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

Citation: *S. H. v Minister of Employment and Social Development*, 2019 SST 485

Tribunal File Number: AD-19-172

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: May 17, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] S. H. (Claimant) completed Grade 12 and a secretarial program in the 1980s. She has worked in retail stores, her spouse's business, and secretarial positions. She last worked part-time in a jewellery store. She fell in a grocery store in 2013, suffered injuries to her left leg and lower back, which resulted in chronic pain and other conditions, and has not returned to work since then. She applied for a Canada Pension Plan disability pension and claimed that she was disabled by these conditions and mental illness.

[3] 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, concluding that the Claimant did not have a severe disability on or before her minimum qualifying period. The Claimant's appeal from this decision to the Tribunal's Appeal Division was also dismissed. The Claimant applied for judicial review of the Appeal Division decision. The Federal Court granted the application and referred the matter back to the Tribunal's Appeal Division.

ISSUES

[4] 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 when

a) It stated that the Claimant received Ontario Disability Support Program benefits for six years;

b) It stated that the Claimant worked at a jewellery store in 2009;

c) It stated that the Claimant did not fulfill her responsibility to cooperate in her health care; or

d) It failed to give equal weight to the Claimant's testimony and the written evidence?

[5] Did the General Division make an error in law by failing to apply the legal principles from at least one of the following court decisions?

a) *Villani v. Canada*[1]

b) *Attorney General of Canada v. Dwight-St. Louis*[2]

c) *Bungay v. Canada*[3]; or

d) *Inclima v. Attorney General*[4]

ANALYSIS

[6] 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, 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.[5] The Claimant argues that the General Division based its decision on erroneous findings of fact and made errors in law. These grounds of appeal are examined below.

Issue 1: Erroneous findings of fact

[7] In order to succeed on appeal on the basis that the General Division based its decision on an erroneous finding of fact, the Claimant must establish three things: that a finding of fact was erroneous (in error); that the finding was made perversely, capriciously, or without regard for the material that was before the General Division; and that the decision was based on this finding of

[1] 2001 FCA 248
[2] 2011 FC 492
[3] 2011 FCA 47
[4] 2003 FCA 117
[5] DESD Act s. 58(1)

fact.[6] The DESD Act does not define the terms “perverse” or “capricious". However, guidance is given by court decisions that considered the *Federal Courts Act*, which has the same wording. In that context, perverse has been found to mean “willfully going contrary to the evidence”. Capricious has been defined as being “so irregular as to appear to be ungoverned by law”. Finally, a finding of fact for which there is no evidence before the Tribunal will be set aside because it is made without regard for the material before it. I accept that these definitions apply when considering the DESD Act.

ODSP benefits

[8] The first erroneous finding of fact that the Claimant argues that the General Division based its decision on is the statement that the Claimant “was on Ontario Disability benefits (ODSP) for about 6 years (medical reports indicate 16 years)”.[7] The Claimant testified that she received ODSP benefits for 16 years so the statement is erroneous. She argues that while this error is minor in nature, it demonstrates that the General Division was selective in its presentation of the evidence, and only considered evidence that supported the decision that the Claimant did not have a severe disability. She argues that this error is only one illustration of this.

[9] The finding of fact is erroneous. However, the decision was not based on whether the Claimant received ODSP or for how long. The decision was based on the Claimant’s medical conditions and their impact on her capacity regularly to pursue any substantially gainful occupation. Therefore, no error under the DESD Act was made.

[10] The Claimant’s argument that the General Division only considered evidence that supported its conclusion also fails. The General Division decision summarizes all of the evidence that was presented, including evidence that favoured the Claimant’s case and evidence that did not. For example, the decision refers to the following:

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[6] *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319
[7] General Division decision at para. 12

- The Claimant was accommodated by her employer in her last job so that she could catch a timely bus home after work.[8]

- The Claimant declined group counselling because it would be a negative experience for her.[9]

- The Claimant has tried unsuccessfully to quit smoking.[10]

- The Claimant testified that she was unable to carry out normal activities of daily living, and must take breaks when doing household chores.[11]

- The family doctor refused to provide a note for an extension of time off work in 2013.[12]

- The psychologist reported in May 2014, that the Claimant was struggling with chronic pain secondary to the fall, she participates in physiotherapy and chiropractic treatment, her anxiety and stress were heightened, she felt that she was coping "ok" and did not wish counselling.[13]

- The family doctor reported in December 2015 that the Claimant was not expected to return to work, and that the Claimant had no limitations with speaking, hearing, vision, or dexterity; slight limitation in cognition and sensation; and moderate limitation in psychological function.[14]

In addition, the General Division need not refer to every piece of evidence in a decision. The Federal Court of Appeal teaches that "[decision makers] are not trying to draft an encyclopedia memorializing every last morsel of factual minutiae, nor can they. They distill and synthesize masses of information, separating the wheat from the chaff and, in the end,

[8] General Division decision at para. 12
[9] *Ibid.* at para. 14
[10] *Ibid.* at para. 15
[11] *Ibid.* at para. 17
[12] *Ibid.* at para. 18
[13] *Ibid,* at para. 16
[14] *Ibid.* at para. 34

expressing only the most important factual findings and justifications for them."[15] Therefore this argument also fails.

Work in 2009

[11] The Claimant also argues that the General Division based its decision on an erroneous finding of fact under the DESD Act when it states "She re-entered the work force first in a secretarial position typing minutes and then in 2009 worked for a retail jewelry store".[16] The Claimant argues that she worked in one jewellery store for approximately six years, ending in 2009,[17] that this statement is incorrect, and put undue emphasis on her secretarial skills, which are out of date because she completed secretarial courses in the 1980s.[18]

[12] The statement that the Claimant worked at a jewellery store in 2009 was not accurate. However, the decision was not based on this finding of fact. In its analysis of the evidence, the General Division decision states that the Claimant "obtained significant work experience including some skills from self-employment. She has worked in a secretarial position, retail, self-employment selling water systems, and helping her husband's business, thus obtaining a variety of skills and experience. She does not suffer from any barriers with regards to language proficiency and obtained a high school education as well as some secretarial courses."[19] The decision was based on the marketable skills that the Claimant learned while working at various jobs, not how long she held each one. Therefore, this ground of appeal fails.

Cooperation with health care

[13] In addition, the Claimant argues that the General Division based its decision on the erroneous finding of fact that the Claimant failed to cooperate with her health care. She argues that she underwent numerous recommended treatments, and had a reasonable explanation for not pursuing those she did not. For example, she states that she saw the psychologist twice, but declined to participate in a group pain program because being in an environment when others were speaking about pain would not be helpful to her. She also received mental health treatment

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[15] *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 (CanLII) in this regard. Stratas J.A.
[16] General Division decision at para. 12
[17] General Division hearing recording at min. 19:12
[18] *Ibid*. at min. 16:35
[19] General Division decision at para. 46

on an ongoing basis from her family physician. Regarding having an active lifestyle, the Claimant testified that her family doctor told her not to overdo things,[20] The Claimant also testified stopped taking Lyrica because of her concern about weight gain,[21] and that she had tried to quit smoking two years prior to the hearing.

[14] Nevertheless, the General Division accurately refers to a number of recommended treatments that the Claimant did not undergo, including weight reduction, having an active lifestyle or exercising, counselling (individual and group sessions apart from the pain program), and taking medication for mental illness. There was an evidentiary basis for the General Division to find as fact that the Claimant had not cooperated completely in her health care. This finding of fact was therefore not erroneous. The appeal fails on this basis.

Weight given to testimony

[15] Also in this regard, the Claimant argues that the General Division based its decision on an erroneous finding of fact because it did not give adequate weight to the Claimant's testimony, and that equal weight must be given to oral testimony and written evidence. However, the General Division considered the Claimant's testimony. It is summarized in paragraphs 11 to 17 of the decision. The General Division also provides detailed reasons for finding that the Claimant's evidence was not reliable. For example, the decision states that the Claimant's statement that the medical records should be corrected to set out that she never abused drugs was not credible because the medical records clearly state that she disclosed this to her doctor.[22] Her testimony about not being able to live an active lifestyle was also at odds with the medical opinions that she could do so, and her statement to the doctor in December 2015 that she could walk for an hour.[23]

[16] Again, it is not necessary for the General Division to refer to each and every piece of evidence that has been presented. It is presumed to have considered all of the evidence.[24] The

[20] General Division hearing recording at min. 34:55
[21] General Division decision hearing recording part 2
[22] General Division decision at para. 41
[23] *Ibid.*
[24] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

General Division decision summarizes the important oral and written evidence. It gives reasons for placing less weight on the Claimant's testimony. These reasons are logical and intelligible.

[17] The General Division's mandate is to receive the parties' evidence, weigh the evidence, and make a decision based on the evidence and the law. Mere reliance by the General Division on the evidence of some witnesses (the doctors) over the Claimant cannot on its own form the basis of a reasoned belief that the General Division must have forgotten, ignored or misconceived the evidence in a way that affected its conclusion.[25] There is no requirement in law to give equal weight to a claimant's testimony and the medical evidence.

[18] Therefore, the General Division made no error when it placed greater weight on the written evidence. The appeal also fails on this basis.

[19] The Claimant also contends that the General Division erred because it did not consider that the Claimant's doctors' opinions about her ability to return to work changed over time; while they supported a return to work immediately after the Claimant fell, when her condition failed to improve with treatment their opinions changed and by the end of the minimum qualifying period the doctors stated that the Claimant could not work. While this may be so, it is for the Tribunal and not the doctors to decide whether the Claimant is incapable regularly of pursuing any substantially gainful occupation. The General Division did so in this case. Therefore, the Appeal Division should not intervene on this basis.

Issue 2: Errors in law

[20] Another ground of appeal under the DESD Act is that the General Division made an error in law. The Claimant argues that the General Division made four such errors by failing to apply legal principles set out in court decisions. These arguments are considered below.

***Villani* decision and *Dwight-St. Louis* decision**

[21] In V*illani*, the Federal Court of Appeal teaches that when deciding whether a claimant is disabled, the General Division should conduct a real world analysis, considering their personal characteristics as well as their medical conditions to determine whether they are capable

[25] *Housen v Nikolaisen*, [2002] 2 SCR 235 at para 46)

regularly of pursuing any substantially gainful occupation. The Claimant argues that the General Division failed to do so.

[22] However, the General Division decision sets out the legal principle from *Villani*,[26] and considers her personal characteristics. It states that the Claimant was 50 years old at the relevant time, had significant work experience including skills from self-employment, secretarial and retail jobs. She had no language barriers, obtained a high school education and completed secretarial courses.[27] Although this paragraph of the decision does not specifically refer to the fact that the Claimant does not have a drivers' licence, the decision does refer to this evidence,[28] so the General Division was aware of it and is presumed to have considered it.

[23] In the *Dwight-St. Louis* decision, the Federal Court teaches that it is not sufficient for the decision maker to simply list a claimant's personal characteristics, it must explain how those characteristics impact the claimant's capacity regularly to pursue any substantially gainful occupation. The Claimant argues that the General Division failed to do this because it did not explain how the Claimant's lower back and leg pain, as well as her anxiety, affect her ability to engage in employment.

[24] However, the General Division summarized the evidence regarding all of the Claimant's medical conditions. It considered this evidence, and decided that the doctors' opinions that the Claimant could not work were not supported by the objective medical evidence about her injuries.[29] It then specifically considered the Claimant's evidence about her pain and provides reasons for concluding that the Claimant's evidence on this was not reliable.[30] The decision states that the Claimant's evidence that she could not exercise appeared to be exaggerated given that told her doctor that she could walk for one hour. In addition, the Claimant testified about her anxiety, but does not attend for counselling with a psychologist although that is available to her.[31]

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[26] General Division decision at para. 45
[27] *Ibid.* para. 46
[28] *Ibid*. at para. 12
[29] General Division decision at para. 38, 39
[30] *Ibid.* at para. 41
[31] *Ibid.* at para. 42

[25] I am therefore satisfied that the General Division considered the Claimant's personal characteristics and her medical conditions when it made the decision in this case. It made no error in law in this regard.

Bungay decision

[26] In *Bungay*, the Federal Court of Appeal instructs that to decide whether a claimant is disabled, the decision maker must consider all of their medical conditions, not just the most significant one(s). The Claimant argues that the General Division failed to do this because it failed to consider her chronic pain, mental illness and hand shaking.

[27] The General Division decision cites the legal principle from *Bungay*.[32] There was very little evidence in the record about the Claimant's hand shaking, and no medical report on this.[33] Regarding pain, for the reasons set out above, I am satisfied that the General Division considered this. Regarding the Claimant's mental illness, the decision summarized the evidence regarding this, including the reports by the psychologist, the fact that the Claimant continued to work for a number of years with this condition before she fell in 2013, the improvement in her condition with medication, and her failure to continue with medication or ongoing counselling with the psychologist. After considering all of the evidence, the General Division concluded that the Claimant had not established that all of her possible impairments in their totality constitute a severe disability.[34] It made no error of law in this regard.

Inclima decision

[28] In *Inclima*, the Federal Court of Appeal teaches that where there is evidence of capacity to work, a claimant must demonstrate that they could not obtain or maintain employment because of their health conditions. The Claimant argues that the General Division made a legal error in this regard. She contends that she did not have any capacity to work, so the General Division should not have considered whether she had made any efforts to obtain or maintain work.

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[32] *Ibid.* at para. 44
[33] General Division hearing recording part 2 at min. 20:50
[34] General Division decision at para. 44

[29] However, the General Division, after considering all of the evidence, concluded that there was insufficient evidence to conclude that the Claimant was incapable regularly of pursuing any substantially gainful occupation.[35] Thus, the Claimant had some capacity to work. The General Division was therefore obliged to consider evidence regarding whether she could not obtain or maintain employment because of her disability. The General Division sets out this principle,[36]and based on the evidence concluded that the Claimant's lack of effort in obtaining or maintaining employment was not due to her health conditions.[37] No error in law was made.

CONCLUSION

[30] The General Division did not base its decision on any erroneous findings of fact under the DESD Act and made no errors in law.

[31] The appeal is therefore dismissed.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	May 14, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Bozena Korkasiewicz, Counsel for the Appellant Nathalie Pruneau, Representative for the Respondent

[35] *Ibid.* at par. 41
[36] *Ibid.* at para. 42
[37] *Ibid.*