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

Citation: *S. H. v Minister of Employment and Social Development*, 2019 SST 88

Tribunal File Number: AD-18-374

BETWEEN:

S. H.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: February 6, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The matter is referred back to the General Division for reconsideration by a different General Division member.

OVERVIEW

[2] S. H. (Claimant) completed high school, and business college programs in X and X. She also obtained a designation as a X and was licensed to sell X. She worked as a X from 2001 to 2012, when she was in a car accident. She tried to return to work part-time after the accident but could not continue, and her employer would not accommodate her.

[3] The Claimant applied for a Canada Pension Plan disability pension and claimed that she was disabled by a number of conditions resulting from the car accident, including depression, chronic pain, traumatic brain injury, cognitive deficits, and hearing loss and tinnitus. The Minister of Employment and Social Development refused the application. The Claimant appealed this decision to the Tribunal. The Tribunal's General Division dismissed the appeal, finding that the Claimant did not have a severe disability under the *Canada Pension Plan*.

[4] The Claimant's appeal to the Tribunal's Appeal Division is allowed because the General Division erred in law, based its decision on an erroneous finding of fact made without regard for material that demonstrated that the Claimant received treatment long after the accident, and failed to observe a principle of natural justice when it prevented the Claimant from presenting relevant testimony.

ISSUES

[5] Did the General Division make an error in law by failing to apply the principles from the *Villani v Canada*[1] decision?

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[1] *Villani v Canada (Attorney General)*, 2001 FCA 248.

[6] Did the General Division make an error in law by failing to consider the cumulative effect of the Claimant's conditions on her capacity regularly to pursue any substantially gainful occupation?

[7] Did the General Division make an error in law by failing to consider all of the medical evidence and to provide adequate reasons for how it weighed the medical evidence?

[8] Did the General Division base its decision on an erroneous finding of fact—made without regard for the material before it—that there were no reports that the Claimant had a number of different treatments except shortly after the car accident?

[9] Did the General Division fail to observe a principle of natural justice because it relied on the Claimant's participation at the hearing to conclude that her hearing loss was not significant?

[10] Did the General Division fail to observe a principle of natural justice by allowing the Claimant to present evidence only from treatment providers and not from assessors?

ANALYSIS

[11] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It sets out only three grounds of appeal that the Appeal Division can consider. 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.[2] The Claimant argues that the General Division made each of these errors in its decision. These arguments are examined below.

Issue 1: *Villani* decision

[12] In *Villani*, the Federal Court stated that a person's claim that they are disabled must be considered in a real-world context, meaning that their personal circumstances, including age, education, language abilities, and work and life experience, must be considered. The Claimant argues that the General Division failed to do this in a number of ways.

[2] DESD Act, s 58(1).

[13] First, the Claimant submits that the General Division failed to apply the *Villani* principles because it did not take into account that she stopped treatments because she could not afford them. The written record discloses that the Claimant attended a number of treatment sessions with a chiropractor and physiotherapist. She reported to X[3] that she had attended chiropractic and massage treatment in 2012 until her car insurer stopped paying for it.

[14] A claimant's financial circumstances and ability to pay for treatment are part of their real world and, as such, should be considered when deciding whether a failure to pursue treatment is reasonable. The Tribunal has determined that it is unreasonable to require a claimant to exhaust all of their financial resources so that all treatment recommendations can be followed, especially when an insurer has initiated numerous different treatments and they are likely to continue for a long time.[4] This is persuasive. This Claimant followed all treatment recommendations. She attended massage therapy, chiropractic treatment, mental health group programs, and a brain injury clinic. She also attended physiotherapy and continued with a home exercise program after her insurer stopped paying for this treatment. The General Division's failure to consider her ability to pay for treatment is an error in law.

[15] Second, the Claimant argues that the General Division erred in law because it failed to consider how her cognitive impairments would impact her capacity regularly to pursue any substantially gainful occupation. There is undisputed evidence that the Claimant has dizziness and focus, memory, and concentration difficulties.[5] However, the General Division gave the following reasons for its decision:

> The Tribunal determined the conservative nature of the Appellant's treatment for headaches, pain, and depression contemporaneous to her [minimum qualifying period [MQP] and since, the absence of any investigative reports indicating any severe head, cervical spine, or lumbar spine pathology contemporaneous to the Appellant's MQP, the absence of any evidence to the effect the Appellant sustained a significant [traumatic brain injury], if at all, in the January 2012 accident, the absence of evidence that effort at obtaining and maintaining employment not precluded by the Appellant's functional limitations has been unsuccessful by reason of the Appellant's health condition, led to the

[3] GD9-467.
[4] *D. P. v Minister of Employment and Social Development*, 2018 SST 487.
[5] General Division decision at paras 22–24.

> conclusion the Appellant did not have a severe disability before the end of her MQP of December 31, 2014.[6]

The Federal Court of Appeal teaches that all of a claimant's conditions, not just the main ones, must be considered to decide whether a claimant is disabled.[7] The General Division did not consider the impact of the Claimant's cognitive deficits on her capacity to work. This is also an error in law.

[16] Third, the Claimant argues that the General Division also failed to consider that she has fibromyalgia, a condition that was disclosed in the written record[8] and her testimony. The decision does not refer to this condition specifically. However, the General Division did consider the Claimant's pain symptoms and treatment. Its failure to refer to this pain condition by name is not an error in law under these circumstances.

[17] Finally, in this regard, the Claimant argues that the General Division erred because it failed to consider that the Claimant would require retraining to return to any work and that she could not do this due to her cognitive limitations. However, the evidence before the General Division was that the Claimant returned to work on a part-time basis after the accident.[9] No retraining was required for this. The General Division also found that the Claimant has numerous transferrable skills and is well educated.[10] Therefore, I am satisfied that, although the General Division did not specifically refer to the Claimant's retraining needs, it considered her educational background. It made no error in law in this regard; therefore, this ground of appeal fails.

Issue 2: Cumulative impact of all of the Claimant's conditions

[18] The Federal Court of Appeal teaches that all of a claimant's condition should be assessed in its totality. All possible impairments, not just the main one or main ones, must be considered to decide whether a claimant is disabled.[11] The General Division decision states this principle[12]

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[6] General Division at para 41.
[7] *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[8] GD5-18, for example.
[9] General Division decision at para 35.
[10] *Ibid.* at para 43.
[11] *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[12] General Division decision at para 44.

and states that it considered the combined effect of the Claimant's physical and mental condition.[13] However, since I have concluded above that the General Division failed to consider the Claimant's cognitive limitations, I must also conclude that it failed to consider the cumulative effect of her conditions on her capacity regularly to pursue any substantially gainful occupation.

[19] Similarly, there was evidence before the General Division regarding the Claimant's hearing loss. In 2015, she had recurrent ear infections and required hearing aids, including a tinnitus masker for debilitating tinnitus.[14] The Claimant testified about this condition. It is not mentioned in the General Division decision, so it appears that the General Division did not consider it.

[20] This is an error in law. It cannot be saved by the broad statement in the decision that the General Division considered the combined effect of the Claimant's physical and mental conditions.

Issue 3: Weighing of medical evidence

[21] In *Lalonde v Canada*,[15] the Federal Court of Appeal criticized the Pension Appeals Board (which was incorporated into this Tribunal) because it considered a doctor's opinion that a claimant "still had a certain capacity to work" and attributed to the doctor a finding that the claimant was not disabled under the *Canada Pension Plan*. The Court determined that it is for the decision-maker to decide whether a claimant is disabled, and that it could not rely on a doctor's opinion to meet this legal test. Further, the Court stated that the Pension Appeals Board was required to provide reasons for its decision that were proper, adequate, and intelligible.

[22] The Claimant argues that the General Division made the same errors. However, the General Division based its decision on various assessments that concluded that the Claimant was not precluded from returning to work as a X or from taking on other light-duty work, at least part-time.[16] The General Division also based its decision on the conservative nature of the

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[13] *Ibid*. at para 45.
[14] GD9-120.
[15] *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.
[16] General Division decision at para 37.

treatment, the absence of reports indicating a severe condition, and an absence of evidence that attempts to work had been unsuccessful because of the Claimant's condition.[17] The General Division did not attribute a legal conclusion to a medical report.

[23] Nonetheless, there was contradictory evidence before the General Division. Some assessments stated that the Claimant could return to work. Other medical reports stated that the Claimant could not work at her last job.[18] The Claimant also testified about her inability to work. The General Division did not consider any contradictory information or explain why it gave no weight to this evidence. The Supreme Court of Canada teaches that reasons must be given for findings of fact made on disputed evidence and on which the outcome of the case is largely dependent.[19] The General Division therefore erred in law by failing to provide sufficient reasons for its decision.

Issue 4: Erroneous finding of fact

[24] The Claimant also argues that the General Division erred because it based its decision on an erroneous finding of fact made without regard for the material that was before it. To succeed on this basis, the Claimant must prove three things: the finding of fact must be erroneous; it was made in a perverse or capricious manner or without regard for the material before the General Division; and the decision must be based on this finding of fact.[20]

[25] The finding of fact in question is the following statement: "There are no reports the Appellant has had physiotherapy, acupuncture, massage therapy, chiropractic therapy, or participated in an aqua therapy program or exercise program subsequent to shortly after the accident in January 2012."[21] Arguing against this, the Claimant's counsel referred me to a number of medical reports that demonstrated that the Claimant attended physiotherapy, chiropractic treatment, massage therapy, a pain clinic, and a brain injury clinic.[22] These reports refer to the Claimant's attendance at treatment sessions in 2013, 2014, and 2015, long after the car accident. Therefore, the General Division's finding of fact was erroneous. The General

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[17] *Ibid*. at para 41.
[18] For example, Dr. Chawla's January 2019 report
[19] *R. v Sheppard*, 2002 SCC 26.
[20] *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319.
[21] General Division decision at para 27.
[22] See GD9-22, GD9-71, GD9-82, GD2-97, GD5-161, GD9-467, GD9-121, GD9-340, and GD9-363.

Division made the finding without regard for all of the material that was before it. The decision was based, at least in part, on this finding of fact. Therefore, the appeal must be allowed on this basis.

Issue 5: Natural justice

[26] The General Division must observe the principles of natural justice. These principles are concerned with ensuring that parties to an appeal have the opportunity to present their case to the Tribunal, to know and answer the legal case against them, and to have a decision made by an impartial decision-maker based on the facts and the law.

[27] The Claimant argues that the General Division breached these principles in two ways. First, she contends that the General Division "used her participation in the hearing against her." The General Division member stated in the hearing that the Claimant had no difficulty participating because of her hearing loss. She argues that, by making this statement, the General Division failed to allow the Claimant to participate and fully present her case without fear that her conduct would be "used" to undermine her case.

[28] I listened carefully to the recording of the General Division hearing. The Claimant testified that she has hearing loss.[23] The General Division member asked for confirmation that the Claimant could hear and participate in the hearing. She replied that she could and that she can hear men but has trouble hearing women and children. She has hearing aids, but they cause ear infections, so she does not wear them all the time. The General Division member did not interfere with the Claimant's presentation of her evidence on this issue. He asked appropriate questions to clarify the evidence.

[29] The Claimant also testified that she must stay close to a wall and run her fingers along a wall when walking. The General Division member interrupted this testimony, stating that there was "no evidence that corroborates that."[24] The Claimant was not able to further explain why she walks with her fingers on the wall, how this helps her, or what impact this has on her capacity to work.

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[23] General Division hearing recording at approximately 1:28:10
[24] The Claimant testified that she has hearing loss and that she has difficulty dealing with doctors.

[30] In addition, the Claimant testified that she relies on her teenage daughter to complete household chores. When asked how that makes her feel, the General Division member interrupted, saying that that does not have anything to do with the Claimant's ability to work.[25] The Claimant's representative argued that this evidence was relevant to the Claimant's depression. The General Division member responded that there was very little evidence that this was a disabling condition. No further evidence was presented on this topic.

[31] The General Division member is entitled to control the process at the hearing. They must ensure that parties act appropriately and that testimony is relevant to the issues to be decided. To that end, the General Division member is not to be faulted for interrupting a witness during testimony to refocus them if they stray from relevant issues. This must be balanced with the General Division member's obligation to ensure that each party has the opportunity to present their entire case through testimony. When the Claimant's testimony is considered as a whole, I am persuaded that the General Division unduly interfered and prevented the Claimant from presenting her entire case to the Tribunal. The fact that the Claimant has to walk next to walls could impact her capacity to regularly pursue work, depending on all of the circumstances. It is not necessary to have written evidence on a subject before it is relevant. Also, how the Claimant feels about having to rely on her daughter to complete household chores could impact her depression. The General Division failed to observe a principle of natural justice when it prevented the Claimant from presenting evidence on these matters.

[32] The Claimant also argues that the General Division failed to allow her to present her entire case because it prevented her from presenting evidence related to medical reports that treating medical professionals wrote. However, the hearing recording reveals that the General Division member referred to assessments from neurologists and asked the Claimant whether she had received treatment from a neurologist. She replied that she had not.[26] The General Division member then stated that there are a number of assessments and that the majority say that the Claimant has some capacity to do some type of work. The Claimant's representative responded by referring to reports by treating physicians that state that she is disabled or cannot work.[27] I am

[25] General Division hearing recording at 01:19:35.
[26] General Division hearing recording at 00:01:35.
[27] General Division hearing recording at 00:01:37.

not satisfied that the General Division prevented the Claimant's representative from presenting evidence at that time. This was a discussion about what different reports said.

CONCLUSION

[33] The appeal is allowed because the General Division made errors in law and fact under the DESD Act and failed to observe a principle of natural justice.

[34] The DESD Act sets out the remedies that the Appeal Division can give on an appeal. The Claimant's representative asks that I make the decision that the General Division should have given. However, the Claimant was not able to present her entire case. Hence, the record before me is incomplete. Therefore, the appeal is referred back to the General Division for reconsideration.

[35] To avoid any possible apprehension of bias, a different General Division member should reconsider this appeal.

[36] The parties may make submissions to the General Division about whether the recording of the first General Division hearing and the General Division decision should remain part of the record.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	January 29, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. S. and G. H., Representatives for the Appellant Stéphanie Pilon, Representative for the Respondent