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

Citation: *C. R. v Minister of Employment and Social Development*, 2019 SST 1285

Tribunal File Number: AD-19-298

BETWEEN:

C. R.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: October 25, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed. Although the General Division made errors, the Claimant is still not entitled to a disability pension under the *Canada Pension Plan* (CPP).

OVERVIEW

[2] C. R. (Claimant) worked full-time as a personal support worker at a long-term care facility, and she also worked part-time as a cashier. She had an accident that resulted in a ligament tear in her left ankle. The Claimant tried to return to work for a day in December 2016 but was unable to complete a four-hour shift. She did not return to work after that.

[3] The Claimant applied for a disability pension under the CPP. The Minister denied her application initially and on reconsideration. The Claimant appealed to this Tribunal. On April 5, 2019, the General Division dismissed her appeal. At that time, she was waiting for surgery on her ankle. At the Appeal Division level, I granted leave to appeal the General Division's decision.

[4] The Appeal Division must decide whether the General Division made an error under the *Department of Employment and Social Development Act* (DESDA).

[5] I find that the General Division did make errors in the decision. However, when I give the decision that the General Division should have given, the outcome is the same for the Claimant. She is not entitled to a disability pension under the CPP.

ISSUES

[6] The issues I need to decide are the following:

1. Did the General Division make an error of law by failing to consider the cumulative impact of the Claimant's conditions on her capacity to work?

2. Did the General Division make an error of fact by stating that the Claimant reported that she could sit for four to eight hours?

3. Did the General Division make an error of law in its analysis of the Claimant's treatment efforts for her depression?

ANALYSIS

Reviewing General Division Decisions

[7] The Appeal Division does not hear cases again from the beginning. At the Appeal Division, the focus is on deciding whether the General Division made an error. The only errors the Appeal Division can focus on are ones that are listed in the DESDA. One of those errors falls into a category called an "error of law."[1]

[8] Another type of error listed in the DESDA is called an error of fact. The DESDA says that it is an error 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."[2] Mistakes involving the facts have to be important enough that they could affect the outcome of the decision (that is what "material" means here). The error needs to result from ignoring evidence, willfully going against the evidence, or from reasoning that is not guided by steady judgement.[3]

Proving a Disability Is "Severe"

[9] To get a disability pension under the CPP, claimants must have a severe and prolonged disability at or before the end of the minimum qualifying period (MQP). The Minister calculates the MQP based on contributions to the Canada Pension Plan. If the Claimant's MQP is in the future, the General Division considers whether the disability is severe and prolonged at the time of the hearing. A person has a severe disability when they are incapable regularly of pursuing any substantially gainful occupation.[4]

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[1] DESDA, s 58(1)(b).
[2] DESDA, s 58(1)(c).
[3] The Federal Court has considered these ideas about perverse and capricious findings of fact in a case called *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319.
[4] *Canada Pension Plan*, s 42(2).

[10] Claimants have to show that it is more likely than not (also called proving on a "balance of probabilities") that they have a disability. Claimants must have some objective medical evidence to support their claim for the disability pension.[5] When deciding whether a disability is severe, the General Division must take into account all of the impairments, not just the biggest impairment or the main impairment. The Tribunal must consider the cumulative impact of the conditions on the claimant's capacity to work.[6]

[11] In assessing whether a disability is severe, the General Division must take a real-world approach, which means considering whether claimants are employable in light of their backgrounds and medical conditions. This includes considering aspects of claimants' personal circumstances like their age, education level, language proficiency, and past work and life experiences.[7]

Issue 1: Did the General Division make an error of law by failing to consider the cumulative impact of the Claimant's conditions on her capacity to work?

[12] The General Division did not make an error of law. The General Division member considered the cumulative impact of the Claimant's conditions on her capacity to work.

[13] In the decision, the General Division member set out the issue as being whether the Claimant's left ankle injury results in her having a severe disability.[8] The General Division member concluded that the medical evidence about the Claimant's ankle supported the idea that the Claimant had capacity for some work.[9] The General Division member explained that she had also considered the cumulative impact of the Claimant's impairments on her ability to work.[10] The General Division decided that the Claimant's depression was not a seriously disabling condition, "even when considered in conjunction with her ankle injury."[11]

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[5] This is explained in a case called *Warren v Canada (Attorney General)*, 2008 FCA 377.
[6] This is explained in a case called *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[7] This is explained in a case called *Villani v Canada (Attorney General)*, 2001 FCA 248.
[8] General Division decision, between paras 6 and 7.
[9] General Division decision, paras 13 to 16.
[10] General Division decision, para 13. The General Division referred to the Federal Court of Appeal decision that talks about the need to look at all the impairments. That decision is *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[11] General Division decision, para 16.

[14] In the decision on leave to appeal, I asked the parties to consider whether the General Division member might have failed to consider the cumulative impact of the Claimant's ankle injury and depression on her ability to work.

[15] The Minister argues that the General Division did not make an error of law. The General Division decision states the requirement to consider conditions in their totality. The General Division decision also specifically states that it considered the impact of the Claimant's depression "in conjunction" with her ankle injury. The Minister notes that it is not the Appeal Division's role to simply reweigh the evidence, apply it to the law, and come to a different result. There must be an error of law or an error of fact.

[16] In my view, it is more likely than not that the General Division avoided an error here. While it was concerning that the General Division described the issue as whether the left ankle injury results in a severe disability, I am satisfied that the General Division did consider the effect of the Claimant's depression and her ankle injury cumulatively later on in its analysis.

Issue 2: Did the General Division make an error of fact by stating that the Claimant reported that she could sit for four to eight hours?

[17] The General Division made an error of fact. The Claimant did not report that she could sit for four to eight hours. This fact is important enough that it could change the outcome of the decision, and it was not made with regard to the record.

[18] The General Division decision states the following:

> The Claimant reported sitting limitations; however, there were no sitting limitations reported by her treating practitioners, including the most recent report on file from her physiotherapist dated January 2019. At the hearing, she stated that she has developed sciatic nerve damage in her leg that limits how long she can sit comfortably. Nonetheless, she reported that she could sit for four to eight hours. While she may have some real world limitations that preclude physical work, I find that she retains the capacity to work or retrain for a more suitable career.[12]

[12] General Division decision, para 18.

[19] The Claimant argues that the General Division based its decision that she could complete sedentary work on an erroneous finding that she could sit for four to eight hours. The Claimant takes the position that she cannot sit for four to eight hours and that she did not testify during her hearing that she could sit for that long.

[20] The Claimant gave evidence at the General Division hearing about why, in her opinion, she was not able to do sedentary work. During the hearing, the Claimant testified that she "can't sit long" and that "most sedentary jobs are four to eight hours long."[13] She stated that she had developed problems with her sciatic nerve that meant she could not sit for long periods.

[21] The Minister agreed that the General Division misstated a fact in its decision when it wrote that the Claimant could sit for four to eight hours. However, the Minister takes the position that this mistake was not an error of fact as it is defined in the DESDA. The Minister argues that when reading the paragraph as a whole, it is clear that the General Division completed a full analysis of the documents in the file and had already weighed the evidence. The Minister states that the General Division weighed the information about the Claimant's sitting limitations related to sciatic nerve damage against the medical reports that did not mention any sitting limitations.[14] The Minister argues that the General Division did not base its decision on how long the Claimant could sit. The Minister argues that the General Division relied on many other parts of the evidence to decide that the Claimant had a residual capacity to work.

[22] In my view, the General Division made an error of fact. The General Division misstated the Claimant's evidence about how long she could sit. Her evidence was that she cannot sit for long, and she explained how long, in her opinion, most sedentary jobs require workers to sit. The amount of time that the Claimant says she can sit is important and could have an impact on the outcome of the decision. The decision-maker had to weigh the Claimant's evidence about her limitations along with the medical evidence. The Claimant's testimony about how long she could sit could change the outcome of that analysis, even if it was not the only factor on which the General Division relied. The General Division made a finding about how long the Claimant

[13] In the audio recording of the General Division hearing, at approximately 08:38.
[14] AD3-9.

could sit without proper regard for the record, in which the Claimant clearly said something different from what the General Division found. This is an error of fact.

Issue 3: Did the General Division make an error of law in its analysis of the Claimant's treatment efforts for her depression?

[23] The General Division made an error of law by failing to follow the required approach for analyzing treatment set out in the case law from the Courts. The General Division dismissed the Claimant's depression as not meeting the test for severity because the history of her treatment was "conservative." The General Division also relied on a prescription record, which showed that there appeared to be a period of time in which the Claimant did not fill her prescription for her medication. The General Division took the wrong approach in law. Treatment is relevant to two different legal analyses. First, the General Division can consider whether the Claimant's treatment met the threshold for showing that she took steps to manage her medical condition. Second, the General Division can consider whether the Claimant refused treatment unreasonably. The General Division's analysis of the Claimant's treatment does not follow these legal frameworks, and therefore, the General Division made an error of law.

[24] There is no requirement for claimants to exhaust all treatment options in order to get the disability pension.[15] The General Division needs to consider claimants' treatment as part of the analysis about the severity of the disability. Claimants need to show that they have taken reasonable steps to manage their medical conditions. Claimants who have refused treatment unreasonably may not be entitled to the disability pension.[16]

[25] The General Division discussed the Claimant's treatment for depression in some detail. First, the General Division considered Dr. Liang's letter from January 2018:

> [Dr. Liang] found the Claimant totally disabled for even sedentary work mainly due to her psychological problem. Dr. Liang further added that he

[15] The requirement to make reasonable efforts to manage medical conditions is reflected in *Klabouch v Canada (Social Development)*, 2008 FCA 33 and *Sharma v Canada (Attorney General)*, 2018 FCA 48. There is no reference to exhausting all treatment options in these cases. The requirement set out in *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211, is that claimants are not to unreasonably refuse treatment, which is different from exhausting all treatment options.

[16] When the General Division considers whether a Claimant has refused treatment, they must also consider what impact the treatment was expected to have on the disability. Some treatments are just about managing a particular symptom better; other treatments are meant to fully address or end the experience of a symptom.

> had referred her to a mental health counsellor a year prior, but she had declined to follow up with an appointment. He had prescribed Zoloft for depression, but, as Dr. Liang acknowledged, without psychotherapy, she was not following an "ideal treatment plan". Dr. Liang confirmed in April 2018 that the Claimant had started seeing a mental health counsellor.[17]

[26] Next, the General Division explained the Claimant's testimony about her treatment at the time of the hearing and weighed that testimony against prescription records:

> At the hearing, she reported that she continued to take her medication and was seeing a counsellor once or twice a month, but no additional documentation was received from either her family doctor or counsellor. Moreover, prescription records printed in June 2018 show that the Claimant filled one prescription for Zoloft in August 2017[12]. Dr. Liang's clinical notes document that she was prescribed Zoloft in February 2018[13], but the pharmacy records the Claimant provided do not show any further prescriptions.[18]

[27] The General Division acknowledged that the Claimant had poor concentration, a depressed mood, and difficulty sleeping. However, the General Division decided that "her conservative treatment is not indicative of severe symptomatology. Accordingly, I do not find that the evidence supports that her depression was a seriously disabling condition […]."[19]

[28] The Minister argues that the General Division did not make an error about the Claimant's treatment. The General Division weighed the evidence about the Claimant's treatment. The General Division decided that the Claimant's treatment for mental health was "not indicative of severe symptomology."[20] The Appeal Division must identify an error with the way the General Division considered the Claimant's treatment and not simply seek to replace that analysis with its own.

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[17] General Division decision, para 14.
[18] General Division decision, para 15.
[19] General Division decision, para 16.
[20] AD3-14.

[29] I find that there are two ways in which the General Division made an error of law in analyzing the Claimant's treatment.

[30] First, if the General Division member had followed the correct approach in law, the General Division would have considered whether the Claimant's treatment efforts were sufficient to show that she was taking steps to manage her medical conditions. The General Division did not take that approach.

[31] Instead, the General Division dismissed the Claimant's treatment as "conservative" and not consistent with severe symptoms. The General Division did not identify what kind of treatment history for depression would have been sufficient or consistent with "severe symptomology." There is no requirement to exhaust all treatments (or to follow an ideal treatment plan), and claimants need to show that they are taking steps to manage their medical conditions. Without an explanation, it is not clear from the decision how the General Division member concluded that taking medication and seeing a mental health counsellor at the time of the hearing is a "conservative" approach to treatment such that the Claimant's disability is not severe. It is not clear how the Claimant's efforts, which involved both medication and counselling at the time of the hearing, were not enough to show that she was managing her medical condition.

[32] The standard is whether claimants are taking steps to manage medical conditions. The standard is not whether claimants are ensuring their treatments are not too "conservative" to qualify for a disability pension.

[33] Second, if the General Division had followed the correct approach in law, the General Division would have considered whether the Claimant's prescription records meant that the Claimant had unreasonably refused treatment. The General Division did not complete that analysis.

[34] Instead, the General Division relied on the Claimant's prescription record in only a general way to show that she had not consistently taken her medication in the past. The General Division decision does not explain what impact the medication was expected to have on the Claimant's disability. The General Division decision does not explore what reason (if any) the

Claimant had for failing to take her medication for a time and whether the Claimant's past decision about filling her prescription was reasonable.[21] Even if the General Division had completed that analysis, it is not clear what impact that would have on the result. The Claimant's testimony at the hearing was not consistent with her refusing any treatment at all for her depression at that time. The General Division was required to focus on the severity of the disability at the time of the hearing because the MQP was in the future.[22] The fact that the Claimant may or may not have taken her medication at some point before the hearing (or that she did not start seeing a counsellor immediately in 2017) is not as important as what her situation was at the time of the hearing.

[35] The standard is whether the Claimant unreasonably refused treatment that would have impacted her disability, not whether there was any general evidence to point to a lapse in filling prescriptions in the past.

[36] It is clear from the decision that the General Division member's analysis of the Claimant's treatment played a role in reaching the outcome. The General Division did not apply the legal principles set out in the case law to the facts about treatment. If the General Division was going to make findings of fact about treatment, it should have been to help decide (a) whether the Claimant has made sufficient efforts to manage her medical condition, or (b) whether she has unreasonably refused recommended treatments that would have an impact on her capacity for work. Discussing and relying on the question of the Claimant's treatment in the way that the General Division did in this case (without applying the legal principles provided by the Federal Court of Appeal on treatment) is an error of law.

REMEDY

[37] When the Appeal Division finds an error under the DESDA, it can decide to give the decision that the General Division should have given.[23]

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[21] The same can be said for the information about the Claimant having initially refused to see the counsellor. The General Division does not explore why the Claimant made that choice back in 2017.
[22] General Division decision, para 3. The hearing was held on March 12, 2019, and the MQP ends on December 31, 2020.
[23] DESDA, s 59.

[38] In this case, the record is complete, so I have the information I need to make a decision. At the Appeal Division hearing, the parties did not object (if I found an error) to me giving the decision that the General Division should have given. Giving the decision that the General Division should have given at this stage will be the most efficient option, consistent with the *Social Security Tribunal Regulations*.[24]

The Claimant's Testimony and the Weight Assigned to it

[39] The outcome for the Claimant remains the same: as of March 12, 2019 (the date of the Claimant's hearing at the General Division), the Claimant did not show that she was incapable regularly of pursuing any substantially gainful occupation.[25] In reaching that conclusion, I rely entirely on the General Division's analysis with two exceptions.

[40] First, I acknowledge that the Claimant testified that she cannot sit for the length of time required to do a sedentary job. I acknowledge that she said she has developed problems with her sciatic nerve. I do not doubt that she is being truthful about the belief that her limited ability to sit acts as a barrier to working and to retraining for lighter work. However, I cannot accept that this testimony means that she lacks capacity for any substantially gainful sedentary work. The Claimant's evidence on this limitation was somewhat vague. She did not testify about whether she finds there is anything she can do to manage this limitation in terms of breaks or alternating from sitting to standing. She did not testify about what treatments, if any, she has had to address this pain, and whether anything she has done helps her to sit longer.

[41] The Claimant's problems with her sciatic nerve are not documented in her medical records. The Claimant does not need objective medical evidence to back up every functional limitation she describes. However, she has not shown in this case, based solely on her testimony, that she cannot sit long enough to complete some kind of sedentary work that would be substantially gainful. In the CPP questionnaire the Claimant completed when she applied for the disability pension, she stated that prolonged sitting causes numbness and pain to her left ankle,

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[24] Section 2 of the SST Regulations states the following: These Regulations must be interpreted so as to secure the just, most expeditious and least expensive determination of appeals and applications.
[25] That is the definition of a severe disability in s 42(2) of the *Canada Pension Plan* that the Claimant had to meet. She needed to show that it was more likely than not (or on a "balance of probabilities") that her disability fell within that definition.

shooting up to her leg and thigh.[26] However, the functional abilities form does not say anything about the Claimant being limited in her ability to sit.[27] Dr. Hickey stated that the Claimant should be capable of performing jobs with relatively sedentary duties as of December 11, 2017.[28] The Claimant's physiotherapist report from January 2019 did not mention sitting limitations.[29]

[42] When I weigh the medical evidence along with the Claimant's testimony, I find that I reach the same conclusion that the General Division reached: the Claimant has not proven that she is incapable regularly of pursuing some substantially gainful sedentary work.

The Claimant's Efforts to Manage her Depression

[43] Second, I accept the Claimant's testimony about the treatment of her depression. I am satisfied that taking medication and seeing a counsellor once or twice a month shows that the Claimant is taking steps to manage her medical condition. At the time of the hearing, the Claimant was not refusing treatment.

[44] I accept that the Claimant experiences poor concentration, a depressed mood, and difficulty sleeping. However, I do not find in this particular case that these symptoms would stop her from pursuing any substantially gainful occupation. I reached that conclusion not based on her treatment history, but on the symptoms themselves that she identified. In her testimony at the General Division, she focussed more on the physical reasons that she could not complete a sedentary job. Dr. Liang took the position back in January 2018 that the Claimant was totally disabled for even sedentary work mainly due to her psychological problems, but I do not find that note particularly helpful in assessing the Claimant's condition as of March 2019 when she was taking her medication and seeing a counsellor. I cannot conclude that her concentration, depressed mood, and sleepiness are severe enough that she could not handle any sedentary work, even part-time. I reach the same conclusion that the General Division did: the Claimant's depression, in conjunction with her ankle injury, do not mean that the Claimant is incapable regularly of pursuing any substantially gainful occupation.

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[26] GD2-84.
[27] GD2-80.
[28] GD2-62.
[29] GD5-4.

[45] The remainder of the General Division's analysis stands. The cumulative impact of the Claimant's ankle injury and depression does not lead to the conclusion that she is incapable regularly of pursuing any substantially gainful occupation. She has capacity for some form of sedentary employment, and her personal circumstances like her age, education level, language proficiency, and past work experience mean that she has the capacity to work or retrain for a more suitable career.

[46] At the time of the General Division hearing, the Claimant's MQP was to end on December 31, 2020. Based on the information I have about her disability as of her hearing at the General Division on March 12, 2019, she has not shown that she meets the test for receiving a disability pension under the CPP.

[47] However, the Claimant may choose to reapply for the disability pension in the future. It may be that her medical situation or the evidence about that situation continues to change from March 12, 2019, to December 31, 2020 (the end of her MQP based on the evidence at the General Division). In the future, the Claimant may have more information from her treatment team about her sciatic nerve problem and her ability to sit. She may have updated information to share about her depression symptoms in the future as well. She may also have new information about her medical condition once she has her ankle surgery. It may be that, sometime before December 31, 2020, the evidence will suggest that the cumulative impact of those conditions results in a severe and prolonged disability according to the CPP.

CONCLUSION

[48] The appeal is dismissed. The Claimant is not entitled to a disability pension as of the time of her hearing before the General Division (which was March 12, 2019).

Kate Sellar
Member, Appeal Division

HEARD ON:	July 17, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	C. R., self-represented Susan Johnstone, Representative for the Respondent