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

Citation: *K. P. v Minister of Employment and Social Development,* 2018 SST 1288

Tribunal File Number: AD-18-478

BETWEEN:

K. P

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: December 14, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

[2] The Appeal Division makes the decision that the General Division should have made. The Claimant's appeal is dismissed.

OVERVIEW

[3] K. P. (Claimant) worked in a number of different retail and administrative positions until 2014. She applied for a Canada Pension Plan disability pension and claimed that she was disabled by a number of medical conditions, including chronic pain, loss of feeling in her right arm and leg, spasms, migraine headaches, anxiety, and depression. The Minister of Employment and Social Development (Minister) refused the application.

[4] The Claimant appealed the Minister's decision to this Tribunal. The Tribunal's General Division dismissed the appeal, deciding that the Claimant retained some capacity regularly to pursue a substantially gainful occupation and that she had failed to establish that her efforts to obtain and maintain employment were unsuccessful because of her health. The Claimant's appeal from this decision is allowed because the General Division failed to consider her mental illness. The Appeal Division gives the decision that the General Division should have made: her claim is dismissed.

PRELIMINARY MATTERS

[5] The Appeal Division held a pre-hearing conference in this matter. At that time, the Claimant's counsel confirmed that the Claimant was not arguing that any section of any legislation contravened the *Canadian Charter of Rights and Freedoms* (Charter) but that the Tribunal should apply Charter principles when deciding this appeal. The appeal proceeded on this basis.

[6] At the Appeal Division hearing, counsel for the Minister was not able to connect to the videoconference due to technological problems. She was able to connect by telephone. The

parties agreed to continue with the hearing with the Claimant's counsel present by videoconference and the Minister's counsel by teleconference.

ISSUES

[7] Did the General Division make any of the following errors in law?

a) It failed to apply the statutory test for disability.

b) It relied on the legal principle from the *Inclima v Canada*[1] decision rather than the statutory test for disability.

c) It considered whether the Claimant was disabled when she stopped working in 2014 and not at the end of the minimum qualifying period (MQP) on December 31, 2016.

d) It failed to consider all of the Claimant's conditions.

e) It failed to follow the Canada Pension Plan Adjudication Framework when it weighed the medical evidence.

[8] Did the General Division base its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material that was before it in one of the following ways?

a) It failed to consider all of the medical evidence and only considered the evidence that supported its conclusion.

b) It failed to consider the Claimant's subjective reports regarding her conditions.

ANALYSIS

[9] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It sets out only three grounds of appeal that I can consider: 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

[1] *Inclima v Canada (Attorney General)*, 2003 FCA 117.

capricious manner or without regard for the material before it.[2] The Claimant's arguments that the General Division made an error in law and based its decision on erroneous findings of fact are examined below.

Issue 1: Errors in law

[10] One ground of appeal under the DESD Act is that the General Division made an error in law. The Claimant contends that a number of such errors were made.

a) Failure to apply the correct legal test and reliance on the *Inclima* decision

[11] The Claimant argues that the General Division failed to apply the correct legal test for a severe disability and instead relied on the legal principle in the *Inclima* decision. Under the *Canada Pension Plan* (CPP), a disability is severe if it renders a claimant incapable regularly of pursuing any substantially gainful occupation.[3] This is correctly stated in the decision.[4] However, in one paragraph of its analysis of the evidence, the General Division states that the Claimant retained a capacity for gainful employment in July 2014 when she stopped working and that she did not attempt to hold a job after July 2014, so the appeal must be dismissed.[5]

[12] The General Division did not fail to apply the correct legal test. The General Division decision summarized the evidence that was before it and correctly set out the correct legal test for disability.[6] The General Division also decided that the Claimant retained some capacity to work when she stopped working in 2014. The decision then correctly states that, where there is evidence of work capacity, a claimant must show that efforts to obtain and maintain employment were unsuccessful because of their health.[7] The evidence of capacity for gainful employment referred to in that paragraph is simply that, not evidence of capacity regularly to pursue any substantially gainful occupation. However, the Federal Court of Appeal requires only evidence of work capacity to trigger the obligation to demonstrate that efforts to obtain or maintain

[2] DESD Act, s 58(1).
[3] *Canada Pension Plan*, s 42(2)(a).
[4] General Division decision, para 49.
[5] *Ibid*. para 63.
[6] *Ibid*. para 49.
[7] *Inclima v Canada (Attorney General)*, 2003 FCA 117.

employment failed because of a claimant's health, rather than evidence of capacity regularly to pursue any substantially gainful occupation.

[13] The Claimant did not present any evidence of any attempts to obtain or maintain any work. The General Division decision explains why the General Division also concluded that her attempts to simulate a work environment at home were insufficient.[8] Therefore, she failed to meet this legal obligation. The General Division made no error in this regard.

b) Wrong date of disability considered

[14] The Claimant also argues that the General Division erred in law because it considered the Claimant's capacity to work in July 2014 when she left her last job and not at the end of the MQP (the date by which a claimant must be found to be disabled to receive the disability pension), which was December 31, 2016. However, it did not err in this way. The General Division concluded that the weight of professional opinion supported a finding that the Claimant retained capacity for gainful work in July 2014. This was when she stopped working. The General Division then went on to consider her activities after she stopped working, including two trips from her home to Alberta (long travel days by airplane), an attempt to use a jet ski, and her efforts to simulate a sedentary work environment at home. I am satisfied that, when it concluded that she was not disabled, it considered her condition at the MQP. This argument fails.

c) Failure to consider the Canada Pension Plan Adjudication Framework

[15] The Minister has prepared an adjudication framework document to help explain how disability pension applications are to be adjudicated. This document refers to a "reasonably satisfied standard" as the standard to be met for a claimant to be found disabled. The Claimant argues that this document is binding on the Tribunal or at least must persuade the Tribunal of the standard that has to be met for the Claimant to be found disabled.

[16] The Adjudication Framework is a policy document. It is not binding on the Tribunal.[9] The standard of proof in a disability case is the balance of probabilities. This is correctly set out in the decision—the Claimant must prove that it is more likely than not that she was disabled on

[8] General Division decision, para 62.
[9] *Atkinson v Canada (Attorney General)*, 2014 FCA 187.

or before the end of the MQP.[10] Nothing before me suggests that the General Division erred in applying the correct standard of proof to the evidence before it.

[17] The Adjudication Framework also indicates that decision-makers must accept and consider medical evidence when making disability decisions. The Claimant argues that the General Division "sidestepped" this obligation when it found that Dr. Brennan changed her opinion that the Claimant was not disabled only after she received copies of reports that the Claimant's lawyer had commissioned and that it concluded that she was not able to work. However, the General Division decision considered all of the evidence before it. It gave weight to different medical reports and explained why it did so. For example, the General Division discounted Dr. Finnamore's conclusion that the Claimant was diagnosed with rheumatoid arthritis as a child and with widespread arthritic pain because there was no other medical evidence that supported this and because such diagnoses were outside of Dr. Finnamore's area of expertise.

[18] The General Division's mandate is to receive the evidence presented to it and to weigh it to reach a decision. It did so. No error in law is found in this regard.

d) Failure to consider all of the Claimant's conditions

[19] The Federal Court of Appeal also teaches that, when deciding whether a claimant is disabled, a decision-maker must consider all of the claimant's conditions. The Claimant had a number of medical conditions, including pain, physical restrictions, anxiety, depression, and an adjustment disorder. The General Division decision contains a detailed summary of all the medical evidence and testimony. The decision reports that the Claimant's depression symptoms scored in the moderate range and her post-traumatic stress disorder symptoms were just below the "cut-off." It also states that she testified that she had been diagnosed with anxiety and depression and was taking medication for this in December 2016 but receiving no counselling and that she had not been referred to a mental health professional.

[20] However, in its analysis of the evidence, the General Division did not consider the impact that the Claimant's mental illness would have on her other conditions or on her capacity

[10] General Division decision, para 47.

regularly to pursue any substantially gainful occupation. Therefore, the General Division erred in law, and the appeal must be allowed.

Issue 2: Erroneous findings of fact

[21] 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 that was before it. To succeed on this ground of appeal, the Claimant must prove three things: that a finding of fact was erroneous (wrong); that the finding was made perversely, capriciously, or without regard for the material that was before the General Division; and that the General Division decision was based on that particular finding of fact.[11] The Claimant argues that the General Division made two such errors.

a) Failure to consider objective medical evidence

[22] The General Division discounted Dr. Finnamore's opinion regarding the Claimant's arthritic conditions, in part, because it found that there was no basis in the medical documentation to support a finding of widespread arthritic pain.[12] However, Dr. Cook wrote that the Claimant had undergone investigations and scans of the thoracic and lumbar spine showing significant degenerative disc disease and neural involvement.[13] The General Division decision does not refer to this evidence. The General Division based its decision, at least in part, on there being no medical documentation to support a cause for the Claimant's pain, when some such evidence was presented. Therefore, the finding of fact that there were no medical documents to support a finding of widespread pain was erroneous. It was made without regard for all of the material that was before the General Division. The decision was based, in part, on this finding of fact. Therefore, the appeal must succeed.

b) Failure to consider the Claimant's subjective reports about her conditions and evidence of mental illness

[11] *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319.
[12] General Division decision, para 52.
[13] GD8.

[23] The Claimant's testimony at the General Division hearing is summarized in the decision.[14] This included her description of her physical limitations, migraine headaches, and mental illness. When it analyzed the evidence, the General Division discounted all of her testimony, stating that it was "tendentious" because it ignored what was contradictory and mischaracterized what was not supportive of her claim[15] and it was self-serving and therefore unreliable.[16] The General Division found that the Claimant's evidence was not credible and gave reasons for this finding—there was no medical evidence to support her testimony that she was diagnosed with rheumatoid arthritis at age 12,[17] the Claimant testified that her doctor never said she was "cleared" to return to work when her doctor had never said that she could not return to work,[18] and she took two long trips from her home to Alberta despite her claimed limitations for sitting and standing.[19] Therefore, the General Division did not err when it discounted the Claimant's subjective reports about her condition. The appeal cannot succeed on this basis.

REMEDY

[24] The appeal is allowed because the General Division failed to consider the Claimant's mental illness and to consider that there was objective medical evidence that explained her pain. The DESD Act sets out what remedies the Appeal Division can give on an appeal, including making the decision that the General Division should have given.[20] The Tribunal also has the legal authority to decide questions of fact and law to resolve an appeal.

[25] It is appropriate that I make the decision that the General Division should have given in this case because the record before me is complete, the parties attended and participated in the General Division hearing, and the *Social Security Tribunal Regulations* also require that proceedings be concluded as quickly as the circumstances and considerations of fairness and natural justice permit.[21] I have reviewed the written record and listened to the recording of the General Division hearing, and there were no procedural deficiencies that would require that the

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[14] General Division decision, paras 27–44.
[15] *Ibid*., para 60.
[16] *Ibid*., para 62.
[17] *Ibid*., para 52.
[18] *Ibid.*, para 55.
[19] *Ibid.*, para 61.
[20] DESD Act, s 59(1).
[21] *Social Security Tribunal Regulations*, s 3(1).

appeal be referred back to the General Division. The Claimant applied for the disability pension in January 2015, so almost three years have passed, and further delay would be incurred if the matter were referred back to the General Division.

[26] The following facts are not disputed:

a) The Claimant completed high school and one year of post-secondary education.[22]

b) She worked as a store manager for approximately nine years and later at a call centre.[23]

c) The Claimant claimed that she was she could no longer work after July 2014 because of her medical conditions.[24]

d) She claimed that the following medical conditions resulted in her being disabled: herniated discs, right leg spasms and numbness, right arm numbness, migraine headaches, headaches, leg and back pain, vomiting, and functional limitations.[25] She also has mental illness.

e) The end of the Claimant's MQP was on December 31, 2016.

f) The cause of the Claimant's pain is not clear. It improved with physiotherapy and unfortunately regressed when the Claimant stopped going to physiotherapy because she could not pay for it.

g) The Claimant was able to make two trips from X to Alberta by plane to assess whether her health would be better in that climate. She was accommodated on the planes by having priority boarding and deplaning, assistance with baggage onboard, and the opportunity to stand and stretch during the flights.

h) The Claimant's family physician did not state that the Claimant was unable to work until after the MQP.

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[22] GD2-52.
[23] General Division decision, para 6.
[24] General Division decision, para 7.
[25] *Ibid.*, paras 7, 8 and 12.

i) The Claimant was assessed by a psychologist in 2017, who found that her depression symptoms were moderate and her post-traumatic stress disorder scores were just below the "cut off." The psychologist concluded that the Claimant has chronic pain, depression, anxiety, and an adjustment disorder.[26]

[27] There is no reason to change the General Division's conclusion that the Claimant was not disabled because of her physical conditions. The decision contains a detailed summary of the oral and written evidence that was before it. In particular, the Claimant was able to attend work at X regularly until the summer of 2014, albeit with modified duties. The medical evidence from before the MQP also recommends that the Claimant return to work in the future. Before the MQP, her family physician did not support the idea that the Claimant's disability would prevent her from ever working again.[27] Despite her limitations, the Claimant was able to travel alone from X to Alberta by plane and car on two occasions with some accommodations. She was also able to try using a jet ski.

[28] The General Division decision refers to medical reports that describe the Claimant's pain as "awaiting diagnostic clarity."[28] It also refers to an MRI report that showed some osteoarthritis and a disc protrusion in 2015.[29] Other medical reports before the General Division that showed different spinal conditions, which could explain the Claimant's ongoing pain. However, the cause of the Claimant's pain does not determine whether she is disabled, rather it is the effect of her conditions on her capacity regularly to pursue any substantially gainful occupation.[30] Examining the evidence as a whole, demonstrates that the Claimant retained some capacity regularly to pursue a substantially gainful occupation at the MQP.

[29] The Federal Court of Appeal instructs decision-makers to consider all of a claimant's conditions.[31] This means that the Claimant's mental illness must also be considered. The Claimant has been diagnosed with depression and severe anxiety. She takes medication for depression. She also shows some post-traumatic stress disorder symptoms. Although she has not

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[26] GD3-2.
[27] GD1-25.
[28] General Division decision, para 17.
[29] *Ibid*., para 18.
[30] *Klabouch v Canada (Social Development)*, 2008 FCA 33.
[31] *Bungay v Canada (Attorney General)*, 2011 FCA 47.

attended counselling, no such referrals were made for her. When asked about this at the General Division hearing, the Claimant testified that she asked her family doctor about counselling and was told to try medication first. They then concentrated on her other conditions, so there has been no follow-up.[32] The Claimant is not to be faulted for not attending counselling when none has been recommended.

[30] In September 2016, the Claimant reported that the medication for her mental illness made her feel better, with less anxiety.[33] When she applied for the disability pension, the Claimant did not state that mental illness prevented her from working.[34] She gave little testimony about this condition at the General Division hearing. Therefore, I am satisfied, on balance, that the Claimant's mental illness, when considered together with her other conditions, did not render her disabled under the CPP at the MQP.

CONCLUSION

[31] The appeal is allowed because the General Division erred when it failed to consider the Claimant's mental illness.

[32] The Claimant's appeal is dismissed for the reasons set out above.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	November 26, 2018
METHOD OF PROCEEDING:	Videoconference and Teleconference
APPEARANCES:	George McAllister, Counsel for the Appellant Sandra Doucette, Counsel for the Respondent

[32] General Division hearing recording, part 2 at 1 hour, 4 minutes approximately.
[33] GD4-8.
[34] GD2-54.