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

Citation: *E. C. v. Minister of Employment and Social Development*, 2018 SST 514

Tribunal File Number: AD-17-913

BETWEEN:

E. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: May 9, 2018

DATE OF CORRIGENDUM: MAY 29, 2018

DATE OF SECOND CORRIGENDUM: SEPTEMBER 4, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed and the decision that the General Division should have given is made: the Claimant was disabled in ~~October 2014~~ **October 2013**.

OVERVIEW

[2] E. C. (Claimant) completed Grade 11. She has worked in child care and retail settings. She last worked at a gas station/convenience store until she injured her knee and was persuaded to stop working by her doctor and her employer. The Claimant is also incontinent. She applied for a Canada Pension Plan disability pension and claimed that she was disabled by these conditions and anxiety. The Minister of Employment and Social Development refused the application.

[3] The Claimant appealed this decision to the Tribunal. The Tribunal's General Division dismissed the appeal, deciding that the Claimant's disability was not severe. The appeal is allowed because the General Division erred in law. The disability claim is allowed because the Claimant was disabled in ~~October 2014~~ **October 2013**.

PRELIMINARY MATTER

[4] This appeal was decided on the basis of the documents filed with the Tribunal, after the following was considered:

a) The legal issues to be decided are straightforward;

b) The parties filed detailed written submissions on appeal;

c) There are no gaps in the submissions received;

d) Neither party requested an oral hearing.

ISSUES

[5] Did the General Division make an error in law by failing to consider the legal principles set out in court decisions?

[6] Did the General Division make an error in law by finding that medical events after the minimum qualifying period were irrelevant?

[7] Did the General Division make an error of law by placing insufficient weight on the Claimant's testimony?

[8] Did the General Division base its decision on an erroneous finding of fact that from a functional perspective, the Claimant's only imposed limitation was to avoid prolonged standing, and that she reportedly had difficulty stocking shelves?

ANALYSIS

[9] 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, 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 that it made in a perverse or capricious manner or without regard for the material before it.[1] The Claimant has presented a number of grounds of appeal. They are each considered in this context below.

Issue 1: Failure to Apply Legal Principles From Court Decisions

[10] The Claimant argues that the General Division failed to apply various legal principles to the facts before it. This would be an error in law.

a) The *Villani*[2] decision

[11] In *Villani*, the Federal Court of Appeal teaches that when deciding whether a claimant is disabled, the decision maker must consider their personal circumstances, including age,

[1] DESD Act, s. 58(1)
[2] *Villani v. Canada (Attorney General)*, 2001 FCA 248

education, language skills, and work and life experience. This is correctly set out in the General Division decision.[3] The General Division considered that the Claimant was 43 years old, had completed Grade 11, and had limited transferrable skills because of her narrow work experience and physical limitations from her medical conditions. The decision references the Claimant's unsuccessful attempts to upgrade her education. However, the General Division failed to grapple with how this inability to obtain further education would impact the Claimant's capacity to retrain for alternate employment.

[12] The General Division also failed to consider what impact her bowel condition, including incontinence and unpredictable bowel urgency, would have on her capacity to retrain or work in a sedentary job. This is also an error in law because it is a failure to consider all of the Claimant's personal circumstances when deciding whether she is disabled.

[13] The Minister contends that the Claimant could not upgrade her education because of anxiety, but that this condition was not recognized or treated prior to the minimum qualifying period (MQP) —the date by which a claimant must be found to be disabled to receive the disability pension. However, the reason that the Claimant could not upgrade her education is not important. The General Division's failure to consider this is an error in law. The appeal must be allowed on this basis.

b) The *Bungay*[4] decision

[14] In *Bungay*, the Federal Court of Appeal teaches that when deciding whether a claimant is disabled, the decision maker must consider all of their disabling conditions, not just the main one(s), and must consider the cumulative impact of the conditions.[5] This is correctly set out in the General Division decision.[6] The decision then summarizes the evidence regarding the Claimant's physical conditions at the MQP. It concludes that the Claimant's only imposed limitation at that time was to avoid prolonged standing, and that the Claimant reportedly had difficulty stocking shelves. The decision acknowledges that the Claimant continued to work despite her bowel condition, using "Depends," and states that when this condition was

[3] General Division decision, para. 32
[4] *Bungay v. Canada (Attorney General)*, 2011 FCA 47
[5] *Ibid*.
[6] General Division decision, para. 42

considered cumulatively with the others, they did not preclude the Claimant regularly from pursuing all substantially gainful employment.[7]

[15] From this, it is clear that the General Division considered all of the Claimant's medical conditions at the MQP date. It made no error of law in this regard.

c) The *Inclima*[8] decision

[16] In *Inclima*, the Federal Court of Appeal instructs that where there is evidence of work capacity, a claimant must show that efforts at obtaining and maintaining employment were unsuccessful because of their health condition.[9] This is correctly set out in the decision.[10]

[17] The Claimant argues that the General Division failed to apply this principle to the facts before it; she says that her efforts to continue to work with accommodations from her employer until October 2013 satisfied this legal requirement and were not considered by the General Division. However, the General Division did consider that the Claimant continued to work with her limitations until October 2013, when she injured her knee. The General Division also found as fact that she made no other efforts to obtain or maintain employment. Therefore, the General Division applied this legal principle to the facts before it, and made no error in law.

Issue 2: Medical Issues After the MQP

[18] The General Division decision acknowledges that the Claimant fell in 2014, injuring both of her knees, and that she underwent bowel surgery in 2015. However, the General Division concluded that new medical events or a deterioration of a condition after the MQP was not relevant to its determination of the Claimant's capacity at the MQP date. The Claimant argues that this was an error because her condition began to deteriorate prior to the MQP date, and that further deterioration after that date helps to establish the status of her condition at the MQP.

[19] I am not persuaded that the General Division made any error in this regard. It examined the Claimant's condition at the MQP. Unfortunately her condition worsened after this date and

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[7] *Ibid*.
[8] *Inclima v. Canada (Attorney General)*, 2003 FCA 117
[9] *Ibid*.
[10] General Division decision, para. 40

the Claimant required surgery in 2015, and was further limited by additional knee injuries. However, this additional deterioration does not assist in determining whether the Claimant was disabled at the MQP. The General Division's finding of fact that this evidence was not relevant was not erroneous.

Issue 3: Weight Given to Testimony

[20] The General Division found that the Claimant was credible and placed equal weight on the oral testimony and the medical evidence.[11] The Claimant contends that insufficient weight was placed on her evidence regarding the impact that her conditions had on her day-to-day functioning. However, it is for the General Division to receive the evidence from the parties and weigh it. The Claimant has not pointed to any important evidence that was overlooked or not considered. The General Division made no error in this regard.

Issue 4: Functional Limitations

[21] The General Division found as fact that from a functional perspective, the Claimant's only imposed limitation as of the MQP was to avoid prolonged standing because of left knee instability, and that the Claimant reportedly had difficulty stocking shelves.[12] However, the Claimant also points to Dr. Curtis's progress note[13] stating that she was not able to do work that required standing, and her report stating that the Claimant would need to be accommodated for mobility restrictions.[14]

[22] This evidence is not specifically mentioned in the General Division decision. However, the General Division is presumed to have considered all of the evidence that was before it and need not refer to each and every piece of evidence in its decision.[15] These documents were penned after the MQP and refer to the Claimant's functioning at the time they were written, so they provide little assistance in assessing the Claimant's condition at the MQP date. The General Division's finding that the Claimant had a functional limitation regarding prolonged standing and

[11] General Division decision, para. 33
[12] *Ibid*., para. 42
[13] May 2014, GD2-52
[14] March 2015, GD2-90
[15] *Simpson v. Canada (Attorney General)*, 2012 FCA 82

that she reportedly had trouble stocking shelves was based on the evidence and was not erroneous. The appeal cannot succeed on this ground.

REMEDY

[23] The appeal is allowed because the General Division erred in law. The DESD Act sets out what remedy the Appeal Division can give.[16] In this case, it is appropriate to give the decision that the General Division should have given. The General Division made no factual errors. The record before me is complete. The law can be applied to these facts.

[24] The following facts are undisputed:

- The Claimant completed Grade 11
- Her attempts to upgrade her education were unsuccessful due to her anxiety[17]
- The Claimant's work experience is limited to retail and child care settings
- The Claimant has had bowel issues for a number of years, and since 2009 has needed to use "Depends" and take a change of clothes to work because of this
- In 2013, the Claimant left her last job at a gas station/convenience store after injuring her left knee. She had been accommodated in that position by working night shifts and sitting when possible.
- The Claimant first sought medical advice for anxiety in 2014
- In 2014 and later, the Claimant suffered further knee injuries when she fell, and her bowel condition worsened, requiring surgery in 2015

[25] In order to be disabled under the *Canada Pension Plan*, the Claimant must have a disability 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. A disability is

[16] DESD Act, s. 59(1)
[17] General Division hearing at 11:00, although the exact time on the recording may vary, depending on the device used to listen to the hearing

prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death. In addition, to decide whether a disability is severe, the decision maker must consider a person's personal circumstances, including age, education, language skills, and work and life experience.[18]

[26] The Claimant has limited education and her work experience is restricted to jobs that require physical abilities. She has not been able to upgrade her education, which further limits her capacity to retrain or obtain sedentary work. Her ability to retrain is also impacted by bowel urgency and incontinence. The Claimant is young (43 at the MQP date) and is fluent in English. However, when I examine her physical limitations, along with her limited education and work experience, and her inability to upgrade her education, I am satisfied that she would not be able to retrain or obtain sedentary work. On balance, she is incapable regularly of pursuing any substantially gainful occupation.

[27] The Claimant's disability is also prolonged. She has had knee and bowel issues for at least eight years. These conditions have not improved, despite the Claimant's compliance with treatment. There is no suggestion that these conditions will improve.

[28] The Claimant was disabled when she stopped working in ~~October 2014~~ **October 2013**. ~~Payments will start four months after the Claimant became disabled,[19] which is February 2015~~ **2014.** ~~.~~ **The Claimant applied for the Canada Pension Plan disability pension in August 2015. Under the Canada Pension Plan a claimant cannot be disabled more than 15 months prior to when they applied for the pension. Therefore, the Claimant is deemed to be disabled in May 2014. Payments will start four months after this date, which is September 2014.**

Valerie Hazlett Parker
Member, Appeal Division

METHOD OF PROCEEDING:	On the record

[18] *Villani v. Canada (Attorney General)*, 2001 FCA 248
[19] *Canada Pension Plan*, s. 69

SUBMISSIONS:	E. C., Appellant Kerry Duggan, Representative for the Appellant Nathalie Pruneau, Representative for the Respondent