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

Citation: *K. S. v Minister of Employment and Social Development*, 2019 SST 1361

Tribunal File Number: AD-19-634

BETWEEN:

K. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: November 25, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

[2] The appeal is referred back to the General Division for reconsideration.

OVERVIEW

[3] K. S. (Claimant) completed high school and two years of a nursing program. She is a Personal Support Worker. She has a lot of work experience caring for people with special needs. The Claimant last worked in a special care home despite having a number of medical conditions. She was in two car accidents in 2017. She then applied for a Canada Pension Plan disability pension and claims that she is disabled by her medical conditions and injuries from the car accident.

[4] The Minister of Employment and Social Development refused the application because it decided that the Claimant's disability was not severe. The Claimant appealed this decision to the Tribunal. The Tribunal's General Division dismissed the appeal because it also decided that the Claimant did not have a severe disability.

[5] I granted leave to appeal because the appeal had a reasonable chance of success on the basis that the General Division made an error in law because it failed to consider the totality of the Claimant's conditions. After considering the Application to the Appeal Division, the Minister's written submissions, the General Division decision and the General Division hearing recording, the appeal is allowed. The General Division failed to observe a principle of natural justice, made errors in law and based its decision on erroneous findings of fact under the *Department of Employment and Social Development Act* (DESD Act). The matter is referred back to the General Division for reconsideration.

PRELIMINARY MATTER

[6] This appeal was decided on the basis of the documents filed with the Tribunal after considering the following:

a) The legal issues to be decided are straightforward;

b) The parties addressed the legal issues in their written materials;

c) The Claimant wrote that attending a hearing was very stressful for her and she felt re-victimized by having to attend a hearing;

d) The Tribunal asked the parties to tell it what form of hearing they preferred. The Minister requested that the appeal be decided on the basis of the documents filed with the Tribunal; the Claimant did not respond to this request, but did write that she had no further submissions to provide.

e) The *Social Security Tribunal Regulations* require that appeals be concluded as quickly as the circumstances and considerations of fairness and natural justice permit.[1]

ISSUES

[7] I have to decide the following issues in this case:

[8] Did the General Division fail to observe a principle of natural justice by addressing its questions to the Claimant when she understood that her representative would be able to respond on her behalf?

[9] Did the General Division fail to observe a principle of natural justice when it failed to give the Minister an opportunity to respond to the last functional capacity evaluation report?

[10] Did the General Division make an error in law as follows:

a) It failed to consider the totality of the Claimant's condition; or

b) It failed to consider that if the Claimant could work for two to three hours each day, this would not be a substantially gainful occupation?

---

[1] *Social Security Tribunal Regulations* s. 3(1)

[11] Did the General Division base its decision on an erroneous finding of fact under the DESD Act as follows:

a) It failed to consider that the Claimant was approved for the disability tax credit;

b) It failed to consider that the car accidents made all of the Claimant's conditions worse;

c) It failed to consider the severity of the Claimant's symptoms when prior sexual trauma was triggered in 2016;

d) Its statement that Dr. Smith does not treat the Claimant's mental and physical conditions;

e) It failed to consider that the Claimant's IBS is not controlled despite her attempts to treat it with medication, diet changes, supplements, and the impact of the Claimant's financial hardship on her ability to treat this condition;

f) It failed to consider all of the results of the Claimant's MRI, including nerve issues, narrowing/compression of the central canal and disc protrusions touching nerves;

g) Its statement that the Claimant had not been referred to a psychologist, without considering that she could not pay for this treatment;

h) It failed to consider that the Claimant is waiting for a pain management consultation; or

i) It failed to consider that the Claimant cannot tolerate some medications because of allergies, and that she cannot afford to pay for some medication?

ANALYSIS

[12] 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. Only three kinds of errors can be considered. They are that 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.[2] If at least one of these errors was made, the Appeal Division can intervene. The Claimant has presented numerous grounds of appeal. They are each examined below.

Natural justice

[13] One ground of appeal under the DESD Act is that the General Division failed to observe a principle of natural justice. These principles are concerned with ensuring that the parties have the opportunity to present their legal case to the Tribunal, to know and answer the other party's case and to have a decision made by an independent decision maker based on the law and the facts.

[14] The Claimant says that the General Division failed to observe these principles because it asked questions of her during the hearing, that her anxiety was heightened, and she could not answer the questions properly. In addition, she says that she had a representative with her and believed that he would be able to answer questions on her behalf.

[15] I have listened to the hearing recording. At the start of the hearing, the General Division member explained that questions would be put to the Claimant and that she was to answer them. The Claimant's representative agreed that the appeal should proceed in this way.[3] The Claimant's representative then asked the Claimant a few questions. The General Division member followed with numerous questions. The Claimant answered all of the questions clearly. Her answers were responsive. At the end of the Claimant's evidence, her representative stated that he ensured that she had put forward everything.[4]

[16] A bald assertion that a claimant was not able to present her case to the Tribunal is not enough to demonstrate that the General Division failed to observe a principle of natural justice. I am not persuaded that the General Division made such an error in this case. The Claimant presented her case in full to the General Division. There is no indication that she did not

---

[2] DESD Act s. 58(1)
[3] General Division hearing recording approximate minute 5:15 although the exact time may differ depending on what device is used to listen to the recording
[4] General Division hearing recording approximate minute 1:39:57

understand or was not able to answer the Minister's legal case, or that the General Division was biased.

[17] The appeal fails on this basis.

[18] Nonetheless, the General Division failed to observe a principle of natural justice in another way. The Claimant filed a copy of a functional capacity evaluation with the Tribunal on the day before the hearing. The General Division member said at the hearing that she had not seen it before the hearing. The *Social Security Tribunal Regulations* require that the Tribunal provide a copy of all documents filed with it to all parties.[5] With this report not having been filed with the Tribunal until the day before the hearing and the General Division member not having received it before the hearing, the Minister also must not have received it before the hearing.

[19] The Minister could not have considered or made any submissions on this evidence. Despite this, the General Division member concluded that reviewing this report would not change its legal position on appeal so it did not give the Minister any time to review or respond to this evidence after the hearing.[6]

[20] However, a review of this evidence may have changed the Minister's position. Or the Minister may have made submissions on it if given the opportunity to do so. The report concludes that the Claimant demonstrated a workday tolerance for a two to three-hour workday, and that she would be unable to sustain this on a daily basis.[7] The General Division failed to give the Minister an opportunity to consider this evidence, and to address it. The General Division thus failed to give the Minister the opportunity to fully meet the Claimant's case. This is a breach of the principles of natural justice.

[21] The appeal must be allowed on this basis.

[5] *Social Security Tribunal Regulations* s. 5(2)
[6] General Division decision at para. 8
[7] GD9-11

Error in law: the totality of the Claimant's condition

[22] Another ground of appeal that the Appeal Division can consider is whether the General Division made an error in law. The Claimant says that the General Division in this case made two such errors.

[23] First, the Federal Court of Appeal teaches that when deciding whether a claimant is disabled, all of their conditions must be examined, not just the main one(s).[8] The Claimant argues that the General Division erred because it failed to consider the totality of her condition.

[24] However, the General Division lists the Claimant's medical conditions as chronic pain, irritable bowel syndrome (IBS), post-traumatic stress disorder (PTSD), and mental health illness.[9] It also identified an issue it had to decide as whether the Claimant's conditions of chronic pain, IBS, PTSD, and other mental health issues result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by the date of the hearing.[10] The General Division weighed the medical evidence and concluded that her conditions were not debilitating. It considered the evidence regarding the car accident and concluded that her injuries not severe.[11] It therefore made no error in law by failing to consider the totality of the Claimant's condition.

[25] However, I am troubled by the overall conclusion that the General Division reached regarding the Claimant's medical conditions. The decision states:

> [The Claimant] has not attempted to return to any work since the car accident of January 2017 where she suffered soft tissue injuries causing chronic pain. She was capable of working with her other conditions of IBS, PTSD and mental health issues. She stated she never had chronic pain while working. Therefore, she has failed to prove she is incapable of working with her chronic pain along with her other conditions which did not affect her ability to work.[12]

---

[8] *Bungay v. Canada (Attorney General)*, 2011 FCA 47
[9] General Division decision at para. 2
[10] *Ibid.* at para. 9
[11] *Ibid.* at para. 21
[12] *Ibid* at para. 53

A Claimant is not required, in every case, to demonstrate that they cannot obtain and maintain work because of their health condition. Only if there is evidence of some capacity to work does a Claimant have this legal obligation.[13] The General Division did not assess whether the Claimant had any remaining work capacity before concluding that she had failed to prove that she was incapable of working with chronic pain and all of the other conditions. This is an error in law. The Appeal Division must intervene on this basis.

Error in law: whether part-time work would be substantially gainful

[26] To be disabled, a claimant must be incapable regularly of pursuing any substantial gainful occupation.[14] The Claimant argues that the General Division made an error in law because it failed to consider whether, if she were able to work for two or three hours each day, this would be substantially gainful work. However, there was no evidence about any such work that the Claimant could do, had done, or that was available to her. There was no evidentiary basis on which the General Division could assess whether such work would be substantially gainful. It cannot be faulted for failing to consider something for which there is no evidence. Therefore, the General Division made no error in this regard.

Erroneous findings of fact

[27] A third ground of appeal under the DESD Act is that the General Division based its decision on an erroneous finding of fact. To succeed on 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.[15]

The DESD Act does not define the terms "perverse" or "capricious." However, guidance is given by court decisions that considered the *Federal Courts Act*, which has the same wording. In that context, perverse has been found to mean "willfully going contrary to the evidence." Capricious has been defined as being "so irregular as to appear to be ungoverned by law." Finally, a finding of fact for which there is no evidence before the Tribunal will be set aside because it is made

---

[13] *Inclima v. Canada (Attorney General)*, 2003 FCA 117
[14] *Canada Pension Plan* s. 42(2)((*a*)(*i*)
[15] *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319

without regard for the material before it. I accept that these definitions apply when considering the DESD Act.

failure to consider that the Claimant was approved for the disability tax credit

[28] The first finding of fact that the Claimant says was erroneous was the General Division's failure to consider that she had been approved for the disability tax credit. The Claimant testified about this. However, the legal test for this benefit is different than to receive the CPP disability pension. Therefore, that the General Division failed to mention this in the decision is not an error.

failure to consider that the car accidents made all of the Claimant's conditions worse

[29] Next, the Claimant argues that the General Division based its finding of fact that her disability was not severe on an erroneous finding of fact because it failed to consider that the car accidents made all of her medical conditions worse. However, the General Division did consider this. The decision states that the Claimant took herself to the hospital after the first accident and was given a note to be off work for one week. It concludes that the injuries from this car accident was not severe.[16] Regarding the second car accident the General Division considered Dr. McMullin's report and concluded that this supported the conclusion that this accident aggravated her conditions for a few weeks.[17] The General Division considered this, so the appeal fails on this basis.

failure to consider the severity of the Claimant's condition when prior trauma was triggered in 2016

[30] The Claimant also argues that the General Division erred because it failed to consider that prior emotional trauma had been triggered again in 2016. The decision states that Dr. Smith referred the Claimant to an assault centre where she attended for eight or nine months.[18] This shows that the General Division turned its mind to the Claimant's mental health illness. In addition, the General Division had to consider the Claimant's condition at the date of the

---

[16] General Division decision at para. 21
[17] *Ibid*. at para. 30
[18] *Ibid.* at para. 23

hearing. So, whether a condition was triggered in 2016 (approximately three years before the hearing) was irrelevant. The General Division did not err in this regard.

failure to consider Dr. Smith's treatment

[31] The Claimant produced evidence that Dr. Smith treated her PTSD and other conditions. The decision states that Dr. Smith was not qualified to provide aggressive treatment for PTSD apart from making a referral, and that he did not do so.[19] The decision sets out no evidentiary basis for concluding that Dr. Smith was not qualified to provide this treatment. This finding of fact was therefore erroneous. It was made without any evidentiary basis. The decision was based, at least in part, on the finding of fact that the Claimant was not being treated for post-traumatic stress disorder because it disregarded Dr. Smith's evidence. Therefore, the General Division based its decision on an erroneous finding of fact under the DESD Act. The Appeal Division should intervene on this basis.

[32] The decision also states that Dr. Smith was not the Claimant's family doctor and was not treating her physical conditions. The Claimant disagrees, and argues that Dr. Smith was treating her physical and mental health. Her testimony was consistent with this. Since Dr. Smith describes the Claimant's physical conditions and treatment, I am satisfied that the General Division also erred when it made this finding of fact.

[33] The decision also does not mention that the Claimant had requested a mental health referral, and that one of the reasons she failed to attend was that she had no money to pay for it. However, nothing indicates that the decision turned on this, so the failure to mention this was not an error under the DESD Act.

failure to consider that the IBS is not controlled and the impact of the Claimant's finances on her ability to control it.

[34] In addition, the Claimant argues that the General Division based its decision on an erroneous finding of fact that her IBS was not severe without regard for her evidence that the condition is not controlled despite her attempts to do so with medication, diet, etc., and the

[19] *Ibid* at para. 24

impact that her strained financial situation has on this. However, the General Division did consider the evidence on this condition. The decision states

a) That the Claimant has been diagnosed with this condition many times,[20]

b) That she never took time off work because of it although she sometimes had to adjust her workday to accommodate washroom breaks,

c) She is waiting for a further specialist appointment.

d) There is no medical evidence that this condition is disabling,[21] and

e) the evidence supports that the Claimant was able to work despite this condition.

Therefore, the General Division took into account the written and oral evidence on this issue. It weighed the evidence and reached a conclusion, which is its mandate. That the Claimant disagrees with the conclusion does not demonstrate that the General Division based its decision on an erroneous finding of fact. The appeal fails on this basis.

failure to consider MRI and nerve issues

[35] The Claimant argues, further, that the General Division erred because it failed to consider the results of an MRI and various nerve issues. The decision summarizes the written and oral evidence on this,[22] including that the Claimant testified that the neurosurgeon did not think that she was a surgical candidate based on the MRI results, and that he referred her to a physiatrist.

[36] But, the General Division then jumped to the conclusion that because the Claimant’s doctor has not made any new recommendations while she awaits the physiatry appointment her condition can be managed “as is” until some future recommendation is made.[23] There is no evidentiary basis for this conclusion. The lack of new treatment recommendations does not automatically mean that the Claimants overall condition is being adequately treated. It is equally plausible to conclude that the Claimant’s doctor has not recommended other treatments because

[20] *ibid.* at para. 12
[21] *ibid.* at para. 15
[22] *Ibid* at paras. 31-34
[23] *Ibid.* at para. 34

he is unaware of them, or because he prefers to maintain a status quo. Then the physiatrist will not have to assess whether any change in treatment has caused some of her symptoms.

[37] This finding of fact is erroneous. It is made without any evidentiary basis. The decision is based, at least in part, on the fact that the Claimant has not tried any different or additional treatment. Therefore, the General Division erred and the Appeal Division must intervene.

failure to consider the Claimant's ability to pay for treatment

[38] The Claimant argues that the General Division erred because it failed to consider that she could not pay for psychological treatment. However, the decision states that the Claimant attended at the assault centre for eight or nine months and has not had any other psychotherapy or counselling.[24] The decision does not consider the Claimant's ability to pay for therapy, but it didn't have to. The General Division does not find any fault in the Claimant's failure to attend for psychotherapy after she finished at the assault centre. No other referrals were made. Therefore, this is not an error under the DESD Act

failure to consider that the Claimant is waiting for pain management

[39] The Claimant also says that the General Division erred because it failed to consider that she is waiting for a pain management appointment. The decision states that the Claimant was waiting for an appointment with a physiatrist. It also says "This indicates there may still be an option for her chronic pain. As such, she still has not been referred to chronic pain management which is a usual recommendation for chronic pain."[25] The General Division made no error in this statement. It is not known whether further treatment recommendations will be made by the physiatrist.

failure to consider that the Claimant cannot tolerate or pay for some medication

[40] The Claimant testified that she must pay for medication first, and is later reimbursed by an extended health care plan. This impacts her ability to afford some medication. In addition, she testified that she has allergies and digestive problems that have become more prominent and

---

[24] *Ibid.* at para. 23
[25] *Ibid.* at para. 33

impact what medication she can take. However, the General Division made no findings of fact regarding this evidence. It made no error in failing to do so.

CONCLUSION

[41] The appeal is allowed because the General Division failed to observe a principle of natural justice, made errors in law and based its decision on erroneous findings of fact.

[42] The DESD Act sets out what remedies the Appeal Division can give when an appeal is allowed.[26] This appeal is referred back to the General Division for reconsideration. The Minister must be given the opportunity to answer the Claimant's full legal case. It is for the General Division to receive evidence and legal argument from the parties, weigh it, and make a decision after considering all of the evidence and arguments.

[43] To avoid any possibility of any apprehension of bias, the appeal should be reconsidered by a different General Division member.

[44] The parties may address what form the reconsideration hearing will take with the General Division.

Valerie Hazlett Parker
Member, Appeal Division

METHOD OF PROCEEDING:	On the Record
SUBMISSIONS:	W. H., Representative for the Appellant Susan Johnstone, Representative for the Respondent

[26] DESD Act s. 59(1)