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

Citation: *G. C. v Minister of Employment and Social Development*, 2019 SST 388

Tribunal File Number: AD-18-629

BETWEEN:

G. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: April 30, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] G. C. (Claimant) was injured in a car accident in 2010. She had increasing pain in her shoulder and underwent an arthroscopy in 2014 that did not improve her symptoms. She has pain in her right shoulder, back, right knee, and right leg. She also has depression. She returned to work after the car accident but later stopped working due to a layoff and because she was not performing her job as quickly as she could before the accident.

[3] The Claimant applied for a disability pension under the *Canada Pension Plan* (CPP) and the Minister denied her application initially and on reconsideration. The Claimant appealed to this Tribunal. On July 3, 2018, the General Division decided that the Claimant was not eligible for a disability pension under the CPP. The Claimant appealed to the Appeal Division.

[4] The Appeal Division granted leave to appeal. The Appeal Division must decide whether it is more likely than not that the General Division made an error under the *Department of Employment and Social Development Act* (DESDA) that would justify allowing the appeal.

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

PRELIMINARY MATTER

[6] The Claimant filed a series of medical documents after the Appeal Division issued the decision to grant leave to appeal.[1]

[7] With several exceptions, the Appeal Division does not hear new evidence.[2]

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[1] The parties agreed that AD2-1 to 5, AD3-1 to 5, AD5-1 to 15, AD4-7 starting April 15, 2016 to 65, AD4-68 to 69, AD4-71-73, and AD4-85, AD6-2 to 10, and AD11-4 to 20 were not before the General Division but were filed with the Appeal Division.
[2] *Parchment v Canada (Attorney General)*, 2017 FC 354.

[8] At the Appeal Division hearing, the Claimant's counsel agreed that the new documents were not relevant to the question as to whether the General Division made an error under the DESDA. None of the exceptions to the "no new evidence" rule applies here, and the new evidence will not be considered by the Appeal Division.

ISSUES

[9] The issues are:

1. Did the General Division make an error of law by failing to assess the Claimant's impairments in their totality in order to determine their cumulative impact?
2. Did the General Division make an error of fact by ignoring Dr. West's opinion that the Claimant was unable to engage in any other occupation for which she may reasonably be suited by way of education, training, skill, or experience?
3. Did the General Division make an error of law or an error of fact in its analysis of the Claimant's personal characteristics?
4. Did the General Division make an error of fact by ignoring Dr. Farooqi's evidence?
5. Did the General Division make an error of law by focussing on the severity of the Claimant's impairments, instead of whether her disability prevented her from earning a living?

ANALYSIS

Issue 1: Did the General Division make an error of law by failing to assess the Claimant's impairments in their totality in order to determine their cumulative impact?

[10] The General Division did not make an error of law by failing to assess the Claimant's impairments in their totality.

[11] The law requires the General Division to consider all the possible impairments, not just the biggest or the main impairment. Impairments must be assessed in their totality to determine their cumulative impact.[3]

[3] *Bungay v Canada (Attorney General)*, 2011 FCA 47.

[12] The Claimant argues that the General Division reviewed her conditions individually,but then failed to consider her physical and psychological conditions together.

[13] The Minister concedes that the General Division did not set out the requirement to assess impairments in their totality to determine their cumulative impact. The Minister takes the position that the General Division member did not make an error of law, however, because she discussed both the Claimant's physical limitations and her lack of cognitive deficits in determining that she had some capacity for work.[4]

[14] The General Division did consider the evidence about the impact of the Claimant's physical conditions on her capacity to work[5], and then considered the impact of her psychological conditions on her capacity to work separately after that.[6] There is also some overlap in the analysis – for example, the General Division considered the evidence from Dr. Khanna (the Claimant's family physician) about both the Claimant's physical pain and her depression.[7]

[15] After reviewing the medical evidence of the Claimant's functional limitations in some detail (including pain and restrictions in personal care and household tasks), the General Division concluded:

a) first, that the Claimant did not have a severe physical condition at the time of her MQP (noting that she had substantially gainful earnings after the accident in 2013 and more earnings after 2010 than in 2009); and

b) second, that the Claimant's psychological conditions of depression and anxiety were controlled for many years, although her mood fluctuated over the years.[8]

[4] General Division decision, para 49.
[5] *Ibid* at paras 12-38.
[6] *Ibid* at paras 39-45.
[7] *Ibid* at paras 24-25.
[8] *Ibid* at para 44.

[16] At the end of the decision, the General Division stated again that it considered "all of the written and oral evidence" and was not satisfied that the Claimant met her burden to show a severe disability within the meaning of the CPP.[9]

[17] The General Division member did consider the conditions cumulatively as is required. Although the General Division member discussed the physical and psychological conditions separately at first, it is clear from the rest of the decision that the General Division member considered all of the conditions in deciding that the Claimant had residual capacity to work in or to be retrained for a sedentary position.[10]

Issue 2: Did the General Division make an error of fact by ignoring Dr. West's opinion that the Claimant was unable to engage in any other occupation for which she may reasonably be suited by way of education, training, skill, or experience?

[18] The General Division did not make an error of fact by ignoring Dr. West's opinion.

[19] The General Division is presumed to have considered all the evidence before it, and does not have to refer to all of the evidence in its decision.[11] However, that presumption does not apply when the evidence is important enough that it should have been discussed.[12]

[20] The Claimant argues that the General Division made an error of fact by ignoring Dr. West's opinion from January 9, 2016, that the Claimant was unable to engage in any other occupation for which she may reasonably be suited by way of education, training, skill, or experience. This opinion was provided almost a full year before the end of the MQP (on December 31, 2019), and it characterizes the Claimant's prognosis as guarded.[13]

[21] The Minister points out that Dr. West's report actually states:

> In my medical opinion, as a result of the injuries sustained directly from the accident of February 2, 2010, [the Claimant] is **currently** not able to resume the essential tasks involved in her pre-accident employment. In addition, in my opinion, [the Claimant] is **currently** not able to resume

[9] *Ibid* at para 56.
[10] General Division decision, para 49.
[11] *Simpson v. Canada (Attorney General)*, 2012 FCA 82
[12] *Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498; *Kellar v Canada (Minister of Human Resources Development)*, 2002 FCA 204; *Litke v Canada (Human Resources and Social Development)*,2008 FCA 366.
[13] GD1-10 to 27.

> any other type of employment for which she is reasonably suited by way of education, training, skill, or experience. [**emphasis added**]

[22] The Minister argues that by leaving out the word "currently," the Claimant changed the meaning of Dr. West's statement about the Claimant's capacity for work. The Minister notes that the General Division decided that the Claimant was unable to return to her previous physical work, but that she had a residual capacity for some work. The Minister argues that the General Division's conclusions are consistent with Dr. West's opinion that the Claimant was **currently** not able to resume any other type of employment and recommended that she participate in vocational assessment and employment counselling, to assist her in resuming gainful employment in the future.[14]

[23] At the Appeal Division hearing, the Claimant's counsel argued that Dr. West's report stated that the prognosis was guarded,[15] and that in fact her condition later worsened as evidence by Dr. Khanna's testimony. The Claimant argued that the error of fact is actually more about the General Division ignoring Dr. Khanna's evidence, rather than ignoring the conclusions of Dr. West. The Minister argued that the General Division did not ignore Dr. Khanna's evidence either, and noted specifically that Dr. Khanna believed that, "some of [the Claimant's] symptoms have worsened."[16]

[24] The General Division did not make an error of fact in relation to Dr. West's evidence. The General Division analyzed Dr. West's evidence like this:

> Dr. West recommended treatments in 2016, which included a psychological assessment, physiotherapy, membership to a local gym, analgesic and anti-inflammatory medication, a chronic pain management program and a vocational assessment to assist her to be able to resume gainful employment. He reported that she would be unable to complete the essential tasks involved in her pre-accident employment. This does not preclude all employment. His recommendation about a vocational assessment is significant to me. I find it illogical that he would determine she should have a vocational assessment when he stated that she suffers

[14] AD10-14 and 15.
[15] GD1-10.
[16] General Division decision, para 24.

> from an impairment that resulted in a significant overall diminution of her quality of life.[17]

[25] I find that the General Division member did not ignore Dr. West's conclusion that the Claimant was unable to complete the essential tasks of her pre-accident employment. In fact, the General Division expressly acknowledged that part of Dr. West's evidence. The General Division did not describe Dr. West's note that the Claimant was not currently able to resume any other type of employment. However, that opinion was not important enough to discuss in light of Dr. West's other recommendation that the Claimant complete a vocational assessment. The General Division found that the recommendation for a vocational assessment was consistent with the conclusion that the Claimant had some capacity for more sedentary work before the end of the MQP. The Claimant may not share the General Division's view of her residual capacity to work, but the General Division did not ignore Dr. West's evidence, it simply interpreted it in a manner that the Claimant disagrees with.

Issue 3: Did the General Division make an error of law or an error of fact in its analysis of the Claimant's personal characteristics?

[26] The General Division did not make any error under the DESDA in relation to its analysis of the Claimant's personal characteristics.

[27] The General Division must take a real-world approach to the question of whether the Claimant's disability is severe under the CPP. A person with a severe disability under the CPP is incapable regularly of pursuing any substantially gainful occupation.[18] A real-world approach requires the General Division to consider both the Claimant's medical conditions and her personal circumstances, including: age, education level, language proficiency, and past work and life experience.[19]

[28] The Claimant argues that the General Division failed to acknowledge that her education is from an institution that is outside of Canada, not recognized within Canada, and was not in

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[17] *Ibid* at para 55.
[18] *Canada Pension Plan*, s 42(2)(a).
[19] *Villani v Canada (Attorney General)*, 2001 FCA 248.

English. The Claimant takes the position that she cannot function in any kind of environment that is dependent on the ability to speak English and that she is not capable of retraining.

[29] When she applied for the disability pension, the Claimant explained that she has a Bachelor of Arts from the University of Punjab. There is no information on the record about whether that degree is "recognized" in Canada or for what purpose the degree might not be recognized. In closing submissions, the Claimant's counsel argued that the Claimant's degree is not recognized in Canada.

[30] In its decision, the General Division correctly set out the test for considering the severity of the Claimant's disability in the real-world context.[20] The General Division considered the Claimant's personal circumstances as follows:

> The Claimant was only 42 years old on the MQP. She completed university, albeit in India. She is not fluent in English, which she submits is a significant limitation. I do not agree. Although this is possibly a handicap, I do not find it is not a total barrier to employment. I am not persuaded that someone of her obvious intelligence could not undertake efforts to improve those skills, with a view to improving her prospects in the labour market. I have seen nothing that demonstrates to me that she is unable to upgrade her language skills and to retrain for a different role. I find that this is not unreasonable as Dr. West found in 2016 that she spoke English without any difficulty and there was no need for an interpreter.
>
> Her work in Canada has been exclusively in physical labour and she argues that she can no longer do this type of work. I agree and am satisfied that she isn't able to return to her previous physical demanding work. I am not aware of any objective evidence of cognitive deficits that would lead me to believe retraining couldn't succeed. I find there is no evidence to support that she regularly lacks the capacity to pursue alternative suitable sedentary employment within her limitations or to retrain for such a job. She has lived and worked in a Punjabi community and obtained several other jobs through friends.

[20] General Division decision, para 46.

[31] The General Division member concluded that the Claimant's personal characteristics do not mean that on the balance of probabilities she lacked the capacity regularly to pursue any substantially gainful occupation.

[32] The Minister argues that the General Division was alive to the fact that the Claimant was educated in India, and that English is not her first language. The Minister noted that the General Division decision states in particular that the Claimant was 42 years old when the MQP ended, that she completed university in India and, while she is not fluent in English, she was able to converse in English with the orthopaedic surgeon (Dr. West), without an interpreter. The Minister also notes that there was no evidence before the General Division about what language her education was in or whether her diploma is recognized in Canada.

[33] I find that the Claimant has not proven that the General Division made an error of law or of fact in the way it considered the Claimant's personal circumstances. The General Division set out the correct test, described the available evidence of the Claimant's age, education level, language proficiency, and past work and life experience. The General Division concluded that the Claimant could upgrade her language skills, and that she could retrain.

[34] The General Division did not ignore any specific piece of evidence before it that was relevant to the Claimant's personal circumstances, nor did it come to a perverse or capricious conclusion about the Claimant's capacity to retrain.

[35] The Claimant wishes to re-argue how the real-world test ought to have been applied in this case (namely, what conclusions should be drawn from the evidence about the Claimant's ability to retrain given her depression and her language skills), but that is not the role of the Appeal Division here. The General Division concluded that her education outside Canada showed an ability to upgrade English skills and to retrain. This is not a perverse or capricious finding, which is a high threshold to meet to demonstrate an error of fact.

Issue 4: Did the General Division make an error of fact by ignoring Dr. Farooqi's evidence?

[36] The General Division did not make an error of fact by ignoring Dr. Farooqi's evidence.

[37] The Claimant argues that the General Division did not acknowledge Dr. Faooqi's opinion. In particular, that it ignored the fact that Dr. Farooqi diagnosed the Claimant with major depression, and that his notes explicitly state that the Claimant was unable to work and not able to function in any capacity. The Claimant argues that this note from Dr. Farooqi was ignored, especially in relation to the General Division's finding that there was a lack of evidence about any cognitive impairment.

[38] The Minister argues that the Claimant's characterization of Dr. Farooqi's notes is inaccurate. The Minister argues that Dr. Farooqi's notes do not express an opinion that the Claimant cannot work, but are actually his notes summarizing what she told him. The Minister argues that Dr. Farooqi never stated that the Claimant was not able to function in any capacity.

[39] In a note dated September 22, 2016, Dr. Farooqi states, "She was always an avid worker. Now due to physical disability she can not (*sic*) work. The life (*sic*) is meaningless for her."[21] Dr. Farooqi also noted, "We discussed the ongoing issues of not being able to function in any capacity, home or work. All that is causing her to have a very low self-esteem. We discussed various coping strategies specificall (*sic*) with respect to role (*sic*) in her life."[22]

[40] The General Division is presumed to have considered Dr. Farooqi's notes, even if he did not refer to them specifically. The General Division noted that the Claimant was referred to Dr. Farooqi.[23] The General Division also referred to the diagnosis and recommendations Dr. Farooqi made.[24] Dr. Farooqi's notes were not so important that the General Division needed to refer to them. As the Minister argued, the notes seem to be notations about what the Claimant was saying during her treatment sessions (i.e. that she could not function in any capacity at home or at work, or that due to physical disability she could not work). These statements do not appear to be Dr. Farooqi's opinion about whether the Claimant could work. The General Division did not need to quote from Dr. Farooqi's notes in order to reach a decision about whether she had a residual capacity to work on or before the end of her MQP.

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[21] GD11-134.
[22] GD11-137.
[23] General Division decision, para 40.
[24] *Ibid* at para 42.

Issue 5: Did the General Division make an error of law by focussing on the severity of the Claimant's impairments, instead of whether her disability prevented her from earning a living?

[41] The General Division did not make an error of law by focussing on the severity of the impairments instead of whether the Claimant's disability prevented her from earning a living. In fact, the General Division properly focussed on the Claimant's capacity for work.

[42] The Claimant notes that the General Division stated that there "is no evidence to support that [the Claimant] regularly lacks the capacity to pursue alternative suitable sedentary employment within her limitations or to retrain for such a job."[25] The Claimant argues that this statement constitutes an error of law because it shows that the General Division was improperly focussing on the severity of the impairments, instead of whether the Claimant's disability prevented her from earning a living.

[43] The Minister argues,[26] and I accept, that the General Division's statement here was in fact a proper focus on whether the Claimant had a capacity to work, even if that was a "residual" capacity.

CONCLUSION

[44] The appeal is dismissed.

Kate Sellar
Member, Appeal Division

HEARD ON:	January 22, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Stuart M. Ghan, Representative for the Appellant Lora Hamilton, Representative for the Respondent

[25] *Ibid* at para 40.
[26] AD1-12 to 13.
