



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. H. v Minister of Employment and Social Development*, 2019 SST 1300

Tribunal File Number: AD-19-570

BETWEEN:

D. H.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: November 4, 2019

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] D. H. (Claimant) completed high school and one year of college before entering the workforce. He is a X. He worked as an X for many years until he started kidney dialysis. He had a kidney transplant in 2014, and a hip replacement in 2015. He developed migraine headaches. The Claimant applied for a Canada Pension Plan disability pension and claimed that he was disabled because of the kidney transplant, hip replacement and headaches.

[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 because it found that the Claimant did not have a severe and prolonged disability before the end of the minimum qualifying period (MQP – the date by which a claimant must be found to be disabled in order to receive the disability pension).

[4] I granted leave to appeal to the Appeal Division because the appeal had a reasonable chance of success on the basis that the General Division made an error in law when it failed to consider whether the Claimant's work after the MQP was substantially gainful. However, after considering the parties' written and oral submissions, the General Division decision and the written record, I find that the General Division did not make an error in law. The General Division also did not base its decision on any erroneous findings of fact under the *Department of Employment and Social Development Act* (DESD Act). Therefore, the appeal is dismissed.

ISSUES

[5] Did the General Division make an error in law when it failed to consider whether the Claimant's work after the MQP was substantially gainful?

[6] Did the General Division base its decision on an erroneous finding of fact that the Claimant had capacity to work?

ANALYSIS

[7] The DESD Act governs the Tribunal's operation. It provides rules for appeals to the Appeal Division. An appeal is not a re-hearing of the original claim, but a determination of whether the General Division made an error under the DESD Act. The Act also states that there are only three kinds of errors that can be considered. 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.¹ If at least one of these errors was made, the Appeal Division can intervene. The Claimant's grounds of appeal are examined below in this context.

Issue 1: The General Division made no error in law regarding the Claimant's work capacity after the MQP

[8] To be disabled under the *Canada Pension Plan* a claimant must have a disability that is both severe and prolonged. A disability is severe if it makes a claimant unable regularly to pursue any substantially gainful occupation.² So, the focus of the Tribunal is not on a claimant's medical conditions, but on their impact on a claimant's capacity to work.

[9] The General Division decision summarizes the evidence regarding the Claimant's medical conditions, including his childhood kidney injury, that he started dialysis in 2010 at home, and later in hospital, that he had a kidney transplant in 2014, and a hip replacement in 2015. The decision also considered medical evidence that showed that the Claimant retained capacity to work in spite of his significant medical conditions. For example, the General Division decision states:

- the Claimant's nephrologist described the Claimant as "feeling quite well" with no specific issues except itchy skin, dizziness after dialysis reported in April 2013, dialysis-related headaches and bone and joint pain in July 2013, and headaches in September 2013,³

¹ DESD Act s. 58(1)

² *Canada Pension Plan* s. 42(2)(a)

³ General Division decision at para. 18

- the Claimant denied any significant headaches before his kidney transplant,⁴ and just before the transplant he reported no disease apart from heartburn, high blood pressure and kidney disease.
- The Claimant specifically reported no shortness of breath after walking one block, housework or climbing a flight of stairs.⁵
- There was no evidence that the Claimant's hip pain was debilitating at the MQP,⁶
- although the Claimant says that he his headaches started after the kidney transplant, this is not supported by the medical evidence.⁷

Based on all of this evidence, the General Division concluded that although the Claimant would have had periods after each surgery that he could not work, he had longer periods where he did not have disabling symptoms and therefore had work capacity before and after the MQP.⁸

[10] The General Division also considered the evidence regarding the Claimant's work activity, including

- The Claimant reported to Dr. Teoh in 2015 that he walks to multiple work sites, goes up and down ladders and stairs, and he can walk two blocks or two flights of stairs,⁹
- The Claimant reported to Dr. Conradie in 2015 that he works eight to ten hour days, and this includes climbing ladders and stairs and that he has no difficulty climbing three or four flights of stairs.¹⁰
- The Claimant and his wife both denied any memory of these reports and testified that they did not know these doctors.¹¹

⁴ *Ibid* at para. 20

⁵ *Ibid* at para. 21

⁶ *Ibid.* at para. 22

⁷ *Ibid.* at para. 23

⁸ *Ibid.* at para. 24

⁹ *Ibid.* at para. 26

¹⁰ *Ibid.* at para. 27

¹¹ *Ibid.* at para. 28

- The Claimant told a dietician that he was self-employed.
- The Claimant told his family doctor in 2017 that he ran an X company.¹²

[11] The General Division specifically considered that the Claimant reported \$3,500 in income each year from 2013 to 2017 on his income tax returns. The Claimant's accountant describes this as a director's fee, which is compensation for holding a mandatory office or position.¹³

[12] The Claimant argues that this director fee is not earned income, and does not demonstrate that the Claimant had capacity to work. However, the General Division did not conclude that this income, alone, demonstrated that the Claimant had capacity to work. Rather, it was one piece of evidence, along with what he reported to his treating professionals and what they observed about his medical conditions, that the General Division weighed when it made its decision.

[13] The General Division did not specifically turn its mind to whether the receipt of \$3,500 as income was substantially gainful. However, this was not required. The Claimant did not argue before the General Division that this income was not substantially gainful. The General Division looked at the fact that the Claimant received this director's fee annually and concluded that this, with the other evidence supported the conclusion that he had capacity to work.

[14] The Claimant also argues that even if he could have worked after the MQP he would not have been able to sustain this. However, the General Division had no evidence upon which it could evaluate whether the Claimant could sustain employment. So, it made no error when it failed to consider this.

[15] Therefore, the General Division made no error in law, and the appeal fails on this basis.

Issue 2: The General Division made no erroneous findings of fact

[16] The Claimant's other ground of appeal is that the General Division based its decision on an erroneous finding of fact under the DESD Act that he had capacity to work. To succeed on

¹² *Ibid.* at para. 30

¹³ GD6-45

this basis, the Claimant must prove 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 fact.¹⁴

[17] The General Division's finding of fact that the Claimant had capacity regularly to pursue any substantially gainful occupation had an evidentiary basis. I have referred already to some of that evidence above.

[18] In addition, despite having just had a kidney transplant, the Claimant was approved for hip replacement surgery in April 2015 (subject to a further consultation regarding his kidney because the Claimant had stopped taking prednisone). After the hip replacement, the Claimant's doctor reported that the Claimant was doing well and was pleased with the result of the hip replacement.¹⁵

[19] The Claimant referred me to a number of medical documents that report on the Claimant's limitations immediately after his kidney transplant and hip replacement surgeries - including that he required assistance with transfers, toileting, and was at risk for falling;¹⁶ and that he required narcotic pain killers.¹⁷ The General Division decision does not refer to this evidence. However, it is presumed to have considered it.¹⁸ Also, these medical reports refer to the Claimant's condition immediately after each of his surgeries. These conditions improved as the Claimant healed. Therefore, the General Division did not err by not referring to this evidence.

[20] In addition, the Claimant had the hip replacement in 2015, after the MQP. The medical evidence noted condition in February 2015 when the Claimant was hospitalized although the Claimant testified that he had hip pain starting approximately one year prior to the kidney transplant. There was no evidence that this condition was debilitating at the MQP.

[21] Dr. Teoh and Dr. Conradie each saw the Claimant on one occasion in November 2015. Dr. Teoh reported that the Claimant told him that he owned his own X business, walks to

¹⁴*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319

¹⁵ GD2-102

¹⁶ For example, GD3-1060, GD3-1404

¹⁷ GD3-1482

¹⁸*Simpson v. Canada (Attorney General)*, 2012 FCA 82

multiple sites and goes up and down ladders and stairs.¹⁹ Dr. Conradie similarly reported that the Claimant worked eight to ten hour days, including climbing stairs and ladders.²⁰ The Claimant argues that these reports could not be accurate because he was still recovering from the kidney transplant and continued to take significant opioid medications for pain. He further argues that this evidence is contrary to the large quantity of other medical evidence that shows that the Claimant did not have this capability.

[22] With this argument, the Claimant is asking me to reweigh the evidence that was before the General Division to reach a different conclusion. Assigning weight to evidence, whether oral or written is the province of the trier of fact, the General Division in this case.²¹ The General Division did not overlook or misconstrue any important information. It gave reasons for preferring the written evidence of Drs. Teoh and Conradie over the oral evidence presented at the hearing: the medical evidence was from different sources and recorded by different objective professionals at the time, whereas it would be difficult for the Claimant and his spouse to recall specifically how debilitating their symptoms were and when they began, so the medical evidence was preferred when there was a discrepancy between the written and oral evidence.²² These reasons are logical and intelligible.

[23] The Claimant also argues that he could not have been working after the MQP because the income tax information filed with the Tribunal shows no income apart from the director's fee. However, the Claimant did not file any other evidence about his company, including income and loss statements, etc. Therefore, this argument cannot be evaluated, and I cannot find that the General Division made any error in this regard.

[24] Therefore, the finding of fact that the Claimant had capacity to work at the MQP was not erroneous. The appeal fails on this basis.

¹⁹ GD3-2010

²⁰ GD3-2013

²¹ *Simpson v. Canada (Attorney General)*, 2012 FCA 82

²² General Division decision at para 17

CONCLUSION

[25] The appeal is dismissed for these reasons.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	October 30, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. H., Appellant James Ludwar, Counsel for the Appellant John Unrau, Counsel for the Respondent