



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *C. W. v Minister of Employment and Social Development*, 2019 SST 1368

Tribunal File Number: AD-19-626

BETWEEN:

**C. W.**

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: Valerie Hazlett Parker

DATE OF DECISION: November 28, 2019

## DECISION AND REASONS

### DECISION

[1] The appeal is allowed. The decision that the General Division should have given is made.

[2] The Claimant was disabled in December 2018, and is entitled to the disability pension starting in April 2019.

### OVERVIEW

[3] C. W. (Claimant) completed Grade 12 before she entered the paid workforce. In 2010 and 2011 she was in two car accidents. She returned to work afterwards, but stopped working in 2016 when she moved to Saskatoon. She applied for a Canada Pension Plan disability pension and claimed that she was disabled as a result of a number of medical conditions, including attention deficit disorder/learning disorder, chronic pain, and depression.

[4] The Minister of Employment and Social Development refused the Claimant's application. She 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 and prolonged disability before the end of her minimum qualifying period (MQP – the date by which a person must be found disabled in order to receive the disability pension). In this case, the MQP is December 31, 2018.

[5] I granted the Claimant leave to appeal the General Division decision to the Tribunal's Appeal Division because the appeal had a reasonable chance of success on the basis that the General Division based its decision on an erroneous finding of fact under the *Department of Employment and Social Development Act* (DESD Act).

[6] The Minister now concedes that the General Division made such an error when it stated that the Claimant had one day each month where her pain is so severe that she lies down and tries not to move. This is because the Claimant testified that she has only one day each month where she does not do this. The Minister requests that the appeal be allowed.

[7] The parties also ask that the Appeal Division give the decision that the General Division should have given. For the reasons set out below, I find that the Claimant became disabled in December 2018.

## ISSUES

[8] Did the General Division base its decision on an erroneous finding of fact regarding how many days each month the Claimant had to lie down and try not to move due to pain?

[9] If so, what remedy should the Appeal Division give?

## ANALYSIS

### **The General Division erred**

[10] The DESD Act governs the Tribunal's operation. It sets out the only grounds of appeal (reason for appealing) that the Appeal Division can consider. One ground of appeal is that the General Division based its decision on an erroneous finding of fact under the DESD Act.<sup>1</sup> In order for an appeal to succeed on the basis of an erroneous finding of fact, she must prove three things:

- a) that a finding of fact was erroneous (in error);
- b) that the finding was made perversely, capriciously, or without regard for the material that was before the General Division; and
- c) that the decision was based on this finding of fact.<sup>2</sup>

In this case, the finding of fact in question is that about one day a month the Claimant's pain is so severe that she lies down drying not to move.<sup>3</sup> This finding of fact was made in error because it is at odds with the Claimant's written evidence that she has constant pain all day,<sup>4</sup> and with the General Division's finding of fact that her pain is constant.<sup>5</sup> This finding of fact was made

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<sup>1</sup> DESD Act s. 58(1)(c)

<sup>2</sup> *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319

<sup>3</sup> General Division decision at para. 8

<sup>4</sup> GD2-10, GD4-1

<sup>5</sup> General Division decision at para. 8

without regard to the Claimant's written evidence. The Claimant also says that she testified at the hearing that she had constant pain every day, and that only one day each month did she not lay down and try not to move. Unfortunately, the hearing recording is no available, so this cannot be verified.

[11] The General Division decision was based, at least in part, on this finding of fact.

[12] Therefore, the General Division made an error under the DESD Act. The appeal is allowed on this basis.

**Remedy: Giving the decision that the General Division should have given**

[13] The DESD Act sets out what remedies the Appeal Division can give when an appeal is allowed.<sup>6</sup> It is appropriate for me to give the decision that the General Division should have given in this case for the following reasons:

- the DESD Act says that the Tribunal can decide questions of fact and law necessary to conclude appeals<sup>7</sup>
- the *Social Security Tribunal Regulations* require that appeals be concluded as quickly as the circumstances and considerations of fairness and natural justice permit<sup>8</sup>
- The Claimant first applied for the disability pension in 2016. Further delay would be incurred if the matter was referred back to the General Division for reconsideration
- The parties both ask that the Appeal Division should give the decision that the General Division should have given<sup>9</sup>
- The record is complete
- The issue to be decided is narrow and straightforward

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<sup>6</sup> DESD Act s. 59(1)

<sup>7</sup> DESD Act s. 64

<sup>8</sup> *Social Security Tribunal Regulations* s. 3(1)

<sup>9</sup> Appeal Division hearing recording

[14] In deciding when the Claimant became disabled I have considered the evidence, including the following:

- The Claimant says that her condition worsened in 2017
- In May 2017, the Claimant's psychiatrist wrote that the Claimant had mild to moderate depression, cannabis and cocaine use disorder, was a victim of child abuse and perhaps had a learning disorder
- In July 2017 the Claimant saw her doctor almost weekly regarding pain issues and medication treatment for this
- In August 2017 the Claimant's doctor wrote that she was able to do sedentary or supervisory jobs despite her physical limitations.
- In December 2017 the Claimant wrote that she is in constant pain all day every day, and can hardly do anything, including most household tasks<sup>10</sup>
- In December 2017 the Claimant's doctor wrote that she was not doing well; she was struggling with chronic backache, opioid dependency and depression over the last several months/years
- In January 2018, the Claimant's family doctor wrote that the Claimant was diagnosed with fibromyalgia after the 2010 car accident, and that she also has attention deficit disorder, gastroesophageal reflux disease, scoliosis, mechanical back pain, and a history of chronic abdominal pain. In addition, she was diagnosed with depression, and began to see a psychiatrist in June 2017. She also took a number of medications including narcotic pain medication and medication for depression<sup>11</sup>

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<sup>10</sup> GD2-10

<sup>11</sup> GD2-61

- In January 2019 the family doctor wrote that the Claimant's return to work date was unknown.<sup>12</sup>

[15] To be disabled under the *Canada Pension Plan* a person must have a disability that is both severe and prolonged. A disability is severe if as a result the person is incapable regularly of pursuing any substantially gainful occupation. It is prolonged if it is likely to be long continued and of indefinite duration.<sup>13</sup> Based on the written record and the parties' submissions I accept that the Claimant is disabled.

[16] I must decide when the Claimant's conditions first met the legal test to be disabled.

[17] It is clear to me that the Claimant has had significant limitations for a long time. Her chronic pain and associated symptoms began when she was in the car accidents. From the evidence it is also clear that the Claimant's condition began to worsen in 2017.

[18] I place significant weight on the family doctor's evidence. He has treated her consistently for a long time. He has prescribed medication and other treatments for all of her conditions. He acknowledged the Claimant's limitations. Despite this, he wrote in a report for the disability pension application in August 2017 that the Claimant could work in a sedentary or supervisory position at that time.

[19] Then, in January 2019 the Claimant's doctor completed another detailed form regarding her health. In this report he again summarizes the Claimant's health, and states that it was unknown when the Claimant could return to work. I am therefore satisfied that the Claimant's condition deteriorated from 2017 to 2018 such that she was unable regularly to pursue any substantially gainful occupation by January 2019. The Claimant's condition must have been severe prior to this report being completed. So, I find that the Claimant's condition became severe in December 2018.

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<sup>12</sup> GD4-6

<sup>13</sup> *Canada Pension Plan* s. 42(2)(a)

[20] The Claimant's condition is also prolonged. She has had physical and mental health conditions for a number of years. They have not improved despite treatment with medication, physical therapy or counselling. Nothing suggests that her overall condition will improve.

**CONCLUSION**

[21] The appeal is allowed.

[22] The decision that the General Division should have given is made: the Claimant began to be disabled in December 2018.

[23] She is entitled to begin to receive a *Canada Pension Plan* disability pension as of April 2019.<sup>14</sup>

Valerie Hazlett Parker  
Member, Appeal Division

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| HEARD ON:             | November 26, 2019   |
| METHOD OF PROCEEDING: | Teleconference  |
| APPEARANCES:          | C. W., Appellant<br>Nathalie Pruneau, Representative for the Respondent |

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<sup>14</sup> *Canada Pension Plan* s. 69 says that the disability pension begins to be paid four months after a person becomes disabled.