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

Citation: *J. M. v. Minister of Employment and Social Development*, 2018 SST 899

Tribunal File Number: AD-18-96

BETWEEN:

J. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: September 13, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, J. M., is 60 years old and has a history of back and neck pain. She was trained as a registered nurse, although she did not participate in the labour market for many years. In 2010, she began working as a nursing assistant in a veterans' long-term care facility. She sustained a series of on-the-job injuries that left her with pain in her right hip and lower back. These injuries, combined with vertigo and migraine headaches, caused her to stop working in December 2013. In September 2014, she attempted to return to work but could not even manage shorter hours or modified duties.

[3] Over a period of more than 20 years, the Appellant has applied for the Canada Pension Plan (CPP) disability pension four times, most recently in November 2014. The Respondent, the Minister of Employment and Social Development (Minister), refused this last application after determining that her disability was not "severe and prolonged" as of the minimum qualifying period (MQP), which ended on December 31, 2015.

[4] The Appellant appealed the Minister's refusal to the General Division of the Social Security Tribunal. In November 2017, after holding a hearing by teleconference, the General Division dismissed her appeal, finding that the Appellant had failed to demonstrate that she was "incapable regularly of pursuing any substantially gainful occupation" as of the MQP. In particular, the General Division found that there was little "objective medical documentation" available from May 2015 to August 2016—the period it determined was most relevant. The General Division also noted that the Appellant had continued to apply for jobs until March 2016, when she fell and injured herself.

[5] On February 7, 2018, the Appellant requested leave to appeal from the Tribunal's Appeal Division, alleging that the General Division committed various errors in the course of rendering its decision. On April 12, 2018, I allowed leave to appeal because I saw a reasonable chance of

success for at least one of the Appellant's arguments. I made no finding on the Appellant's remaining grounds of appeal and permitted unrestricted discussion of them during the hearing.

[6] Having now reviewed the parties' oral and written submissions, I have concluded that none of the Appellant's reasons for appealing have sufficient merit to warrant overturning the General Division's decision.

ISSUES

[7] According to s. 58(1) of the DESDA, there are only three grounds of appeal to the Appeal Division: the General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material.

[8] The Appellant has raised the following issues:

Issue 1: Did the General Division, having determined that there was a "gap in the information" between May 2015 and August 2016, act unfairly by proceeding without offering the Appellant an opportunity to obtain additional evidence?

Issue 2: Did the General Division disregard evidence supporting the Appellant's claim and fixate on the absence of a statement from any medical practitioner specifically pronouncing her disabled from work as of the MQP?

Issue 3: Did the General Division base its decision on a "cumulative and cascading series of erroneous findings of fact" by selectively relying on evidence that disadvantaged the Appellant's case while discounting evidence that favoured it?

ANALYSIS

Issue 1: Did the General Division, having determined that there were "gaps in the information" between May 2015 and August 2016, act unfairly by proceeding without offering the Appellant an opportunity to obtain additional evidence?

[9] The Appellant submits that the General Division failed to observe a principle of natural justice by refusing her request to adjourn the hearing of October 16, 2017. She alleges that the presiding General Division member knew from the outset that her submissions were deficient. She submits that he should have therefore given her an opportunity to gather further medical evidence that might have helped prove her claim. The Minister maintains that the General Division had no positive duty to assist the Appellant in making her case.

[10] Having carefully considered both sides of this issue, I find that the Appellant, on balance, has not made her case.

[11] Much of the Appellant's claim rested on the numerous reports of her family physician, Dr. Patrick Somers, who, in addition to documenting her status in his clinical notes, completed numerous claims forms on her behalf—for Sun Life, for Canada Life, for Advantage Rehab, for her employer's sick leave program, and for CPP disability (twice). There is no doubt that the General Division based its denial, in large part, on what it found was the near-absence of information during the most relevant period leading up to the end of the MQP and immediately afterward. In its analysis, the General Division wrote:

> [46] The second distinct post-employment period between May 28, 2015 and August 24, 2016 is notable for the lack of any objective medical documentation other than the October 29, 2015 form advising the Appellant that she was on the waiting list for a chronic pain program. The Appellant continued to report symptoms and limitations during this period but these are not supported by contemporaneous documentation.

[12] Having found indications of functionality prior to May 2015, the General Division went on to draw an adverse inference from the 15-month "gap" in the information:

> [51] Given the hope expressed during the first post-employment period, as well as the somewhat contradictory explanations given by the Appellant for her doctor's evidence from that period, the absence of documentation in the second post-employment period is troublesome. The Appellant's subjective symptoms were significant during this time, particularly in 2016, but the Tribunal is wary of relying entirely on subjective reports without at least some objective support. […]

[13] My review of the Appellant's medical file confirms that there was indeed a gap in the information—Dr. Somers recorded frequent visits up to March 20, 2015, when his clinical notes ended. That happened to be the date on which Dr. Somers printed his file and submitted it to the Minister, who had requested it to help with the assessment of the Appellant's application for CPP disability benefits. In the two years following the Minister's denial of her claim, the Appellant submitted a large volume of material to the General Division's attention, but almost none of it related to the crucial period between May 2015 and August 2016. What the Appellant did submit demonstrated an incomplete understanding of what she needed to prove disability under the CPP's statuary criteria. Instead of sending her own monthly status updates, for example, the Appellant would have been better off requesting the remainder of Dr. Somers' clinical notes. To her claim's detriment, she did not do so.

[14] I am willing to accept that the General Division "knew from the get go"—as the Appellant's representative put it—that the material filed by the Appellant in support of her application was in some way lacking. Under s. 21 of the *Social Security Tribunal Regulations*, it is within the General Division's discretion to decide whether an oral hearing is needed and, if so, to select what format it deems appropriate. In its notice of hearing dated August 4, 2016, the General Division advised the parties that it had decided to hold a hearing by videoconference because, among other reasons, "[t]here are gaps in the information in the file and/or a need for clarification."

[15] The General Division presumably called the hearing for the purpose of filling in those gaps. However, once the hearing was convened, the General Division's obligation to collect information from the Appellant did not go beyond making relevant inquires. My review of the audio recording of the hearing[1] indicates that the presiding member did just that, asking the Appellant about the comparative absence of information in her file from the months before and after December 31, 2015. In paragraph 19 of its decision, the General Division member wrote:

> When asked about the lack of medical documentation in the period leading up to August 24, 2016, the Appellant said that she was confusing the processes for CPP disability benefits and private insurance disability benefits. She said she was sending information to the private insurer. She also said she was depressed during this time

[1] From the 51:15 mark of the audio recording.

> and felt like giving up: as a result, she stopped filing reports. She did not think she was seeing any specialists during this time but would have been seeing Dr. Somers on a monthly basis. However, he only permitted her to deal with one issue per visit. She said she also would have been attending physiotherapy during this time.

[16] The General Division apparently did not find the Appellant's explanation compelling, as was its right as trier of fact. In any event, the burden of proof lies with the Appellant to show, on a balance of probabilities, that she is disabled, rather than with the Minister or, for that matter, the General Division, to prove otherwise.[2] Moreover, the onus is on the Appellant to provide evidence, as indicated by s. 68(1) of the *Canada Pension Plan Regulations*, which states that an applicant for benefits "**shall** supply the Minister" [my emphasis] with documents relating to their disability.

[17] The Appellant claims that the General Division refused her request to adjourn the hearing to allow her more time to obtain medical evidence. That is not what I heard in my review of the audio recording, which revealed that the Appellant asked the General Division whether it wanted to wait for the results of her pending spinal MRI.[3] The Appellant did not demand an adjournment but rather raised it as a possibility that the General Division could choose to pursue. It is notable that the Appellant did not float the delay the purpose of obtaining the "missing" medical records, in which the General Division had previously shown interest; instead, she suggested that the General Division look at an imaging report that, coming nearly two years after the MQP, would have had only limited relevance to the issues at hand. The General Division declined the offer—in my view, for good reason—because the delay would have served no useful purpose.

[18] It is irrelevant that the Appellant was without legal representation before or during the hearing before the General Division. As the Federal Court stated in *McCann v. Canada*,[4] "the law is the same for all and does not vary depending on whether a litigant chooses to be represented or to represent himself or herself." I note, in any case, that the General Division gave many opportunities to the Appellant to make her case, admitting into the record every one of her submissions, even those received after the filing deadline. The Appellant now suggests that the

---

[2] *Dhillon v. Minister of Human Resources Development* (November 16, 1998), CP 5834 (PAB).
[3] Audio recording at 39:45.
[4] *McCann v. Canada (Attorney General)*, 2016 FC 878.

General Division should have actively demanded specific documents and adjourned the hearing to allow the Appellant additional time in which to obtain them. I cannot agree. Imposing such a duty on the General Division would undoubtedly assist claimants, but it would, in my view, throw the adjudicatory system established by Parliament out of balance and cast the General Division in a role more akin to advocate than independent arbiter.

[19] I sympathize with the Appellant. It was obvious that there was a hole in her case that someone experienced in CPP disability claims might have tried to fill—starting with a request that Dr. Somers forward his clinical notes from May 2015 to August 2016. I have no way of knowing whether Dr. Somers actually possessed anything that would have assisted the Appellant, and it is now too late to produce new evidence, but I am satisfied that the General Division made a good faith effort to assess the material that was put before it.

Issue 2: Did the General Division disregard evidence supporting the Appellant's claim and fixate on the absence of a statement from any medical practitioner specifically pronouncing her disabled from work as of the MQP?

[20] The Appellant alleges that the General Division was "locked" in a quest to find a statement from one of her treatment providers that specifically deemed her unable to work as of the MQP. She suggests that the General Division should have looked at the evidence in its totality and drawn a reasonable inference from it that she was disabled.

[21] This allegation, as with all of the Appellant's submissions, implies that the General Division approached her claim with a rigid mindset that destined it to failure. The Appellant accuses the General Division of not quite bias, but a form of tunnel vision that led to a predetermined result. Having examined the General Division's conduct during the hearing and its analysis of the evidence, I must disagree.

[22] The General Division identified three distinct periods after the Appellant's failed return to work in September 2014. An initial post-employment period, which lasted until the May 2015 physiotherapy referral, was marked by optimism on the part of both the Appellant and Dr. Somers that she might be capable of part-time sedentary work. The second period, the aforementioned "gap" in the medical record, was characterized by an apparent absence of

healthcare interventions, except for a reference, in one of the Appellant's letters to Service Canada, to a pending CT scan. The third period began with the resumption of the medical record in August 2016 and continued to the hearing date.

[23] The General Division made a specific finding that the Appellant was capable of substantially gainful employment at the end of the first period, based on her March 2015 statement—relayed to Dr. Somers and recorded in his clinical notes—that she could still perform part-time work. She made similar statements in letters written to Service Canada around the same time. At the hearing, the Appellant did not deny making these statements but did attempt to minimize them, claiming that Dr. Somers had declared her capable of work only because she insisted that he do so, believing as she did that expressions of her determination to keep working would assist her in her various disability claims. The General Division considered this explanation but ultimately found it laboured, concluding that the most reasonable interpretation of the Appellant's statements was that she retained some work capacity. The General Division was within its authority to make such a finding, as long as it was founded in reason and not based on factual error.

[24] Similarly, the General Division was not wrong to base its decision, in part, on the absence of medical evidence from the second period. The Appellant criticizes the General Division for unreasonably fixating on the absence of a specific pronouncement from any of her physicians that she was unable to work, but its reasons make clear that the real problem for the General Division was the absence of any medical evidence from what was the most relevant timeframe:

> Given the issues identified above, the lack of objective documentary evidence in the second post-employment period is instrumental in preventing her from meeting that onus. While it is possible that such evidence may exist elsewhere, the Tribunal can only make a decision based on the evidence before it.[5]

[25] In the third period, as the General Division found, Dr. Somers "consistently affirmed that the Appellant was not capable of working at any job."[6] The problem for the General Division was that these opinions were inconsistent with the evidence from the first period, which had

[5] General Division decision, para. 53.
[6] General Division decision, para. 47.

ended only a little more than a year earlier. The General Division addressed this inconsistency as follows:

> While the failure to establish a severe disability by December 31, 2015 is determinative of the appeal, the Tribunal notes a marked change in the third post-employment period. There does not appear to have been any point in that period where Dr. Somers found the Appellant capable of any kind of work. The recent development of a more significant disability is consistent with her evidence that her condition had deteriorated since December 31, 2015.

[26] Again, the second-period information gap was the obstacle: there was nothing in the documentary record to indicate a sudden decline in the Appellant's functionality, nor to explain why Dr. Somers' opinion had shifted. In the absence of such evidence, the General Division was justified in concluding that the Appellant had failed to discharge the burden of proof.

[27] I see no indication that the General Division turned a blind eye in assessing the Appellant's disability claim. Its decision indicates that it thoroughly analyzed and carefully weighed the Appellant's evidence. Contrary to the Appellant's allegation, the General Division did not ignore her testimony, but simply chose to give it less weight than most of the documentary evidence. It did so for defensible reasons that it expressed clearly. The Appellant faulted the General Division for fixating on the absence of a doctor's statement that she was incapable of work, but this oversimplifies the General Division's logic. Its decision was based not just on Dr. Somers' silence about the Appellant's capacity for work between May 2015 and August 2016, but also on a variety of other factors, including the family physician's March 2015 statement that the Appellant was capable of part-time sedentary work and the Appellant's own declaration that she was applying for jobs as late as March 2016.

[28] Finally, the Appellant criticizes the design of the questionnaire that healthcare practitioners are expected to complete when one of their patients applies for CPP disability benefits: "The Minister's form of medical report asks the doctor for a prognosis but does not ask how the applicant's condition affects that person's ability to work."[7] This, she submitted, accounted for Dr. Somers' failure to offer a definitive statement about her disability in the periods prior to August 2016. She alleges that the General Division seized on this failure in order

[7] Appellant's submissions dated February 7, 2018, AD1-14.

to deny her benefits and that it should have recognized the flaw in the form and made a reasonable inference that she was disabled from the information that Dr. Somers did provide.

[29] I agree with the Appellant that the CPP medical report is poorly designed, and it is indeed odd that a questionnaire that is intended to draw information on whether a person is disabled never asks treatment providers this direct question: "Can the applicant work?" Still, I do not think that this apparent omission can help the Appellant. Any deficiency in the application materials is the Minister's fault, but it is the General Division's conduct that is at issue in this appeal. The General Division had a duty to do no more than consider the available materials that were submitted, however problematic they might be. I think it would place an unreasonable burden on the General Division to expect it to infer answers to questions that were never asked. In any event, it was open to Dr. Somers to declare the Appellant unfit for work, but he declined to do so. While he did not specifically address the Appellant's work capacity in his November 2014 CPP medical report, he did so in a separate letter, written on the same date, allowing that she might gradually return to a sedentary job.

[30] In support of her argument, the Appellant refers to *M. C. v. Minister of Employment and Social Development*,[8] an earlier Appeal Division decision that, in broad terms, cautions the General Division against basing a decision on the **absence** of a declaration from a medical professional that contains specific words that correlate to a statutory provision. I can understand why the Appellant believes her fact situation is analogous to *M. C.*, but there is a significant difference between the two cases. Both involve the ways in which medical evidence is used to apply legal definitions—in *M. C.*, incapacity under the *Old Age Security Act* (OASA) and, in the Appellant's case, disability under the CPP. However, in *M. C.*, the Minister took an active role in directing the claimant to obtain a doctor's certificate of incapability, which, it turned out, was the wrong form for the claimant's mother because it did not contain language specific to the OASA's definition of incapacity. This history was plainly evident to the General Division, which, according to the Appeal Division, should have taken the Minister's error in account when it found that the "correct" declaration of incapacity came too late. In the present case, there is no such level of Ministerial error on the record.

---

[8] *M. C. v. Minister of Employment and Social Development,* 2017 SSTADIS 94.

Issue 3: Did the General Division base its decision on a "cumulative and cascading series of erroneous findings of fact" by selectively relying on evidence that disadvantaged the Appellant's case while discounting evidence that favoured it?

[31] The Appellant points to three findings that, in her view, support her argument that the General Division selectively relied on evidence supporting the conclusion it wanted to reach:

- In paragraph 14 of its decision, the General Division noted the Appellant's testimony, at different points during the hearing, that both taking and not taking Cipralex made her "stupid;"
- In paragraph 21, the General Division noted that the Appellant failed to mention tailbone pain in her January 2016 letter, even though it was supposedly a major component of her disability; and
- In paragraph 22, the General Division noted that paramedics were called to the Appellant's home in March 2016 in response to a fall, although there was no record of this event on file.

[32] The Appellant describes these findings as "erroneous," but my review of the underlying record indicates that they are not; each of them accurately reflects the documentary evidence on file and what was said at the hearing. As a result, none of them are a ground of appeal as described by s. 58(1)(*c*) of the DESDA. Rather, the Appellant's objections to three findings flow from her overarching thesis that the General Division acted unfairly by "cherry-picking" weaknesses or inconsistencies in her evidence in an effort to undermine her case.

[33] I fail to see the merit in this argument. I am mindful of the words of the Federal Court in *Hussein v. Canada*[9] that the "weighing and assessment of evidence lies at the heart of the [General Division's] mandate and jurisdiction. Its decisions are entitled to significant deference."

[34] It should go without saying that a decision-maker cannot be expected to incorporate every element and aspect of the evidence in its written reasons. While the Appellant may not agree with its conclusions, the General Division is entitled to sort through the relevant facts and

---

[9] *Hussein v. Canada (Attorney General)*, 2016 FC 1417.

decide what to accept or disregard.[10] As I have indicated above, the General Division's analysis did more than just dwell on the liabilities of the Appellant's case—it also fully considered its assets, including the Appellant's testimony and Dr. Somers' findings of disability (late though they were). However, after assessing the evidence as a whole, the General Division concluded that, on balance, it favoured the Minister's position.

[35] In the end, the Appellant is requesting that I reweigh and reassess the evidence in order to reach a different conclusion about her disability. However, as the Federal Court held in *Tracey v. Canada*,[11] it is not the role of the Appeal Division to conduct a reassessment when determining whether leave should be granted or denied, because a reassessment does not fall within any of the grounds of appeal under s. 58(1) of the DESDA.

CONCLUSION

[36] For the reasons discussed above, the Appellant has not demonstrated to me that, on balance, the General Division committed an error that falls within the grounds listed in s. 58(1) of the DESDA.

[37] The appeal is therefore dismissed.

Member, Appeal Division

HEARD ON:	August 22, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. M., Appellant John O'Neill, Representative for the Appellant Sandra Doucette, Representative for the Respondent

[10] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.
[11] *Tracey v. Canada (Attorney General),* 2015 FC 1300.