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

Citation: *S. D. v Minister of Employment and Social Development*, 2019 SST 594

Tribunal File Number: AD-18-854

BETWEEN:

**S. D.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

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DECISION BY: Kate Sellar

DATE OF DECISION: June 21, 2019

## DECISION AND REASONS

### DECISION

[1] The appeal is allowed. The Appeal Division will return the matter to the General Division for reconsideration.

### OVERVIEW

[2] S. D. (Claimant) was working as a general labourer in 2002 when he injured his knee. He stopped working. He applied for a disability pension under the *Canada Pension Plan* (CPP) in 2015, and the Minister denied his application initially and on reconsideration. He appealed to this Tribunal, and the General Division dismissed his appeal on October 31, 2018.

[3] The Appeal Division must decide whether the Claimant has shown that it is more likely than not that the General Division made an error under the *Department of Employment and Social Development Act* (DESDA).

[4] The Appeal Division finds that there is an error, so the appeal is allowed.

### PRELIMINARY MATTERS

[5] The Minister argued that the Claimant raised new evidence at the Appeal Division level about his level of literacy that was not before the General Division.

[6] Unless there is an exception that applies, the Appeal Division does not accept new evidence on appeal.[1] There is no exception to the rule that applies here. Therefore, I have not considered anything about the Claimant's retraining or his literacy that was not already in the record at the General Division.

### ISSUE

[7] Did the General Division make an error of fact by stating that the reports on file dated before the minimum qualifying period (MQP) do not mention the Claimant's depression?

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[1] *Parchment v Canada (Attorney General)*, 2017 FC 354.

## ANALYSIS

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

[8] The Appeal Division does not provide a chance 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 there are errors. That review is based on the wording of the DESDA, which sets out the grounds of appeal for cases at the Appeal Division.[2]

[9] The DESDA says that a factual error happens when the General Division bases its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.[3] For an appeal to succeed at the Appeal Division, the legislation requires that the finding of fact be material ("based its decision on"), incorrect ("erroneous"), and made in a perverse or capricious manner, or without regard for the evidence.

### Did the General Division make an error of fact by stating that the reports on file dated before the MQP do not mention the Claimant's depression?

[10] The General Division made an error of fact by stating that the reports on file dated before the MQP do not mention the Claimant's depression. This was erroneous as there were clinical notes that mention the Claimant's depression from that time, and the General Division based its decision on this error.

[11] To receive the disability pension, claimants must show they have a severe and prolonged disability during their MQP. The MQP is calculated based on a claimant's contributions to the Canada Pension Plan.

[12] When deciding whether a disability is severe, the General Division must consider claimants' conditions in their totality. That means that the General Division must consider all of the possible impairments, not just the biggest impairments or the main impairment.[4]

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[2] DESDA, s 58(1).
[3] DESDA, s 58(1)(c).
[4] *Bungay v Canada (Attorney General)*, 2011 FCA 47.

[13] The General Division decision stated that "[t]he reports on file dated prior to the MQP do not mention [the Claimant's] depression."[5] The General Division member found that the Claimant had knee pain, but that he had a residual capacity to work. Accordingly, the General Division considered whether the Claimant's efforts to obtain and maintain employment were unsuccessful by reason of his health condition. The General Division member acknowledged that she needed to and did consider the Claimant's conditions in their totality.[6]

[14] The Claimant's MQP ended on December 31, 2004.[7] There are handwritten notes made by the Claimant's family doctor that prescribe Paxil (an antidepressant) to the Claimant as early as May 2004and following.[8] There is a direct reference to depression in those same notes in an entry that looks like it is dated in December 2004.[9] In addition, a report from the Claimant's psychiatrist dated January 20, 2006, stated the Claimant had been feeling depressed for about two years.[10]

[15] The Claimant argues that the General Division found that, at the time of the MQP, the Claimant did not have a psychiatric condition. The Claimant argues that this was an erroneous finding of fact because the Claimant's family doctor treated the Claimant for depression after his injury and before the end of the MQP. The Claimant further points out that it was only the referral to a psychiatrist that happened after the end of the MQP.

[16] The Minister argues that the General Division did not make an error. The Minister argues that the General Division decision contains a poor choice of words by stating that the reports on file dated prior to the MQP do not mention the Claimant's depression. The Minister takes the position that these words are not fatal to the decision. The Minister notes that the General Division does not need to address every piece of evidence before it. The Minister notes that we can presume that the General Division considered all of the evidence, even if a particular piece

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[5] General Division decision, para 19.
[6] *Ibid*, at para 25.
[7] GD2-32 to 36.
[8] GD2-82 to 85.
[9] GD2-85.
[10] GD2-58.

of evidence is not mentioned in the decision.[11] The General Division specifically stated in its analysis that "there are numerous medical reports on file, all of which were considered."[12]

[17] I find that the General Division made an error of fact. The General Division found that the reports on file dated during the MQP did not mention the Claimant's depression. In my view, "reports" here includes clinical notes. The General Division's statement about the available evidence of the Claimant's depression at the time of the MQP is incorrect (erroneous). There actually were clinical notes on file to show that the Claimant was receiving treatment from his family doctor for depression before the end of the MQP. The notes were handwritten and somewhat difficult to read, but they were in the record.

[18] There is a presumption that the General Division has considered all of the evidence.[13] The exception to that rule applies when the evidence is important enough that it should have been discussed.[14]

[19] As the Claimant argued, this is not about the sufficiency of the reasons in the sense that the General Division failed to adequately address some medical documents in the decision. Rather, the error is that the General Division made a finding that no such documents even existed in the record. I do not accept the Minister's argument that this was merely a poor choice of words.

[20] The General Division member's erroneous finding was material: the erroneous finding had a direct impact on the outcome. The decision was essentially based on an assessment of only one of the Claimant's conditions at the time of the MQP, but the record shows there were two conditions. All conditions must be considered, not just the main condition. The General Division

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[11] The Minister relies on *Simpson v Canada (Attorney General)*, 2012 FCA 82; *Yantzi v Canada (Attorney General)*, 2014 FCA 193 to argue that the General Division's reasons were sufficient even if they did not contain a reference to the medical notes during the MQP about depression.
[12] General Division decision, para 12.
[13] *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[14] *Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498.

based its decision on its error: it made a fundamental error about which conditions the Claimant had before the end of the MQP.[15]

**REMEDY**

[21] The Appeal Division has several options to fix errors in General Division decisions: for example, 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.[16] The Appeal Division has the ability to decide any question or fact or law before it.[17]

[22] The *Social Security Tribunal Regulations* require the Appeal Division to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.[18] In many cases, it is more efficient for the Appeal Division to simply give the decision that the General Division should have given. However, sometimes, the Appeal Division may find it appropriate to refer a matter back to the General Division. For example, where the record is incomplete because there was a breach of natural justice the Appeal Division might send a case back to the General Division.

[23] The Claimant's counsel points out that the Claimant has been involved in multiple hearings relating to his conditions in different forums. He argued that it would be better for the Claimant to avoid another hearing, but he also stated that this was not a strong preference.

[24] The Minister argued that if the Appeal Division found an error, the matter might need to be returned to the General Division for reconsideration. The Minister noted that the record might not be complete in at least two ways. First, the Claimant was attempting to rely on new evidence at the Appeal Division about his level of literacy, and evidence about this was not in the record at the General Division. Second, the Minister noted that there is no recording available of the General Division hearing.

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[15] Since the General Division made an error of fact about what the record contained (and by extension whether the Claimant had a particular condition at the time of the MQP), a detailed assessment about the sufficiency of reasons (with reference to the cases the Minister cited) is not necessary.
[16] DESDA, s 59.
[17] DESDA, s 64.
[18] SST Regulations, s 3(1).

[25] While it would be more efficient for me simply to give the decision that the General Division should have given, in fairness I cannot do that. The record is not complete. Unfortunately, there is no recording available for the hearing at the General Division. I cannot fairly reach a decision about whether the Claimant is entitled to the disability pension in this particular case without reviewing the Claimant's testimony.

[26] I cannot know for certain whether the Claimant gave evidence about functional limitations resulting from his depression at the time of the MQP that would be relevant to my analysis. Also, it is not clear what evidence the Claimant gave about his personal circumstances, in particular his language proficiency, his education level, and his past work and life experience.

[27] At the next hearing, it would be especially helpful for the Claimant to give testimony about his level of literacy, his functional limitations in terms of both of his conditions before the end of the MQP, and his efforts to retrain through WSIB (whether those efforts were successful, what he was retraining for, how well he did in the program, whether he experienced any barriers to success in that program).

**CONCLUSION**

[28] The appeal is allowed. The matter is returned to the General Division for a new hearing.

Kate Sellar
Member, Appeal Division

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| HEARD ON: | June 7, 2019 |
| METHOD OF PROCEEDING: | Teleconference |
| APPEARANCES: | S. D., Appellant<br><br>Leo J. Dillon, Representative for the Appellant<br><br>Tiffany Glover, Representative for the Respondent |