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

Citation: *R. J. v Minister of Employment and Social Development*, 2020 SST 107

Tribunal File Number: AD-19-684

BETWEEN:

R. J.

Appellant
(Claimant)

and

Minister of Employment and Social Development

Respondent
(Minister)

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: February 14, 2020

Canada

DECISION AND REASONS

DECISION

[1] I have decided to dismiss this appeal.

OVERVIEW

[2] The Claimant, R. J., has held a number of jobs over the years and last worked as a home-based medical transcriptionist in February 2017. She claims that she lost her three-month contract because hand tremors and memory loss prevented her from carrying out her duties. She is now 35 years old.

[3] In June 2017, the Claimant applied for a Canada Pension Plan disability pension, claiming that he could no longer work because of symptoms related to various medical conditions, including Crohn's disease, rheumatoid arthritis, and hypothyroidism. The Respondent, the Minister of Employment and Social Development (Minister), refused the application after determining that the Claimant's disability was not "severe and prolonged," as defined by the *Canada Pension Plan* (CPP).

[4] The Claimant appealed the Minister's refusal to the General Division of the Social Security Tribunal. The General Division held a hearing by teleconference and, in a decision dated July 21, 2019, dismissed the appeal, finding that the Claimant had failed to demonstrate that she became incapable regularly of pursuing any substantially gainful occupation during her minimum qualifying period, which ended on December 31, 2012, or during her prorated period, which ran from January 1, 2013 to August 31, 2013. The General Division based its decision, in part, on what it found was the Claimant's resistance to recommended treatment. It also found that the Claimant's background, particularly her varied work experience, positioned her well for future employment.

[5] The Claimant applied for leave to appeal from the Appeal Division, alleging errors on the part of the General Division. Last November, I granted leave to appeal because I thought the Claimant had raised an arguable case.

[6] I have now considered the parties' submissions and reviewed the file in detail. On balance, I agree with the Claimant that the General Division committed a significant error in coming to its decision. I have decided that the appropriate remedy in this case is to make my own assessment of the Claimant's work capacity and give the decision that the General Division should have given. As a result, I am overturning the General Division's decision, but I am substituting it with my own finding that the Claimant was not disabled as of the MQP or during the prorated period.

ISSUES

[7] There are only three grounds of appeal to the Appeal Division. A claimant must show that the General Division acted unfairly, interpreted the law incorrectly, or based its decision on an important error of fact.[1]

[8] The Claimant argued that the General Division made two errors when it found that she was not disabled:

(i) The Claimant alleges that the General Division regarded her varied employment as an asset in the labour market, ignoring the fact that each one of her short-lived jobs came to an end because of her impairments. In doing so, did the General Division mischaracterize the Claimant's work history?

(ii) The Claimant alleges that General Division drew a negative inference from her reluctance to take Remicade without considering her reasons for that reluctance—she had, among things, previously experienced severe reactions to steroid medications. Did the General Division find her non-compliant with treatment without taking her circumstances in account?

Having considered these arguments, I am satisfied that the General Division based its decision on an erroneous finding about the Claimant's work history and its impact on her employability.

[1] Section 58(1) of the *Department of Employment and Social Development Act.*

Since the General Division's decision falls for this reason alone, I see no need to fully address the remaining issues in this decision.

ANALYSIS

Issue 1: Did the General Division mischaracterize the Claimant's work history?

[9] One of the most striking things about the Claimant's background is her checkered work history, which has seen her leave numerous jobs after relatively brief tenures. The Claimant's representative argues that the General Division missed the obvious implications of this history and inferred from it capacity, rather than incapacity, resulting in what he described as a "complete inversion" of the evidence before it.

[10] Now that I have reviewed the record in detail, I agree with the Claimant that the General Division failed to consider her employment history in its totality.

[11] In its decision, the General Division spent considerable time detailing the Claimant's employment history:[2]

- Her early jobs were at a fast food restaurant, daycare centre, jewelry store, and several call centres. She lost all these jobs because she missed too much time at work due to flare-ups of Crohn's disease.
- In 2009, she tried working in a hotel but lasted only a few months, with multiple leaves of absence due to illness.
- In 2011, she worked in another call centre until she had a Crohn's flare-up and contracted pneumonia. She missed too much time at work and her employment was terminated before the end of her three-month probation period.
- She then found job as a receptionist and filing clerk at a hospital's health records department. She attended less than one week of training until she had a flare-up of Crohn's disease, leaving her extremely tired and down with the flu. She did not return to work.

[2] General Division decision, paras 11-17.

- By January 2012, she felt that she could no longer work outside the home. She tried to work from home in a couple of call centres, on each occasion lasting only one or two weeks due to her health problems.
- She then accepted a three-month contract to work from home as a customer service representative for an online retailer. Again, she had difficulty concentrating and missed time because of Crohn's flare-ups. Her contract was not renewed.
- At that point, she took training to be a medical transcriptionist. She worked in that field for only a few months.

I am not suggesting that the General Division ignored the specific details of the various jobs that the Claimant has held over the years, but I do think that it failed to consider her work history as a whole.

[12] When it considered the Claimant's employability, the General Division referred to her rather spotty work history in positive terms, listing it among a number of other unmistakably positive attributes. The General Division wrote, "The Claimant is very young and well-educated. She is fluent in the English language. *She has worked in a variety of jobs*, including jobs requiring her to use a computer [emphasis added]."[3] This passage leaves no doubt that the General Division regarded the Claimant's varied work history as an asset—something that would help her retrain or find a new job or adapt to new situations. However, the General Division did not attempt to address one of the Claimant's main arguments—that every one of her jobs had ended prematurely because of performance issues related to her health problems.

[13] I am satisfied that the General Division based its decision on an erroneous finding that the Claimant's series of short-lived jobs suggested ability rather than disability.

REMEDY

There are three possible ways to fix the General Division's error

[3] General Division decision, para 38.

[14] The Appeal Division has the power to address whatever errors that the General Division may have committed.[4] Under the *Department of Employment and Social Development Act* (DESDA), I can:

- confirm, rescind, or vary the General Division's decision;
- refer the case back to the General Division for reconsideration; or
- give the decision that the General Division should have given.

I also have the power to decide any question of fact or law necessary to carry out the above remedies.

[15] The Tribunal is required to conduct proceedings as quickly as the circumstances and the considerations of fairness and natural justice allow. In addition, the Federal Court of Appeal has stated that a decision-maker should consider the delay in bringing an application for a disability pension to conclusion. It has now been four years since the Claimant applied for a disability pension. If this matter were referred back to the General Division, it would only delay a final resolution.

[16] In their respective submissions, the Claimant and the Minister agreed that, if I were to find an error in the General Division's decision, the appropriate remedy would be for me to give the decision that the General Division should have given and make my own assessment of the substance of the Claimant's disability. Of course, the parties had different views on what the outcome should be. The Claimant argued that, if the General Division had properly assessed the evidence, it would have concluded that she had a severe and prolonged disability as of the MQP or during the prorated period. The Minister argued that, whatever General Division's errors, the Claimant had not met the burden of proving that she was ever regularly incapable of performing substantially gainful employment at the relevant times..

The record is complete enough to decide this case on its merits

[17] I am satisfied that the record before me is sufficiently complete to permit me to make an informed decision about the substance of this claim. The Claimant has had an opportunity to

[4] DESDA, s 59(1).

gather and submit evidence documenting her impairments. She has filed written statements arguing that she has been unable to perform substantially gainful employment since at least 2012 or earlier.

[18] Unfortunately, a recording of the General Division hearing does not exist because of a technical malfunction. Although I would have been interested to hear the Claimant's testimony, I do not feel it is necessary for me to assess her disability claim. First, there is ample medical information on file, including office notes from at least two of her treating physicians. Second, the Claimant's representative has submitted detailed narratives that describe his client's impairments and their effect on her ability to function.

[19] As a result, I am in a position to assess the evidence that was on the record before the General Division and to give the decision that it would have given, had it not erred. In my view, even if the General Division had not mischaracterized the Claimant's work history, the result would have been the same. My own assessment of the record leads me to conclude that the Claimant did not become disabled before December 31, 2012 or, alternatively, between January 1, 2013 and August 31, 2013.

The Claimant was not disabled during her coverage periods

[20] The Claimant's CPP disability coverage ended some time ago, and one of her challenges has been to show that she became disabled during the MQP or prorated period.

[21] Claimants for disability benefits bear the burden of proving that they had a severe and prolonged disability during their coverage periods. I have reviewed the record, and I have concluded that the Claimant did not meet that burden according to the test set out in the CPP. I have no doubt that the Claimant has had Crohn's disease for many years, but I simply did not find enough evidence to suggest that its symptoms prevented her regularly pursuing substantially gainful employment during the relevant periods. I based this conclusion on the following factors:

There is not enough evidence that the Claimant's condition was severe before August 31, 2013

[22] Most of the available medical evidence was prepared well after the MQP and prorated period. That by itself is not harmful to the Claimant's case, because physicians can sometimes

make retrospective assessments. However, my review of the evidence strongly suggests that the Claimant's condition was manageable before August 31, 2013 but took a turn for the worse some time afterward.

[23] The Claimant was not referred to a specialist until June 2015, when she saw a gastroenterologist. At the time,[5] Dr. Williams relayed the Claimant's complaint of chronic diarrhea (one to five bowel movements per day). A colonoscopy later showed possible "mild" inflammatory bowel disease,[6] and Dr. Williams agreed that she likely had "mild" Crohn's disease.[7] In April 2016, Dr. Williams reported that the Claimant was complaining of increased symptoms—abdominal cramps, periodic "scant" rectal bleeding, and up to 10 or 15 bowel movements per day.[8] However, this decline in the Claimant's condition occurred nearly three years after her coverage period came to an end.

[24] None of the Claimant's other conditions, alone or in combination, strike me as disabling. She has been seeing an endocrinologist since 2008, after experiencing fatigue, weight gain and hair loss. In June 2010, Dr. Dornan reported that she had been diagnosed with hypothyroidism and, once she started on Synthroid, had been generally feeling well.[9] Dr. Dornan saw her again in December 2015 about increased weight and decreased energy,[10] but by November 2017, he was reporting improvement.[11]

[25] In September 2017, the Claimant saw a neurologist for cognitive symptoms, tremors, headaches, insomnia, and chronic fatigue.[12] Dr. Kuriakose said that the Claimant had been experiencing these symptoms "for the last few years," but they apparently did not become serious enough to consult specialist about them until well after the MQP and prorated period. On examination, Dr. Kuriakose saw no signs of a tremor and speculated that it might be linked to

[5] Report dated June 2, 2015 by Dr. Chadwick Ian Williams, gastroenterologist, June 2, 2015, GD2-82.
[6] Colonoscopy report dated August 21, 2015, GD2-89.
[7] Report by Dr. Williams dated October 8, 2015, GD2-89.
[8] Report by Dr. Williams dated April 1, 2016, GD2-308.
[9] Report by Dr. John M. Dornan, endocrinologist, dated June 15, 2010, GD2-331.
[10] Report by Dr. Dornan dated December 31, 2015, GD2-95.
[11] Report by Dr. Dornan dated November 2, 2017, GD2-297.
[12] Report by Dr. Renju Kuriakose, neurologist, dated September 6, 2017, GD2-304.

anxiety. In November 22, 2017, Dr. Kuriakose relayed improvements in her tremor and headaches, although she continued to complain of mind fog, poor concentration, and fatigue.[13]

[26] The Claimant also saw a rheumatologist in September 2017 about possible inflammatory arthritis. Dr. Smith noted the Claimant's history of active Crohn's disease, as well as diffuse pain involving her knees, lower back, ankles, wrists, and hands since childhood.[14] Here, the Claimant was again reporting longstanding symptoms that had not prevented her from working previously. If those symptoms worsened, it appears that they did so after the MQP and prorated period.

[27] The Claimant's strongest evidence came from her family physician, who was presumably best positioned to assess her condition as a whole. In his July 2017 CPP Medical Report,[15] Dr. McLaughlin said that, while he had been treating the Claimant for over 17 years, he did not begin treating her main medical condition until April 2015. He listed diagnoses of Crohn's disease, inflammatory arthritis, and hypothyroidism. He said she had experienced "progressive" loose bowel movements with blood for several years. This statement confirmed that the Claimant's condition was getting worse over time, but it did not indicate whether her condition was severe during the MQP or prorated period. Dr. McLaughlin also said that the Claimant had been unable to maintain employment due to bowel urgency, frequency, and incontinence and that her attempts work from home but had difficulty with concentration and memory. Again, this statement came more than four years after the Claimant last had coverage, and I can only give it limited weight given competing evidence that her condition had deteriorated since 2013.

[28] Dr. McLaughlin later reported that the Claimant had advised him in April 2012 and February 2013 that her "troublesome bowel symptoms" were preventing her from working. He said that he had ordered upper gastrointestinal and small bowel x-rays at the time, but there was no follow-through. He later referred her to Dr. Williams. Dr. McLaughlin concluded that the Claimant had been unable to regularly pursue any gainful occupation since some time before April 2012, primarily due to abdominal pain and frequent unpredictable and difficult to control loose bowel movements.[16]

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[13] Report by Dr. Kuriakose dated November 22, 2017, GD2-296.
[14] Report by Dr. Alexa Smith, rheumatologist, dated September 8, 2017, GD2-301.
[15] CPP Medical Report by Dr. J.H. McLaughlin, family physician, dated July 11, 2017, GD2-66.
[16] Dr. McLaughlin's letter dated February 13, 2018, GD2-138.

[29] However, two years after the MQP and prorated period, Dr. McLaughlin wrote that she was capable of working from home.[17] Moreover, Dr. McLaughlin's office notes[18] reveal that the Claimant saw her family physician only four times between April 2012 and April 2015 (with apparently no visits at all for two of those years), and a marked increased in the frequency of such visits after that period. I do not doubt that the Claimant had symptoms from Crohn's disease and other conditions during the relevant period, but the evidence strongly indicates that they did not become disabling until after August 2013.

The Claimant's background and personal characteristics were not barriers to work

[30] *Villani v Canada*[19] is a leading case that requires disability to be assessed in a real world context. As of August 31, 2003, the Appellant was only 28 years old—years from the typical age of retirement and young enough to adapt to changed circumstances. She is a native-born English speaker and has a high school education. She has shown herself capable of completing post-secondary training. The Claimant undoubtedly has medical issues, but I do not see how they, seen through the lens of her personal background, would prevent her from working or retraining. My view about this is reinforced by indications that the Claimant had not done everything reasonably possible to manage her symptoms.

The Claimant did not take reasonable steps to treat her Crohn's disease

[31] Remicade is recognized as a treatment for Crohn's disease. The hearing file indicates that the Claimant was advised on numerous occasions that she should try this medication. It appears that she refused to do so more than once for reasons that I find unpersuasive.

[32] In October 2015, Dr. Williams wrote:

> I have offered advice regarding treatment. This young lady has a previous history of melanoma and for that reason I do not feel very comfortable with Azathioprine, which is known to be associated with skin cancers, Therefore, we talked about a short course of corticosteroid

[17] Dr. McLaughlin's office note dated July 31, 2015, GD2-156.
[18] Dr. McLaughlin's office notes, November 10, 2004 to January 9, 2018 GD2-152-166.
[19] *Villani v Canada (Attorney General)*, [2002] 1 FCR 130, 2001 FCA 248.

> therapy and biologics. We reviewed the risks of biologic therapy, in particular the anti-TNF therapies, Humira and Remicade. She is aware of the risks of reactivation of latent tuberculosis, lupus-like syndrome with rash and joint pains, and demyelination syndrome.[20]

The Claimant expressed an interest in treatment but put it off because she wanted to get pregnant. In April 2016, after the Claimant had reported a worsening of her symptoms, Dr. Williams again recommended "medical therapy." The gastroenterologist wrote that the Claimant had initially agreed to start treatment but had changed her mind because her mother had suffered a reaction to Remicade, and she was worried about a similar reaction interfering with her studies. Dr. Williams advised her that managing her disease with only with exercise and diet was unlikely to decrease Crohn's inflammation, and he warned her that she risked a potential worsening of her condition if she did not pursue medical therapy. In June 2017, Dr. Williams reported that the Claimant had not kept six follow-up appointments and had failed to have her fecal calprotectin levels checked. He also noted that she was still opposed to medical therapy.[21]

[33] Other treatment providers took note of the Claimant's reluctance to try Remicade. Dr. Dornan, the endocrinologist, noted that she had been advised to take Remicade, and was instead using marijuana oil to treat her condition.[22] Dr. D.D. Smith, a specialist in physical medicine and rehabilitation, reported that she was reluctant to take Remicade due to sensitivity to medication.[23] Dr. Kuriakose, the neurologist, expressed concern that the Claimant's Crohn's disease was not being treated.[24] Dr. Alexa Smith, the rheumatologist, urged the Claimant to optimize treatment for her Crohn's disease.[25]

[34] According to *Lalonde v Canada*,[26] disability claimants must mitigate their impairments by following their treatment providers' recommendations. *Lalonde* also requires decision-makers to consider whether a claimant's refusal of recommended treatment is unreasonable and, if so, what impact that refusal is likely to have on the claimant's disability status. Even if it has been established that a claimant did not submit to recommended treatment, the decision-maker must

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[20] Dr. Williams' report dated October 8, 2015, GD2-91.
[21] Dr. Williams' report dated June 8, 2017, GD2-308.
[22] Dr. Dornan's reports dated June 22, 2017 (GD2-74) and November 2, 2017 (GD2-297).
[23] Report by Dr. D.D. Smith, specialist in physical medicine and rehabilitation, dated October 13, 2016, GD2-98.
[24] Dr. Kuriakose's report dated November 22, 2017, GD2-296.
[25] Dr. A. Smith's report dated September 8, 2017, GD2-301.
[26] *Lalonde v Canada (Minister of Human Resources and Development)*, 2002 FCA 211.

still conduct an inquiry into whether there was some good reason for that omission and give fair consideration to the effect of the omission on the claimant's capacity.

[35] The Claimant has offered various explanations for her reluctance to take Remicade, but I find none of them reasonable. She testified that she had suffered side effects to steroids in the past, but Remicade is not a steroid. She pointed to an increased risk of cancer, but the passage quoted above shows that Dr. Williams specifically considered that risk when he recommended his treatment plan. Her mother might have had an adverse reaction to Remicade, but the Claimant herself was not necessarily destined to have a similar experience. It is difficult to understand why the Claimant would not have been willing at least to try Remicade for a trial period to see what kind of effect it produced.

[36] It is reasonable to assume that Dr. Williams, who specializes in the treatment of Crohn's disease, would not have recommended Remicade as strongly as he did unless he were satisfied that its potential benefits significantly outweighed its potential risks. Based on Dr. Williams' remarks, I am satisfied that Remicade was likely to produce a clinical benefit. How much of a benefit is unknown, since the Claimant chose not to follow medical advice that might have made a difference.

The Claimant's work history is not by itself evidence of disability

[37] The Claimant argues that her irregular employment history supports her claim that her medical conditions prevent her from working. I agree that such pattern is sometimes an indicator of disability, particularly where it occurs toward the end of a working career, but it is not conclusive. Not everyone with a health problem who has difficulty finding and keeping a job is entitled to a disability pension.

[38] In this case, the evidence indicates that the Claimant has never held a long-term job. Her record of earnings show that her annual income exceeded the substantially gainful threshold in only five years,[27] and even then it never exceeded $8,000. In the last decade, the Claimant has held the following jobs:

[27] Record of Earnings, GD2-48.

- X Hotel – a few months in 2009;
- X call centre – three months in 2011;
- X records department – one week in January 2012;
- X Telecommunications – 35 hours in March and April 2012;
- X – three months between October 2012 and January 2013;
- X – a few weeks starting November 2013;
- X – one month in July and August 2014;
- X – two weeks in March 2015; and
- X medical transcription – three months starting November 2016.[28]

[39] The Claimant's attempts to remain in the labour market are admirable, but a series of short-lived jobs is not by itself evidence of disability. There are any number of reasons why someone leaves a job besides illness or impairment. The Claimant insists that poor health repeatedly forced her off the job. She maintains that, in every instance, she either resigned or was fired because she could not manage the essential tasks of her employment. The available evidence shows that the Claimant quit jobs on several occasions, although the precise cause was not always clear. Records from the time do show that illness was often cited as a reason for her departure, although there were at least two occasions when she was let go because of a shortage of work.[29]

[40] Whatever the cause of the Claimant's inability to keep a job, it is overshadowed by two factors that I have already discussed. First, there is the lack of convincing medical evidence that the Claimant's impairments were severe in 2012 and for some time after. Second, and more important, is the Claimant's refusal to try an effective treatment for her main condition when it took a turn for the worse in 2015. It is reasonable to speculate that the Claimant might have been able to work longer and more effectively if she had done more to address her Crohn's symptoms.

There is insufficient evidence of a prolonged disability

[41] Since I have found that the Claimant's impairments did not become severe before December 31, 2012 or between January 1, 2013 and August 31, 2013, I do not need to consider

[28] Claimant's written submissions to General Division (GD3) and Appeal Division (AD3), various records of employment, GD4-143-48.
[29] GD4-145, GD4-152.

whether her disability was also prolonged. However, even if I had found the Claimant to have a severe disability, I would still be doubtful that it was also "long continued or of indefinite duration."[30] Again, the difficulty lies with Claimant's lack of compliance with a recommended treatment. Since the Claimant has never tried Remicade, I could not be certain that there was no scope for the Claimant's condition to improve.

CONCLUSION

[42] I am dismissing this appeal. While the General Division erred by mischaracterizing the Claimant's work history, my own review of the evidence does not persuade me that she had a severe and prolonged disability as of the MQP or during the prorated period.

Member, Appeal Division

HEARD ON:	January 23, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. J., Appellant Duncan Allison, representative for the Appellant Viola Herbert, representative for the Respondent

[30] This is the test for "prolonged" under section 42(2)(a) of the CPP.