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

Citation: *M. V. v Minister of Employment and Social Development*, 2020 SST 109

Tribunal File Number: AD-19-439

BETWEEN:

M. V.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: February 14, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] M. V. (Claimant) applied for a Canada Pension Plan disability pension in 2006 and claimed that she was disabled by mental health illness, including bipolar disorder and borderline personality disorder. She also has back problems.

[3] The Minister of Employment and Social Development granted the application and the Claimant began to receive the disability pension.

[4] The Claimant worked over the next few years, but her jobs did not last long. The Minister decided that these jobs were failed work trials and did not change the Claimant's entitlement to the pension.

[5] The Claimant obtained a job in 2013 as a registered care aide. She worked until 2016, and also did some care work for an individual in 2016 and 2017. The Minister of Employment and Social Development later investigated, and decided that the Claimant was no longer entitled to the disability pension as of September 2013, and that she should repay any overpayment of the disability pension that resulted from this.

[6] The Claimant appealed the Minister's decision regarding her ceasing to be disabled and the overpayment to the Tribunal. The Tribunal's General Division dismissed the appeal. It decided that the Claimant ceased to be disabled in September 2013.

[7] Leave to appeal the General Division's decision to the Tribunal's Appeal Division was granted because the appeal had a reasonable chance of success on the basis that the General Division made an error in law. However, after considering the General Division decision and the entire written record the appeal is dismissed. The General Division made no error in law and did not base its decision on any important factual error.

PRELIMINARY MATTERS

[8] The hearing of this appeal was first scheduled for September 19, 2019. Both the Claimant and the Minister's representative attended the teleconference. At that time the Claimant stated that she was homeless and needed help with the appeal. The parties' therefore agreed to adjourn the hearing to January 22, 2020.

[9] The Claimant assured the Tribunal Member that if documents were sent to her by regular mail or email at the addresses she had provided to the Tribunal she would get them.

[10] The Claimant did not attend the hearing on January 22, 2020 although notice of this hearing was sent to her at the addresses she provided. At that time, the Minister's representative stated that she relied on her written submissions, and had no oral submissions to make.

[11] The Tribunal gave the parties additional time to file written submissions. Notice of this was sent to both parties. The Claimant did not file any further submissions, although she phoned the Tribunal on the day the submissions were due to inquire about her case. Tribunal staff reminded her that written submissions were due that day. The Claimant did not request additional time to file submissions or a further oral hearing.

[12] The *Social Security Tribunal Regulations* state that the Tribunal may proceed with a hearing in a party's absence if it is satisfied that the party received notice of the hearing.[1] I am satisfied that the Claimant had notice of the January 2020 hearing, and of the opportunity after that date to file further written submissions. The appeal therefore proceeds.

[13] The appeal is decided based on the documents filed with the Tribunal.

ISSUES

[14] Did the General Division make an error in law when it decided that the Claimant's 2013 to 2016 work was substantially gainful?

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[1] *Social Security Tribunal Regulations* s. 12(1)

[15] Did the General Division base its decision on at least one of the following important factual errors?

a) That the Claimant requested that her doctor write that she could return to work; or

b) Regarding whether the Claimant told the Minister that she had returned to work.

ANALYSIS

[16] The *Department of Employment and Social Development Act* (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. Instead, I must decide whether the General Division:

a) Failed to provide a fair process;

b) Failed to decide an issue that it should have, or decided an issue that it should not have;

c) Made an error in law; or

d) Based its decision on an important factual error.[2]

[17] The Claimant says that the General Division made and error in law and based its decision on important factual errors. Her arguments are examined below.

Error in law

[18] One ground of appeal that the Appeal Division can consider is whether the General Division made an error in law. Under the *Canada Pension Plan* a person has a severe disability it as a result they are incapable regularly of pursuing any substantially gainful occupation. This is correctly set out in the General Division decision.[3] The decision also correctly states that the Canada Pension Plan Regulations contain a mathematical calculation to decide whether earnings are substantially gainful.[4] The General Division considered the Claimant's earnings from all

[2] This paraphrases the grounds of appeal set out in s. 58(1) of the DESD Act
[3] General Division decision at para. 7
[4] *Ibid.* at para. 12

sources in 2013 to 2017 and decided that they met the mathematical threshold to be substantially gainful.[5]

[19] The Pension Appeals Board has also decided that the term "substantially gainful occupation" includes occupations where the income earned is not merely nominal, token or illusory compensation, but compensation that reflects the appropriate reward for the nature of the work performed.[6] The General Division considered the Claimant's testimony about her employment as a health care aide, including that she was not "written up" by the first owners of the company, but was "written up" regarding her conduct beginning in 2016 when there were new owners.[7] The General Division concluded that performance expectations were not changed for the Claimant, and that she was not accommodated by the employer. These are factors to be considered when deciding whether a job is a substantially gainful occupation.

[20] The General Division decision does not indicate whether the Claimant's wages were different than others in her position. However, there was no evidence presented on this. The General Division is not to be faulted for failing to consider something for which there is no evidence.

[21] When the General Division decision is considered as a whole, it examined the factors other than the Claimant's income that are relevant to deciding whether a job is a substantially gainful occupation. The General Division made no error in law. The appeal fails on this basis.

Important factual errors

[22] Another ground of appeal that the Appeal Division can consider is whether the General Division based its decision on an important factual error. To succeed on this basis, the Claimant must prove three things:

a) That a finding of fact was erroneous (in error);

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[5] *Ibid*. at paras. 12, 13
[6] *Poole v The Minister of Human Resources Development*, CP20748, 2003; G.T. v. MHRSD 2013 SSTAD5
[7] *Ibid.* at para. 15

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.[8]

[23] The Claimant presents two grounds of appeal in this regard. First, she argues that the General Division's finding of fact that she requested that the doctor write that she could return to work[9] was an important factual error. However, there is an evidentiary basis for this finding of fact. The General Division refers to the doctor's note that states, "Subject: came in as a walk-in patient, history of bipolar mood disorder and currently taking lithium as a mood stabilizer, she told me need a form to be filled for return to work as she need for her work place."[10] From this it is reasonable to infer that the Claimant requested that the doctor write that she could return to work. The appeal fails on this basis.

[24] Second, the Claimant argues that the General Division's finding of fact that the Claimant failed to tell the Minister of her return to work was an important factual error. However, the General Division considered all of the evidence on this issue.[11] The decision states that there was conflicting evidence on this – the Claimant said that she had told the Minister twice that she had returned to work, and the Minister had no record of this. The General Division weighed this evidence to reach its decision. There was an evidentiary basis for it finding of fact. That the Claimant disagrees with this is not enough for the appeal to be allowed. The appeal fails on this basis.

CONCLUSION

[25] The General Division did not make any errors in law.

[26] I have read the General Division decision and the written record. The General Division did not overlook or misconstrue any important information. It did not base its decision on any important factual error.

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[8] *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319
[9] General Division decision at para. 18
[10] GD2-110
[11] General Division decision at paras. 23 to 26

[27] There is no indication that the General Division failed to provide a fair process.

[28] Therefore, the appeal must be dismissed.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	January 22, 2020
METHOD OF PROCEEDING:	On the Record
SUBMISSIONS:	Susan Johnstone, Representative for the Respondent