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

Citation: *V.S. v. Minister of Employment and Social Development*, 2018 SST 718

Tribunal File Number: AD-17-58

BETWEEN:

V. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: July 6, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] V. S. (Claimant) worked full-time as a labourer in a window manufacturing company after completing high school. In 1995, he was injured in an explosion at work. He had third-degree burns on his hands and second-degree burns on his face, arms, and knees. After recovering, he became a supervisor at another window manufacturing company but was laid off. He then worked for several years at a hardware store, beginning in sales and eventually becoming the department sales manager. In 2012, he became overwhelmed, confused, and unable to concentrate at work. He states he could no longer work as of 2013 due to anxiety, depression, fatigue, chest pressure, and palpitations. His physician explains he has chronic anxiety, panic, and post-traumatic stress disorder-like syndrome.

[3] The Claimant applied for a disability pension under the Canada Pension Plan (CPP). The Minister denied his application both initially and upon reconsideration. The General Division of this Tribunal denied his appeal in December 2016, finding that there was evidence that he had capacity to work and that he did not show that efforts at obtaining and maintaining employment were unsuccessful by reason of his health condition. The General Division also concluded that he has not "optimized his treatment options." The Appeal Division granted the Claimant leave to appeal the General Division's decision based on a possible error of fact.

[4] The Appeal Division must decide whether the General Division made any errors under the *Department of Employment and Social Development Act* (DESDA) such that an appeal should be granted.

[5] The Claimant has not shown on a balance of probabilities that the General Division made an error of fact. The appeal is dismissed.

PRELIMINARY MATTER

[6] The decision granting the Claimant leave to appeal was clear that the Appeal Division does not provide a new (*de novo*) hearing, it does not normally grant leave to appeal on the basis of new evidence, and it refused to do so in this case.[1]

[7] The Appeal Division has not considered any evidence that the Claimant submitted that was not before the General Division, whether the Claimant submitted that evidence before or after the leave to appeal decision.

ISSUES

1. Did the General Division make an error of fact in its decision in finding that the Claimant had not "optimized his treatment options" by failing to implement a medication change?
2. Did the General Division make an error of fact in finding that the test results from Dr. Elmpak were mostly invalid and exaggerated?

ANALYSIS

Appeal Division's Review of the General Division's Decision

[8] 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 DESDA, which sets out the grounds of appeal for cases at the Appeal Division.

[9] 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's decision be material ("based its decision on"), incorrect ("erroneous"), and made in a perverse or capricious manner or without regard for the evidence.

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[1] *Mette v. Canada (Attorney General)*, 2016 FCA 276.

[10] 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.

Issue 1: Did the General Division make an error of fact in its decision in finding that the Claimant had not "optimized his treatment options" by failing to implement a medication change?

[11] The General Division did not make an error of fact in finding that the Claimant was not compliant with his treatment plan. The finding was neither capricious nor perverse. While the analysis about the Claimant's compliance with treatment did not specifically refer to the evidence from his spouse about how many tasks she coordinated for him around the home, her evidence was not sufficiently probative of the Claimant's ability to participate in his own health care that it needed to be discussed.

[12] The General Division must apply a "real world" approach in determining whether a claimant has a disability that falls within the CPP's definition of severity. Where the General Division finds that a claimant has failed to pursue treatment, part of that real world approach requires the General Division to consider whether the failure was reasonable and what impact that failure had on the person's disability.[2] The General Division is presumed to have considered all of the evidence before it, but that presumption will be set aside where the probative value of the evidence that is not expressly discussed is such that it should have been.[3]

[13] As part of its analysis about whether the Claimant has a severe disability under the CPP, the General Division found that the Claimant was not compliant with treatment and did not have a reasonable explanation for that failure to comply.[4] The General Division decision states that Dr. De Jesus from the Centre for Addiction and Mental Health (CAMH) had recommended a medication adjustment for the Claimant on October 16, 2015, and that the Claimant "testified that he is still considering these changes, but has not yet implemented them."[5] The General Division concluded that the Claimant was not compliant with Dr. De Jesus' recommendation,

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[2] *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211.
[3] *Lee Villeneuve v. Canada (Attorney General)*, 2013 FC 498.
[4] At para. 30, the General Division decision cites *Bulger v. Minister of Human Resources Development* (May 18, 2000), CP 9164 (PAB) for the notion that failing to comply with treatment can mean a claimant is not eligible for a disability pension under the CPP. *Lalonde* (note 2) is a more frequently-cited Federal Court of Appeal alternative.
[5] General Division decision, para. 30.

that he had failed to establish the reasonableness of his failure to comply and, therefore, that he had not made reasonable efforts to improve his health.[6]

[14] Dr. Kirstine follows the Claimant in supportive psychotherapy and review of pharmacotherapy.[7] The stated purpose of Dr. De Jesus' consultation and report was to assess the Claimant and "make treatment recommendations in the context of symptoms of anxiety and depression."[8] The decision is silent on Dr. Kirstine's role in implementing the recommendations from CAMH.

[15] Although the General Division decision concluded that the Claimant's disability is not severe, it also considered whether the disability is prolonged.[9] The General Division decided that given Dr. Kirstine's conclusions from September 2015 (that the Claimant had not reached maximum recovery and that his prognosis was unknown) and given that Dr. De Jesus stated there were other treatment options available if his recommendations for a medication change do not work, the Claimant's disability is neither long continued nor of indefinite duration.

[16] The Claimant's application for leave to appeal asks why the General Division's analysis of his compliance with treatment makes it seem that the burden is placed on him (rather than on Dr. Kirstine, who received the recommendation from Dr. De Jesus) to change his medications.

[17] The Claimant also argues that the evidence about his limitations was ignored in the context of the analysis of his alleged failure to comply with treatment, which led to the error of fact. The General Division acknowledges elsewhere in the decision that his wife testified that he could not dress for weather, shower independently, or be left unattended.[10] The General Division did not expressly consider this evidence in its determination of whether the fact that the Claimant had not yet changed his medications was actually a failure to comply with treatment.

[18] The Minister argues that the General Division's conclusion about the Claimant's compliance with his treatment plan was not an error of fact. The General Division made note of Dr. De Jesus' recommendations, and there is no documentary record before the General Division

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[6] *Ibid*., para. 30
[7] *Ibid*., para. 19
[8] GD3-1
[9] General Division decision, para. 33
[10] *Ibid*., para. 16

as to how Dr. Kirstine dealt with those recommendations. The evidence came from the Claimant, and the General Division found that his evidence was that he was still considering these changes, but has not yet implemented them. The Minister argues that only a physician can prescribe medications, so if the Claimant says he has not yet implemented the changes,

> "The logical inference is that he has either not pursued such changes with his family physician (but also underscoring that he was made aware of the recommendations) or that he has not taken steps to have any prescriptions (detailing medications which may have been prescribed) dispensed."[11]

[19] The Minister takes the position that the General Division did not need to expressly consider the evidence from the Claimant's spouse about his "severe lack of independent decision making" in finding that the Claimant was not compliant with treatment. The Minister argues that the Claimant's spouse's evidence did not necessarily show a lack of decision-making capability, but could equally have been indicative of culturally-entrenched gender roles.

[20] In granting leave to appeal, the Appeal Division found that given: (i) Dr. Kirstine's recognized role in the Claimant's medication management; (ii) the fact that Dr. Kirstine referred the Claimant for the consultation with Dr. De Jesus; and (iii) the fact that the Claimant now states he does not know why the General Division is placing the burden for the decision about medication on him, it was at least arguable that the General Division made an error in finding the Claimant was not compliant with treatment. The Appeal Division also granted leave because it was arguable that the General Division needed to expressly consider the evidence about the Claimant's severe lack of independent decision-making (like being unable to determine what clothes to wear in the morning without assistance), when determining whether the fact that the Claimant had not yet changed medications constituted failing to comply with treatment.

[21] However, at this stage of the appeal, the Claimant must show that it is more likely than not that this error occurred (which is a higher standard than showing that there is an arguable case). The Claimant has not met this burden.

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[11] AD5-14, para. 39.

[22] The Claimant takes issue with the finding that he had not maximized his treatment options given that he believes implementing recommendations from Dr. De Jesus would fall to Dr. Kirstine. The General Division decision is silent about the role that Dr. Kirstine played in implementing Dr. De Jesus' recommendations. The General Division relied on the Claimant's evidence that he was still "considering" the medication changes to mean that, in some way, he was not optimizing his treatment recommendations. Based on the evidence available to the General Division on the matter, that finding of fact is neither perverse nor capricious.

[23] Dr. De Jesus recommended medication changes in the fall of 2015 and the Claimant had not yet implemented those changes at the time of the hearing in December 2016. In the Claimant's particular case, it may not be useful to refer to "refusing" a treatment,[12] because his evidence was that he was considering it. However, it is not for the General Division to infer, based on the facts before it, that the ball was in the family physician's court. The Claimant was considering the changes but had not yet implemented them after more than a year—it is neither capricious or perverse to find that he (the person doing the considering) had not optimized his treatment recommendations.

[24] The General Division also did not make an error of fact in failing to have regard for the evidence from the Claimant's spouse. The Claimant's spouse testified that she did not leave the Claimant unattended and that he did not select clothing appropriate for weather. She also described tasks that she did to assist the Claimant in his day-to-day living. The General Division is presumed to have considered all the evidence, and this evidence is not sufficiently important to the question of the Claimant's treatment compliance to discuss in that context. The Claimant seems to be making an argument about his capacity to make medical decisions that was not made at the General Division. The Appeal Division presumes the General Division had regard for all the evidence and did not see signs in the medical records that indicated the Claimant could not make medical decisions for himself in a timely fashion. The evidence from the Claimant's spouse is not totally irrelevant to this question, but it is not so probative that it needed to be discussed.

[12] As was the case in *Lalonde* (note 2), where the Claimant refused physiotherapy.

Issue 2: Did the General Division make an error of fact in finding that the test results from Dr. Elmpak were mostly invalid and exaggerated?

[25] The Claimant has not established that the General Division made an error of fact in finding that the test results from Dr. Elmpak were mostly invalid and exaggerated. While the statement about the test results may have been made without proper regard for the record, the General Division did not base its decision on this characterization of Dr. Elmpak's results such that there is an error here under the DESDA.

[26] The plain wording of the DESDA requires that factual errors be material. Where there is evidence of work capacity, the Claimant must show efforts at obtaining and maintaining employment were unsuccessful by reason of the health condition.[13]

[27] The General Division quoted from Dr. Elmpak's report in stating that the Claimant's test results were "mostly invalid and exaggerated."[14] However, Dr. Elmpak's report also recommends that, in the future, the Claimant "be supervised and guided during all measures of testing in order to obtain valid results. It is possible that invalidity in test results were due to his inability to adequately attend and process test items."[15] The neuropsychological assessment that the General Division referenced[16] may have arisen as a result of Dr. Elmpak's comments about possible reasons for the invalid results.[17]

[28] In the decision granting leave to appeal, the Appeal Division stated it would benefit from submissions about the General Division's findings about Dr. Elmpak's report and whether they raised an error under the DESDA.

[29] In written submissions he filed after the Appeal Division granted leave, it seems the Claimant argues that the characterization of the findings in the report as "mostly invalid and exaggerated"—without referencing the fact that the invalidity might have come from an "inability to attend and process test items"—was an error of fact.

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[13] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.
[14] General Division decision, para. 21.
[15] GD8-13.
[16] General Division decision, para. 14.
[17] GD8-13.

[30] The Minister argues that the General Division's characterization of Dr. Elmpak's report does not give rise to an error under the DESDA and notes that the report as a whole also includes a statement that it would be useful for the Claimant to have a vocational evaluation to help him find more suitable employment.

[31] The statement about Dr. Elmpak's report may be misleading in the sense that the General Division decision could suggest to the reader that the Claimant may have exaggerated his symptoms and invalidated the results of the assessment, when in fact the decision identifies the notion that a neurological assessment might uncover additional reasons that explain the results. Dr. Elmpak's report factors into the General Division's decision only to the extent that it was one of five sources of evidence the General Division relied on in reaching the conclusion that the Claimant had a capacity to work.[18] The description of Dr. Elmpak's findings in the evidence section of the General Division decision was somewhat incomplete, but it did not rise to an error of fact and was not material, in light of the many sources of evidence the General Division relied on to find that there was evidence of work capacity.

CONCLUSION

[32] The appeal is dismissed.

Kate Sellar
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVES:	V. S., Appellant Palma Pallante, Representative for the Appellant Minister of Employment and Social Development, Respondent

[18] General Division decision, para. 28.

	Sandra Doucette, Representative for the Respondent