISSUES

[6] Did the General Division make an error because it failed to consider the Claimant's mental illness?

[7] Did the General Division make an error by concluding that the Claimant's inability to work was due to socio-economic factors?

[8] Did the General Division make an error by failing to consider the regularity aspect of the Claimant's capacity to work?

[9] Did the General Division make an error by improperly relying on the *Kiraly v. Canada*[2] decision?

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[1] *Social Security Tribunal Regulations* s. 3
[2] *Kiraly v. Canada (Attorney General)*, 2015 FCA 66

ANALYSIS

[10] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It sets out only three narrow grounds of appeal that can be considered by the Appeal Division. They are 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.[3] The Claimant's grounds of appeal are considered below in this context.

Issue 1: Did the General Division Fail to Consider the Claimant's Mental Illness?

[11] The Federal Court of Appeal teaches that when deciding whether a claimant is disabled, the decision-maker must consider all of the claimant's conditions, not just the main one(s).[4] This is set out in the General Division decision.[5] The decision then states that the Claimant did not mention depression in the questionnaire she completed in the disability pension application, that the standard medical report did not mention depression, and that a psycho-vocational report noted that the Claimant had not consulted with a mental health professional and did not wish to.[6]

[12] However, a comprehensive assessment report stated that a psychologist and family physician noted moderate major depressive disorder, pain disorder, and other psychosocial stressors;[7] an Altum Health report diagnosed pain disorder with both a psychological and general medical condition (chronic);[8] and there was evidence of mental health treatment in 2017.[9] In addition, the Claimant refers to a number of other medical reports that discuss her mental illness in the application for leave to appeal. While the General Division need not refer to each and every piece of evidence that was before it,[10] when a decision-maker fails to mention important evidence that points to a conclusion contrary to the decision, it is possible to infer that this contradictory evidence was overlooked.[11] In this case, the General Division decision failed to

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[3] DESD Act s. 58(1)
[4] *Bungay v. Canada (Attorney General)*, 2011 FCA 47
[5] General Division decision para. 38
[6] *Ibid*.
[7] *Ibid.* para. 26
[8] *Ibid*. para. 28
[9] *Ibid*. para. 29
[10] *Simpson v. Canada (Attorney General)*, 2012 FCA 82
[11] *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration),* 1998 CanLII 8667

consider the Claimant's evidence regarding her mental illness or the impact of her condition on her capacity regularly to pursue any substantially gainful occupation.

[13] Therefore, the General Division erred in law by failing to consider all of the Claimant's conditions. This error warrants intervention by the Appeal Division.

Issue 2: Did the General Division Conclude that the Claimant's Inability to Work was Due to Socio-economic Factors?

[14] Another ground of appeal under the DESD Act is that the General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it. In order to succeed on this ground, the Claimant must prove three things: that the finding of fact was erroneous; that it was made perversely, capriciously, or without regard for the material that was before the General Division; and that the decision was based on this finding of fact.

[15] The decision states "[t]he occupations [the Claimant] sought may be difficult to obtain given socio-economic conditions however the evidence indicates she was capable of light/sedentary occupations."[12] The finding of fact that the jobs the Claimant sought may be difficult to obtain because of socio-economic conditions was erroneous. There was no evidence regarding the labour market before the General Division upon which this finding of fact could be made. However, the decision was not based on this finding of fact. It was based on the General Division's determination that the Claimant had some capacity to work in a light/sedentary position that did not require the use of her injured hand and arm.

[16] The appeal cannot succeed on the basis of this ground of appeal.

Issue 3: Did the General Division Consider the Regularity of the Claimant's Condition?

[17] In addition, to be disabled under the CPP, a claimant must be incapable regularly of pursuing any substantially gainful occupation.[13] Each word in this definition must be given meaning. The Claimant argues that the General Division erred because it failed to consider the

[12] General Division decision para. 37
[13] DESD Act s. 42(2)

regularity of the Claimant's condition and she relies on her testimony that she could not commit to a work schedule to support her claim. However, the General Division considered this issue. It accepted that the Claimant could not regularly use her hands in any repetitive capacity[14] but did not have any other physical restrictions. It considered that the Claimant had tried to work unsuccessfully in physically demanding positions and that she would like to work in elder care. Based on this, the General Division concluded that although the Claimant had physical limitations, "[t]hese are not limitations that would preclude her from being capable regularly of pursuing any substantially gainful occupation at the time of the MQP."[15]

[18] The appeal cannot succeed on this basis.

Issue 4: Did the General Division Improperly Rely on the *Kiraly v. Canada* Decision?

[19] The Federal Court of Appeal decision in *Kiraly* teaches that a claimant who could not use her hands in a repetitive manner was not disabled because, in part, she had not attempted to work within her physical restrictions. The Claimant argues that the General Division improperly relied on this decision to find that the Claimant was not disabled despite the fact that she tried to work within her physical limitations and was unsuccessful. However, when the General Division decision is read as a whole, it is clear that the General Division relied on *Kiraly* for the principle that a claimant who cannot repetitively use both hands can still retain some capacity to work. This is correct. The appeal cannot succeed on the basis that the General Division improperly relied on this decision.

CONCLUSION

[20] Because the General Division erred in law, the Appeal Division must intervene.

[21] The DESD Act sets out the remedies that the Appeal Division can give, including referring the matter back to the General Division for reconsideration, giving the decision that the General Division should have given, or confirming the General Division's decision.[16] The Minister concedes that the General Division erred in law by failing to consider the Claimant's

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[14] General Division decision para. 40
[15] *Ibid.* para. 42
[16] DESD Act s. 59(1)

mental illness and argues that the appeal should be returned to the General Division. In contrast, the Claimant argues that I should give the decision that the General Division should have given.

[22] I am persuaded that this is an appropriate case for the Appeal Division to confirm the General Division's decision. The DESD Act gives the Appeal Division authority to do this. It also gives the Tribunal authority to decide questions of law or fact that are necessary to dispose of an application.[17]

[23] The General Division made one error: it failed to consider the impact of the Claimant's mental illness on her capacity regularly to pursue any substantially gainful occupation. The record before me is complete. All relevant written evidence was filed with the Tribunal. The Claimant addressed her mental illness in testimony at the General Division hearing. The Minister did not test this evidence by cross-examination but could have attended the hearing to do so. Even if this matter were referred back to the General Division for reconsideration, it may not result in a new hearing where the parties give new evidence.

[24] Additionally, there is no need for me to reweigh the evidence. The following determinations were made by the General Division and are unchallenged:

- The Claimant came to Canada at the age of 20 and has worked only in physically demanding positions;
- At the time she was injured in 2012, the Claimant was working full-time in a factory and in the evenings washing dishes in a restaurant;
- The Claimant broke her left arm/wrist in 2012 and has ongoing pain and limitations from this, including restrictions related to exposure to cold; light load handling; and limited grasping, pulling, and pushing;
- The Claimant attempted to return to work after the injury, but could not do physically demanding work;

[17] *Ibid.* s. 64(1)

- The Claimant was diagnosed with major depressive disorder, chronic pain syndrome, and anxiety after the injury;

- A psycho-vocational assessment reported that the Claimant's employment options were limited to entry-level jobs and recommended literacy and academic upgrading before the Claimant attempted such work. The Claimant would also require more time than average to acquire skills;

- In 2014, the Claimant had not tried mental health counselling and did not wish to engage in this type of treatment;[18]

- The Claimant began counselling for her mental illness in 2016;

- The Claimant's minimum qualifying period (MQP) is December 31, 2015; and

- At the time of the MQP, the Claimant was 57 years of age. Although English is not her mother tongue, she has worked in places where English was spoken. She also demonstrated the ability to retrain for entry-level positions.

[25] The evidence regarding the Claimant's mental illness reveals that in 2014, Dr. Walker recommended mental health treatment in combination with a return to work.[19] At the General Division hearing, the Claimant testified that in December 2015, she started taking anti-depressant medication and continued to take it despite its side-effects.[20] Although other medical reports have recommended that the Claimant increase her dosage of anti-depressant medication, this does not seem to have occurred. It was also recommended that the Claimant attend a pain program and pursue individual treatment for stress management, anger management, sleep issues, and participate in exercises.[21] The Claimant participated in a WSIB Function and Pain Specialty Program in 2016. The discharge report from this program states that her prognosis for functional improvement (including return to vocational activity) was fair.[22] Her major depressive

[18] GD5-125
[19] Report dated May 2, 2104
[20] General Division hearing recording part 2 min. 2:41, although the exact time stamp may differ depending on the device used to listen to the recording
[21] Workplace Safety and Insurance Board report of January 2016, GD5-210
[22] GD5-246

disorder had improved from "moderate" to "moderate to minor" at the end of this program. She began individual mental health treatment with a social worker in 2016.

[26] I am satisfied that the Claimant suffered from mental illness at the MQP. I am not persuaded, however, that this illness, alone, is a severe disability under the CPP. At its worst, it was described as "moderate" and it improved with treatment.

[27] After considering all the unchallenged findings made by the General Division and the evidence regarding the Claimant's mental illness, I am not persuaded that the combination of physical and mental illnesses are a severe disability under the CPP. The Claimant reported moderate mental illness after the injury, which improved after a treatment program.[23] She was physically restricted only with respect to one arm and hand. Although English is not her first language, she was able to cope in an English-speaking workplace for a number of years. In addition, despite her limitations, the Claimant demonstrated a willingness and ability to retrain and had a fair prognosis for a return to work.

[28] In addition, prior to the MQP, the Claimant had not followed medical recommendations to increase the dosage of medication and to attend individual therapy. I am persuaded by the reasoning of the Pension Appeals Board that to be successful in a disability pension appeal, a claimant must submit to treatment recommendations; if the claimant does not, he or she must establish the reasonableness of his or her failure to do so.[24] In this case, attending individual counselling was a reasonable recommendation, and the Claimant failed to explain why she did not attend this treatment prior to the MQP.

[29] For these reasons, although the General Division made an error in law by failing to consider the Claimant's mental illness, the outcome of the appeal would not have been different if this error had not been made.

[23] Report dated May 2, 2014
[24] *Bulger v. Minister of Human Resources Development* (May 18, 2000), CP9164

[30] The appeal is dismissed, and the General Division decision is confirmed.

Valerie Hazlett Parker
Member, Appeal Division

METHOD OF PROCEEDING:	On the Record
APPEARANCES:	Alexandra Victoros, Counsel for the Appellant Christian Malciw, Counsel for the Respondent