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

Citation: *D. O. v Minister of Employment and Social Development*, 2019 SST 587

Tribunal File Number: AD-18-715

BETWEEN:

D. O.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: June 14, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The General Division made an error. The Appeal Division will give the decision that the General Division should have given: the Claimant is entitled to a disability pension under the *Canada Pension Plan* (CPP).

OVERVIEW

[2] D. O. (Claimant) was born in 1965. He has a Grade 11 education. He worked at a major airline from May 1989 to April 2015. The Claimant argues that he cannot work because of chronic back pain, anxiety, and depression. He applied for a disability pension under the CPP on June 17, 2016.

[3] The Minister denied the Claimant's application initially and on reconsideration. The Claimant appealed to this Tribunal. The General Division dismissed his appeal on June 19, 2018, finding that he had some capacity to work. The Claimant filed an application for leave to appeal to the Appeal Division.

[4] The Appeal Division must decide whether the General Division made an error under the *Department of Employment and Social Development Act* (DESDA), and if so, what will be done to address it.

[5] The General Division made an error of law. I will give the decision that the General Division should have given: the Claimant is entitled to a disability pension under the CPP.

ISSUE

[6] Did the General Division make an error of law by making a finding of fact that Global Assessment of Functioning (GAF) scores "can be subjective" without evidence to support that finding?

ANALYSIS

Appeal Division's Review of the General Division's Decision

[7] The Appeal Division does not provide an opportunity for the parties to re-argue their case in full at a new hearing. Instead, the Appeal Division reviews the General Division's decision to decide whether it contains errors. That review is based on the wording of the DESDA, which sets out the grounds of appeal for cases at the Appeal Division.[1]

[8] One of the grounds of appeal occurs when the General Division makes an error of law, regardless of whether that error appears on the face of the record.[2]

Did the General Division make an error of law by making a finding of fact that Global Assessment of Functioning (GAF) scores "can be subjective" without evidence to support that finding?

[9] The General Division made an error of law by making a finding of fact that GAF scores "can be subjective" without evidence to support that finding.

[10] Claimants must provide some objective medical evidence in support of their disability.[3] The Appeal Division has found in at least one case that "objective medical evidence" is not limited to diagnostic images, laboratory tests or specialist opinions. Objective medical evidence can include physical observations, clinical symptoms and established functional limitations and diagnoses made by a health professional. [4]

[11] It can be an error of law to make a finding of fact without evidence.[5] A decision maker can take judicial notice of facts that are notorious or capable of immediate demonstration.[6]

[12] The Claimant had to show that he had a severe and prolonged disability by the hearing date, which was June 19, 2018. Although the General Division acknowledged that the Claimant's

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[1] DESDA, s 58(1).
[2] DESDA, s 58(1)(b).
[3] *Warren v Canada (Attorney General)*, 2008 FCA 377.
[4] *Minister of Employment and Social Development Canada v L.F.*, 2018 SST 164.
[5] *R. v J.M.H.*, 2011 SCC 45, at para 25; *Murphy v Canada (Attorney General)*, 2016 FC 1208, at para 36.
[6] *R v Spence*, 2005 SCC 71.

physical disabilities resulted in restrictions in terms of prolonged sitting, standing, walking, and lifting, the General Division decided that the Claimant had the capacity for sedentary work.

[13] In addition to his back pain, the Claimant had medical conditions relating to his mental health. Dr. Kelly, a psychotherapist, treated the Claimant. The General Division summarized Dr. Kelly's evidence like this:

> Dr. Kelly completed a form for Great West Life on May 17, 2016. Dr. Kelly stated that the Claimant suffered from anxiety, dysthymia, anxiety – cluster C, and chronic back pain.[13] He provided the Claimant with a Global Assessment of Functioning (GAF) score of 50. Dr. Kelly in a letter to the Minister dated November 22, 2016, stated that the Claimant was very anxious and severely depressed. He described the Claimant as a cooperative patient. The claimant was in financial distress. The Claimant was under stress because of his workplace dispute and he was not fit for work at that time.[7]

[14] The General Division acknowledged that a GAF score of 50 "indicates that the Claimant has a severe impairment in social functioning and cannot keep a job."[8] The General Division decision states:

> The Claimant at his hearing was clearly upset about his medical condition. He had been working in a toxic environment for many years and this has had an impact on his psychological state. However, I did not see such a severe impairment in the Claimant's social functioning at his hearing. He was able to answer questions from his counsel and myself. He appeared to understand the proceedings. GAF scores can be subjective. I do not believe that the Claimant's combined physical and psychological impairments preclude a return to work in a sedentary occupation. He also did not report any memory and concentration difficulties in his Questionnaire for Disability Benefits that was completed around the same time as Dr. Kelly providing the GAF score.[9]

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[7] General Division decision, para 21. Dr. Kelly's report is at GD2-586.
[8] *Ibid*, at para 29. During the hearing at the General Division, timestamp approximately 1hr and 16 minutes, counsel to the Claimant read out the definition of a score of 50 from the DSM-IV in his closing submission as follows: "Serious symptoms. (e.g. suicidal ideation, severe obsessional rituals, frequent shoplifting, OR any serious impairment in social, occupational or school functioning (e.g., no friends, unable to keep a job." The General Division did not request a copy of the definition as it was read, however, the same definition is reflected in *Plaquet v Canada (Attorney General)* 2016 FC at para 58.
[9] *Ibid*, at para 30.

[15] The Claimant argues that the General Division member made an error of law because he dismissed the GAF score as being subjective without any evidence before him about GAF scores as being unreliable or subjective. The Claimant argues that dismissing the GAF score created the basis on which the General Division found that the Claimant had a residual capacity to work. Once the General Division member found a residual capacity to work, he found that the Claimant did not meet the corresponding obligation to show that his efforts to obtain and maintain were unsuccessful by reason of his health condition.

[16] The Minister argues that there is no error of law because the General Division did not make a factual finding without evidence – the evidence was the GAF score itself and the General Division weighed that evidence.

[17] The Minister provided new evidence about the GAF scores at the Appeal Division level. The evidence stated that the GAF has been replaced by a newer diagnostic tool known as the World Health Organization Disability Assessment Schedule 2, and that the American Psychiatric Association has found that the use of the GAF diagnostic tool[10] is outdated and not an adequate instrument of the assessment of psychiatric functional impairment.[11]

[18] This evidence was not before the General Division. It seems that the Minister argues that this is the kind of background information that the General Division member took judicial notice of when it stated that GAF scores can be subjective. The Minister argued that there is no reason for me not to take that information into account on appeal, and legal writers often cite texts and documents in their submissions for decision makers to consider.

[19] Further, the Minister argues that it is not an error to characterize the GAF score as subjective in the sense that the score is generated by the opinions of a psychologist so in that regard it actually is subjective. The Minister pointed to the evidence in the record from a clinical psychologist from 2003[12] who described how the diagnoses in the Diagnostic and Statistical Manual of Mental Health Disorders (DSM) work.

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[10] Axis V in the Diagnostic and Statistical of Mental Health Disorders (DSM).
[11] AD2-97 to 117.
[12] GD2-552 to 557.

[20] The Minister argued at the Appeal Division that regardless, the General Division can take judicial notice of medical-legal issues in general because that is the bread and butter of the Tribunal's work. The Minister noted that the definition of a GAF score of 50 was described in case law from the Federal Court of Appeal in *Plaquet*.[13]

[21] I find that the General Division made an error of law by making a finding of fact without evidence. The General Division did not just decide that the evidence from Dr. Kelly did not warrant weight. The issue is that the General Division's statement that GAF scores can be subjective is a finding of fact made without evidence. The implication in light of the rest of the General Division's reasons is that the GAF score (and its conclusion that the Claimant has serious impairment and gives examples of areas in which that impairment can have an impact, like social functioning and keeping a job) was not worthy of weight.

[22] The Claimant's record at the General Division contained one assessment from 2003 that described how the DSM is a multi-axis system. It described several psychological tests that the Claimant took at that time, but it did not contain any information about how the GAF specifically was calculated.

[23] The Minister is correct to note that the Federal Court described (in *Plaquet*) what it means to have a score of 50 on the GAF. However, again, *Plaquet* does not call into question the weight that GAF scores should be given, and it does not characterize these scores as subjective or objective. The decision in *Plaquet* was largely about taking evidence of deteriorating prognosis for a psychological condition seriously.

[24] The record did not contain any document that described the process by which GAF scores are assigned by treating professionals. The record did not contain any document that explained the history of the use of GAF scores, or anything about those scores having fallen out of favour for any reason. There was no evidence about what situations GAF scores are objective, and in what situations they "can be" subjective. There was no evidence before the General Division member that called into question the objectivity or reliability of GAF scores generally, and so the finding that it "can be" subjective is a finding of fact made without evidence.

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[13] *Plaquet v Canada (Attorney General)*, 2016 FC 1209, para 58.

[25] I reject the argument that the General Division member was merely taking judicial notice of a well-known limitation or concern about GAF scores. To take judicial notice, the facts must be notorious or capable of immediate demonstration. The "fact" that GAF scores "can be subjective" is not even clear enough in its meaning to be notorious or capable of immediate demonstration.

[26] The members of this Tribunal who decide cases about eligibility for disability pensions do have experience in weighing medical reports for a legal purpose. This experience does not entitle them to make findings of fact about the reliability of entire diagnostic or assessment tools like the GAF without referencing basis for that kind of conclusion in the evidence.

[27] It appears that the General Division member made his own medical assessment of the Claimant during the hearing and may have relied partly on his own observations to discount the Claimant's GAF score. It also seems that there is almost no analysis of the Claimant's psychological impairments in relation to his ability to work. The General Division referred to the oral testimony and the medical evidence relating to the Claimant's stress, anxiety and depression. However, it seems that the decision lacks a meaningful analysis of that evidence in the section where the member found that the Claimant had residual work capacity. The General Division member appears to have placed more weight on his observations at the hearing, without explaining why the Claimant's GAF score was not afforded weight, other than to note that those scores "can be" subjective.

[28] The General Division member made an error of law by finding that GAF scores "can be subjective" without a factual basis to support that finding.

REMEDY

[29] The Appeal Division has several options to remedy errors in General Division decisions. Among those options, the Appeal Division can give the decision that the General Division

should have given, or refer the case back to the General Division for reconsideration.[14] The Appeal Division has the ability to decide any question of fact or law before it.[15]

[30] The Claimant argued that he meets the test for a severe and prolonged disability. The Claimant argued that if the Appeal Division found that the General made an error and still had doubts about whether the Claimant met the test, the Appeal Division should send the matter back to the General Division for reconsideration.

[31] The Minister argued that the General Division did not make an error, but that if the Appeal Division did find an error, the record is complete and the Appeal Division should give the decision that the General Division should have given.

[32] Given that the existing record contains the report from Dr. Kelly that formed the basis for the legal error (as well as a recording of the oral hearing), and the Appeal Division has the ability to decide any question of fact or of law before it, the Appeal Division will give the decision that the General Division should have given. Since the record is complete, providing the decision that the General Division should have provided is consistent with the *Social Security Tribunal Regulations*,[16] which require conducting proceedings as informally and quickly as the circumstances and the considerations of fairness and justice permit.

[33] The General Division's conclusion that the Claimant was not able to work in a physical job because of his medical condition is not in error. The error relates to the consideration of Dr. Kelly's report and the Claimant's medical conditions relating to his mental health, so the Appeal Division will give the decision that the General Division should have given by reweighing Dr. Kelly's evidence to determine whether the Claimant had a residual capacity to work.

[34] I find that the Claimant did not have a residual capacity to work as of November 2016, when Dr. Kelly made clear that the Claimant was very anxious and severely depressed and not able to work.

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[14] DESDA, s 59.
[15] DESDA, s 63.
[16] *SST Regulations*, s 3(1).

Decision the General Division should have given

[35] Claimants have a "severe" disability within the meaning of the CPP when they are incapable regularly of pursuing any substantially gainful occupation.[17] The case law from the Federal Court of Appeal suggests that when deciding whether a claimant has a severe disability, the first relevant question is whether the claimant has a serious health condition that affected work capacity. The question is whether the claimant had residual work capacity. To answer that question, the relevant factors are: the nature of the health conditions and the corresponding functional limitations; the recommended treatments and any unreasonable refusal to pursue those treatments; and the claimant's personal circumstances.[18]

[36] The Claimant's MQP was in the future (December 31, 2018) at the time of the General Division hearing.[19] That means that the overarching question is whether the Claimant had a severe and prolonged disability until the time of his hearing at the General Division, which was on June 19, 2018.

[37] I find that the Claimant had serious health conditions that affected work capacity (chronic back pain, anxiety, dysthymia, and anxiety --cluster C). Considering the Claimant's functional limitations, treatment history and personal circumstances, I find that there is no evidence of a residual capacity to work. The Claimant proved that it was more likely than not that he had a disability that was severe and prolonged within the meaning of the CPP by November 2016.

[38] The Claimant was fired in April 2015 and he applied for the disability pension in June 2016. Dr. Kelly's evidence is important because it is dated in May 2016 and November 2016, after he stopped working, during the MQP, and near the time that he applied for the disability pension.

[39] Dr. Kelly diagnosed the Claimant with anxiety, dysthymia, anxiety (cluster C) and chronic back pain, and provided a global assessment of functioning score of 50. He certified that

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[17] *Canada Pension Plan*, s 42(2)(a).
[18] *S.G. v. Minister of Employment and Social Development*, 2017 CanLII 141823.
[19] GD2-44 to 49.

the Claimant was not fit for work as of November 2016. Dr. Kelly's evidence was relevant because he was treating the Claimant during the MQP for the psychological conditions (that, along with back pain) constituted the main conditions the Claimant relied on in his application for the disability pension. Dr. Kelly's report discussed the Claimant's capacity for work during the MQP based on his psychological conditions.

[40] Dr. Kelly stated that the Claimant was both highly anxious and severely depressed.[20] He identified functional limitations in terms of social withdrawal, irritability, chronic rumination and worry, poor sleep, fatigue, palpitations, and dyspnoea (difficult breathing).[21]

[41] At the hearing, the Claimant testified that his condition was worse since 2016. In April 2017 an MRI showed he had a right knee meniscal tear.[22] He stated that his knees and back are worse, and that psychologically he was ready to give up. The Claimant gave evidence not just that he was still seeing Dr. Kelly, but that Dr. Kelly wanted to see him more.

[42] Dr. Kelly's report did not state that the Claimant had memory or concentration issues, and nor did the Claimant state this in his Questionnaire for the CPP. The Claimant did give evidence about the functional limitations associated with his depression and anxiety. The Claimant testified that he could no longer handle the number of people he would need to interact with in his old accommodated position with the airline. He also testified that working on the phones would not be possible as he is afraid of giving the wrong information and causing chaos.

[43] The Claimant's demeanor at the time of the hearing was such that he was able to answer the questions asked of him. His demeanor at the hearing does not assist me to determine whether he has functional limitations that would preclude him from work. Dr. Kelly is a medical professional whose observations are built on a longer history with the Claimant than with the short time the Claimant interacted with the General Division in a hearing. In addition, the Claimant testified that he had taken Lorazapam (a short-acting benzodiazepine) in advance of the hearing in order to address anxiety.

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[20] GD2-586.
[21] GD2-599.
[22] GD5-19.

[44] The fact that the Claimant collected EI, alone, is not evidence of a residual capacity to work. I am not willing to infer that he did so because he was prepared to work throughout the time that he collected that form of income support.

[45] Any evidence about the Claimant's belief that he could return to work in 2016 must be taken in context of his experiences as an injured worker. The file documents his attempts over the years to gain access to (and then to maintain) accommodations in his workplace. He has filed grievances, he has been terminated and rehired, and he has relied on his provincial workplace safety and insurance system for financial support.

[46] The Claimant was terminated from his heavily accommodated employment and contacted the workplace insurance representative to ask for help. The notes from that call document the fact that the representative on the phone told him that no further benefits would be considered or allowed, and that he could not make any new claim based on mental stress.[23] The Claimant stated during that call that he wanted his job back. In the same call, the Claimant stated that he would be going to the media; that he would protest in front of the workplace safety and insurance office; and that he would go to Ottawa and attend inside the Prime Minister's office. I cannot take any of the Claimant's statements from the notes of that call at face value. He was an injured worker in need of financial support and he was receiving bad news.

[47] In support of his application for a disability pension, the Claimant also stated in writing that he planned to look for work after his appeal was over.[24] I find that this is not evidence of a capacity for work. The Claimant testified that he received advice to complete the form that way by someone involved in his workplace safety and insurance claim. If this was advice, it was poor advice. If this was truly the Claimant's plan, it does not appear to be a plan that he would be capable of following through on, given the evidence about his capacity for work. I prefer the Claimant's own evidence about his functional limitations, which preclude him from work.

[48] The Claimant has met his obligation to take steps to manage his medical conditions. The Claimant is not a candidate for surgery.[25] He is treated by his family doctor and by Dr. Kelly. He

[23] GD2-69.
[24] GD2-624.
[25] GD2-310 and 321.

participated in physiotherapy until he no longer had coverage for that treatment. He is hoping for another knee surgery, but it has not been scheduled. He takes medication to address his pain (Tramadol) and medications for his mental health conditions (Paxil, Amitriptyline, and Lorazepam). Dr. Kelly has treated the Claimant with cognitive behavioural therapy and described the Claimant as cooperative.[26]

[49] The Claimant would likely experience barriers in employability based on his personal circumstances. The Claimant is 53 years old and he has a grade 11 education. He was in a heavily accommodated position with a unionized employer after many years of service to that employer. He does not have an easily identifiable set of transferrable skills from his long history of work in baggage at the airport and later in the accommodated position he held handing out radios. In any event, the Claimant's medical evidence, including his physical restrictions (as outlined in the General Division decision) and his limitations in terms of his psychological impairments mean that he would experience real-world barriers to retraining.

[50] The Claimant has shown that he is incapable regularly of pursuing any substantially gainful occupation as of November 2016. His functional limitations in terms of both his chronic pain and his psychological conditions (especially his anxiety) mean that he is incapable regularly of any substantially gainful occupation. He has participated in his own treatment and has few if any transferrable skills. The Claimant did not have even a residual capacity to work in November 2016 when Dr. Kelly assessed his GAF at 50.

The Claimant's Disability is Prolonged

[51] The Claimant's disability is long-continued and of indefinite duration and is therefore prolonged within the meaning of the CPP.

[52] To qualify for a disability pension under the CPP, claimants must have a severe and prolonged disability. A disability is prolonged within the meaning of the CPP if it is likely to be long-continued and of indefinite duration or likely to result in death.[27]

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[26] GD2-586.
[27] *Canada Pension Plan*, s 42(2)(a).

[53] The Claimant has had persistent back pain since 2008.[28] His family doctor stated that his prognosis was likely to be chronic.[29] On May 20, 2015, Dr. Milner stated "unlikely to improve" in a form he completed about the Claimant under the heading "prognosis."[30] Dr. Kelly has treated the Claimant with cognitive behavioural therapy, but there has been no change.[31] Dr. Kelly noted that the prognosis was unknown.[32]

[54] I find that the Claimant's disability is prolonged within the meaning of the CPP. His conditions in terms of his back pain and psychological conditions long-continued and are not improving, despite his compliance with treatment.

CONCLUSION

[55] The appeal is allowed. The Claimant applied for the disability pension in June 2016. The Claimant has shown that he had a severe and prolonged disability by November 2016 when Dr. Kelly explained the impact that the Claimant's psychological conditions were having on his ability to work. Payment begins four months after the date the Claimant became disabled, which in this case means that payment begins effective March 2017.

Kate Sellar
Member, Appeal Division

HEARD ON:	April 2, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	John MacKinnon, Representative for the Appellant Sandra Doucette, Representative for the Respondent

[28] GD2-619.
[29] GD2-622.
[30] GD2-561.
[31] GD2-600.
[32] GD2-600.
