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

Citation: *P. G. v Minister of Employment and Social Development*, 2019 SST 1334

Tribunal File Number: AD-18-250

BETWEEN:

**P. G.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: November 8, 2019

## DECISION AND REASONS

### DECISION

[1] The appeal is allowed. The matter is referred back to the General Division for reconsideration.

### OVERVIEW

[2] P. G. (Claimant) completed her education in Portugal before moving to Canada. She obtained the equivalent of a Grade 8 education. In Canada the Claimant worked in X until July 2009. She applied for a Canada Pension Plan disability pension and claimed that she was disabled due to fibromyalgia, pelvic congestion syndrome, migraines, high blood pressure, a back injury and stress.

[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 decided that the Claimant did not have a severe disability before the end of her minimum qualifying period (MQP – in this case it is December 31, 2011).

[4] The Claimant's appeal from this decision is allowed because the General Division made an error in law when it failed to consider all of the Claimant's pain conditions, and it based its decision on an erroneous finding of fact. The matter is referred back to the General Division for reconsideration.

### PRELIMINARY MATTER

[5] At the hearing of the appeal, Minister's counsel argued that the Claimant should not be able to address any grounds of appeal that are not set out in the Application to the Appeal Division. She relies on the *Social Security Tribunal Regulations*, which state that an application for leave to appeal must contain the grounds for the application and any statements of fact they rely on.[1] In addition, she also argued that the DESD Act provides that the Application to the Appeal Division becomes the Notice of Appeal once leave to appeal is granted,[2] and that the

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[1] *Social Security Tribunal Regulations* s. 40(1)(*c*)
[2] DESD Act s. 58(5)

parties are permitted to file submissions after leave to appeal is granted, but not more grounds of appeal.

[6] However, the *Social Security Tribunal Regulations* provide for at least one occasion when grounds of appeal not set out in the Application to the Appeal Division are to be considered. The Regulations state that before granting or refusing leave to appeal, the Appeal Division may request further information from an applicant or request submissions from the parties.[3] There is no restriction on what type of information could be asked of a party. Therefore, additional grounds of appeal could be requested. These grounds of appeal would then be considered by the Appeal Division notwithstanding the fact that they were not presented in the Application to the Appeal Division.

[7] In addition, the Regulations also state that the Tribunal may provide for any matter concerning a proceeding upon request by a party.[4] What it can provide for is not restricted in any way, so making a request to file additional grounds of appeal is another way that a party could present additional grounds of appeal that are not in the Application to the Appeal Division. These are all good reasons why additional grounds should be considered, even if they are not set out in the Application to the Appeal Division.

[8] The Minister also argues that the Federal Court of Appeal decision in *Hillier*[5] says that parties cannot raise additional grounds of appeal. However, the decision does not say this. In that case the claimant presented a number of grounds of appeal to the Tribunal's Appeal Division. When the Appeal Division granted leave to appeal, it restricted the appeal to only some of the grounds advanced. On judicial review, the Federal Court of Appeal decided that the Appeal Division must consider all of the grounds of appeal that the Claimant raised as long as they fall under the DESD Act.[6] This decision prohibits the elimination of grounds of appeal. It does not consider whether additional grounds of appeal could be presented to the Tribunal after leave to appeal was granted.

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[3] *Social Security Tribunal Regulations* s. 41
[4] *Social Security Tribunal Regulations* s.4
[5] *Hillier v Canada (Attorney General)*, 2019 FCA 44,
[6] *Ibid*. at para. 41

[9] Therefore, the parties are not limited to arguing only those grounds of appeal that are set out in the Application to the Appeal Division.

[10] In this case, the grounds of appeal set out in the Application to the Appeal Division are

a) the General Division made an error in law by failing to consider the entirety of the Claimant's condition;

b) the General Division based its decision on an erroneous finding of fact without regard to the Claimant's testimony because it failed to assess her credibility or her testimony;

c) the General Division based its decision on an erroneous finding of fact regarding when the Claimant was diagnosed with fibromyalgia; and

d) the General Division erred in law when it decided that she had not made attempts to obtain or maintain work because of her health conditions.

[11] The Minister objects to the Claimant's arguments that the General Division failed to conduct a real world analysis of the Claimant's condition and circumstances as required by the Federal Court of Appeal.[7] However, this is not a new ground of appeal. The Federal Court of Appeal teaches that a real world analysis requires that all of a claimant's impairments be taken into account as well as their personal circumstances.[8] The Claimant's first ground of appeal is that the General Division erred in law by failing to consider her entire condition. She has now presented an additional legal argument based on this existing ground of appeal, not an additional ground of appeal. This argument is that the General Division failed to consider all of her circumstances, including her limited work experience, and her limited ability to communicate in English.

[12] The Minister had the opportunity to respond to this argument both at the hearing, and in the time given to file additional written submissions after the hearing. As such, the parties had an

[7] *Villani v. Canada (Attorney General*), 2001 FCA 248
[8] *Bungay v. Canada (Attorney General)*, 2011 FCA 47

adequate opportunity to consider and respond to the other's legal case before this decision was made.

[13] This argument, along with the Claimant's other arguments based on grounds of appeal under the DESD Act are considered below.

## ISSUES

[14] Did the General Division make an error in law when it failed to consider all of the Claimant's circumstances, or to properly consider her pain condition?

[15] Did the General Division make an error in law when it decided that the Claimant had not made attempts to obtain or maintain work because of her health?

[16] Did the General Division base its decision on an erroneous finding of fact under the *Department of Employment and Social Development Act* (DESD Act) because

a) it failed to assess the Claimant's credibility or her testimony;

b) It did not assess whether the Claimant followed treatment recommendations to attend aquatherapy; or

**c)** It did not properly consider whether the Claimant could work in an English-speaking workplace.

## ANALYSIS

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.[9] If at least one of these errors was made, the Appeal Division can intervene.

**Issue 1: Consideration of all of the Claimant's conditions**

[17] One ground of appeal that I can consider is whether the General Division made an error in law. The Federal Court of Appeal teaches that when deciding whether a Claimant is disabled, all of their medical conditions must be examined, not just the major ones.[10] The Claimant argues that the General Division made an error in law because it failed to consider the totality of her pain condition. Although she was not diagnosed with pelvic congestion syndrome until after the MQP, the timing of a diagnosis is not always determinative of when a claimant began to have the condition in question. The Claimant argues that she had symptoms of pelvic congestion syndrome before the MQP. Her testimony is consistent with this.

[18] The General Division decision summarizes the evidence that was presented to it. However, this summary does not include the Claimant's evidence that the biggest thing that stopped her from working was pain, and that she had pelvic congestion syndrome symptoms for many years before the MQP. The General Division decision states that the totality of the Claimant's medical condition at the MQP was fibromyalgia, and that the medical reports do not support any other conditions at that time.[11] The General Division disregarded the Claimant's testimony about her pain because she had not been diagnosed with pelvic congestion syndrome before the MQP. In doing so, the General Division failed to consider all of her conditions. This is an error in law.

[19] In addition, the General Division erred in law because it failed to consider the Claimant's limited English skills. The Federal Court of Appeal instructs that a Claimant's personal characteristics, including language skills, education and work experience, are to be considered

[9]DESD Act s. 58(1)
[10] *Bungay v. Canada (Attorney General)*, 2011 FCA 47
[11] General Division decision at para. 28

when deciding if a claimant is disabled.[12] She testified that she was able to work at her first job because it was a Portuguese-speaking workplace. At her second X job, another worker translated for her. The General Division failed to consider these language-related work accommodations when it concluded that her English skills would not impact her ability to work. The General Division's failure to properly consider this is also an error in law.

[20] The appeal must be allowed on the basis that the General Division erred in law.

**Issue 2: Attempts to obtain or maintain employment were unsuccessful because of her health**

[21] The General Division decision correctly states that where there is evidence of work capacity a claimant must show that efforts at obtaining and maintaining employment was unsuccessful because of their health.[13] The decision then goes on to find that the Claimant failed to meet this legal obligation because she did not try to find work within her limitations or to upgrade her English skills.[14] However, the Claimant argues that she met this obligation because she tried to work for four hours per day in a X job but was unable to continue. The General Division acknowledged this attempt to work, although it referred to it as a "four hour a month X job."[15]

[22] The General Division made no error in law. It considered that the Claimant tried to do a part-time X job. However, it concluded that this work was not within her limitations. Therefore, the General Division properly applied the legal test to the facts of the case and found that she had not met her legal obligation to show that her work efforts failed because of her health condition. The appeal fails on this basis.

**Issue 3: Assessment of the Claimant's testimony**

[23] The Claimant also argues that the appeal should be allowed because the General Division failed to assess her credibility and had no sound reason to disregard her testimony. The Claimant

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[12] *Villani*, supra
[13] General Division decision at para. 27; *Inclima v. Canada (Attorney General)*, 2003 FCA 117
[14] General Division decision at para. 27
[15] *Ibid*.

points to the following statement in the General Division decision to support this argument: "The Tribunal does not find the evidence of the [Claimant] to be reliable. The Tribunal does not place significant weight on her evidence. The Tribunal finds that in the facts of this appeal, the [Claimant's] oral testimony did not overcome the lack of objective findings and she did not prove on a balance of probabilities her pain prevented her from regularly pursuing any substantially gainful occupation".[16]

[24] While it is true that the General Division made no specific finding regarding the Claimant's credibility, it made no error when it failed to do so. The General Division is not required to make a credibility finding in every case.

[25] The General Division did make a finding regarding the reliability of the Claimant's testimony as set out above. However, these statements must be considered in context. In that same paragraph of the decision, the General Division gives reasons for reaching this conclusion. The decision states that the chronic pain is not always supported by objective findings, that the Claimant testified that her pain was worsening with time, that she was unable to remember the results of a vocational assessment, when she last exercised, or signing documents to collect Employment Insurance.[17] The General Division decided to place little weight on the Claimant's testimony because, based on these statements, it found the testimony to be unreliable. There is an evidentiary basis for this finding of fact. It is not erroneous.

[26] Therefore, the appeal must fail on the basis that the General Division based its decision on an erroneous finding of fact regarding the Claimant's testimony.

**Issue 4: following treatment recommendations**

[27] The General Division decision correctly states that claimants have a personal responsibility to cooperate with their health care.[18] In addition, a claimant's failure to follow reasonable treatment recommendations can impact their disability status. The General Division decision also states that the Claimant had not fulfilled her responsibility to cooperate with her

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[16] *R v. Sheppard*, 2002 SCC 26
[17] *Ibid*.
[18] *Kambo v. Minister of Human Resources Development*, 2005 FCA 353

health care because she had not attended for aquafit or exercised for some years.[19] However, the Claimant argues that this finding of fact is erroneous and made without consideration of all of the evidence. In particular, the Claimant says that the General Division failed to consider her testimony that when she attended aquafit she obtained only temporary pain relief so it was reasonable for her to stop attending. Accordingly, the Claimant argues that she was compliant with treatment recommendations.

[28] The Claimant also argues that treatment recommendations are simply that, not mandatory requirements. Therefore, the General Division should not have concluded that the Claimant had not met her legal obligations because she failed to follow the recommendation to increase her activity level.

[29] I am satisfied that the General Division's finding of fact that the Claimant had not adequately cooperated in her health care was erroneous.[20] It was made without considering the Claimant's evidence that she had tried aquafit and only obtained temporary relief and so stopped going. The decision was based, in part, on this finding of fact. Therefore, the appeal also succeeds on this basis.

**Issue 5: Work in an English-speaking workplace**

[30] The Claimant's final ground of appeal is that the General Division based its decision on an erroneous finding of fact that she was able to maintain employment in two different X where the primary language was English.[21]. As mentioned above, the Claimant points to her testimony that at the first job she was able to speak Portuguese, and at the second a co-worker translated for her. The General Division decision does not refer to this evidence. The finding of fact that the Claimant could maintain a job in an English-speaking workplace contradicts this. The Supreme Court of Canada teaches that reasons must be given for findings of fact made on contradictory evidence and upon which the outcome is largely dependent.[22] The General Division failed to provide reasons for not accepting the Claimant's evidence about her lack of ability to work in an English-speaking workplace without translation. The outcome of the appeal was dependent, at

[19] General Division decision at para. 29.
[20]General Division decision at para. 29
[21] General Division decision at para. 32
[22] *R v. Sheppard,* 2002 SCC 26

least in part, on this finding of fact. This is also a factual error upon which the Appeal Division should intervene.

## CONCLUSION

[31] The appeal is allowed because the General Division based its decision on erroneous findings of fact under the DESD Act and made an error in law when it failed to consider the totality of the Claimant's condition.

[32] The DESD Act sets out what remedies the Appeal Division can give when it intervenes. This includes making the decision that the General Division should have made, or referring the matter back to the General Division for reconsideration.[23] Counsel for the Claimant requests that the matter be referred back to the General Division for a new hearing. In fact, counsel argues that whenever the Appeal Division refers a matter back to the General Division, a completely new hearing should be held and that no evidence apart from that which was before the General Division in the first instance should be considered. He contends that unless the new hearing proceeds in this way, it is not a truly *de novo* hearing, and the General Division member will be perceived to be influenced by the prior General Division and Appeal Division decisions.

[33] However, the DESD Act does not require that an appeal be heard entirely afresh, or *de novo*, if it is referred back to the General Division. The DESD Act says, "the Appeal Division may … refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate…"[24] This gives the Appeal Division the discretion to direct a new hearing if appropriate, or to direct that the appeal be reconsidered without a completely new hearing. It also permits the Appeal Division to give directions regarding what written or audio evidence is to be considered by the General Division, including the prior General Division decision, the Appeal Division decision and the recording of the prior General Division hearing. Nothing in the DESD Act restricts the Appeal Division's discretionary power of the Appeal Division when referring matters back to the General Division.

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[23] DESD Act s. 59(1)
[24]DESD Act s. 59(1)

[34] In addition, if a matter is referred back to the General Division for reconsideration, it is open to the parties to present any additional evidence they choose to the General Division. This could include the audio recording of a prior General Division hearing. It would then be for the General Division member upon reconsideration to decide whether to accept this evidence, and if so what weight to give it. The General Division could also consider arguments about any perceived bias that may result as a consequence of listening to this recording.

[35] In this case, it is appropriate for the matter to be referred back to the General Division for reconsideration. This is in part because the General Division overlooked significant evidence about the Claimant's pain conditions. It is for the General Division to receive the parties' evidence and weigh it, then make a decision based on the law and the facts.

[36] The Claimant requests that the original General Division decision, the recording of the General Division hearing and this decision be removed from the record and not be considered by the General Division member who will reconsider this matter. I will not address these arguments at this time. The parties should present their arguments to the General Division upon reconsideration for a preliminary decision to be made on this issue.

[37] The appeal is allowed. The matter is referred back to the General Division for reconsideration.

[38] Valerie Hazlett Parker

Member, Appeal Division

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| HEARD ON: | August 15, 2019 |
| METHOD OF PROCEEDING: | Teleconference |
| APPEARANCES: | P. G., Appellant<br><br>Steven Yormak, Counsel for the Appellant<br><br>Nathalie Pruneau, Representative for the Respondent |

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