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

Citation: *T. G. v Minister of Employment and Social Development*, 2020 SST 101

Tribunal File Number: AD-19-783

BETWEEN:

T. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: February 12, 2020

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

[2] Although the General Division made an error by basing its decision on an important factual error made without regard for all of the evidence that was before it and made an error in law, when all of the evidence is considered, I reach the same conclusion: the Claimant's disability is not severe under the *Canada Pension Plan*.

OVERVIEW

[3] T. G. (Claimant) completed high school and obtained post-secondary diplomas in secretarial and computer programming. She worked for many years, with her last job as a part-time sales associate in a clothing store. She stopped working in 2016 because of back and leg pain. In 2017, the Claimant applied for a Canada Pension Plan disability pension and claimed that she was disabled by her spinal condition.

[4] 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. It decided that the Claimant did not have a severe disability. Leave to appeal this decision to the Tribunal's Appeal Division was granted on the basis that the General Division may have erred by not considering the Claimant's family doctor's evidence. The Appeal Division must intervene on this basis. However, after considering all of the evidence, I reach the same conclusion: the Claimant's disability is not severe. The appeal is dismissed.

PRELIMINARY MATTER

[5] The Claimant represented herself at the General Division hearing. The Minister did not attend that hearing.

[6] At the Appeal Division hearing, I learned that while the Minister had obtained a copy of the recording of the General Division hearing, the Claimant had not. Therefore, a copy of the

recording was sent to the Claimant and she was given an opportunity to make additional written submissions based on this. She wrote that she had no further submissions to make.

GROUNDS OF APPEAL

[7] 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.[1]

The Claimant says that the General Division based its decision on two important factual errors and made an error in law. These arguments are examined below.

ISSUES

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

a) It failed to consider Dr. Knox's evidence;

b) It failed to consider the Physiotherapist's evidence; or

c) It failed to consider that the Claimant's finished her education many years ago?

[9] Did the General Division make an error in law because it failed to give sufficient reasons for its decision?

[1] This paraphrases the grounds of appeal set out in s. 58(1) of the DESD Act

ANALYSIS

[10] One ground of appeal under the DESD Act is that 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);

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.[2]

Failure to consider medical evidence

[11] First, the Claimant says that the General Division based its decision on an important factual error because it failed to consider medical evidence that supported her legal position.

[12] Dr. Knox is the Claimant's family physician. He has treated the Claimant for a long time. He prepared the medical report that accompanied the Claimant's application for the disability pension.[3] In this letter he states that as a result of a disc herniation the Claimant has difficulty standing, walking, bending, lifting and twisting, and that she was completely disabled at that time.[4] His November 2018 notes state that the Claimant could walk around the grocery store but no further, and that she was referred back to the neurosurgeon for reassessment.[5]

[13] The Claimant's physiotherapist wrote that overall there had been some improvement in the Claimant's condition after back surgery, that she can do more of her regular activities of daily living with pacing and frequent breaks, that she requires frequent rests to keep her symptoms at a manageable level, and that she was not ready to function in a work environment.[6]

[14] The Claimant argues that none of this evidence is referred to in the General Division decision, which shows that it was not considered by the General Division. Accordingly, she says,

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[2] *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319
[3] GD2-75
[4] GD2-79
[5] GD3-12
[6] GD6-2

the General Division's conclusion that the Claimant was not disabled was made without regard for all of the evidence that was before it.

[15] The General Division is presumed to have considered all of the evidence that has been presented. It is not necessary for the General Division to mention every piece of evidence in its written decision.[7] However, in this decision, the General Division makes no mention of any evidence that does not support its conclusion. It does not refer to any of Dr. Knox's opinions regarding the Claimant's capacity to work. It also fails to mention the physiotherapist's opinion on this. Rather, it relies on the fact that none of the neurosurgeon's reports say anything about the Claimant's capacity to work.[8]

[16] The Federal Court teaches that when a decision maker fails to mention important evidence that points to a conclusion contrary to her decision, it is possible to infer that this contradictory evidence was overlooked.[9] Because no mention is made of this medical evidence, no explanation is given for disregarding this evidence, and the General Division relies on the neurosurgeon not having said anything about the Claimant's capacity to work I am satisfied that the General Division based its decision on an erroneous finding of fact made without regard for all of the evidence that was before it.

[17] The Minister argues that the General Division must have considered all of Dr. Knox's evidence because it makes reference to one of his clinical notes in a footnote to the decision. However, this reference to the doctor's note is with respect to pain being the Claimant's main complaint, not her capacity to work. Therefore, this argument fails.

[18] The Appeal Division must intervene because the General Division based its decision on

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[7] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.
[8] General Division decision at para. 19
[9] *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667

an important factual error without considering all of the medical evidence.

The Claimant's education

[19] Second, the Claimant says that the General Division based its decision on an important factual error regarding her having transferrable skills.

[20] The Claimant completed Grade 12 and obtained two college diplomas, in secretarial and computer programming. Her recent work experience was in the retail sector, using different skills. The General Division decision states that while the Claimant may be unable to return to a retail sales job which requires lifting and being on her feet for long periods, she has transferrable skills for more suitable work or retraining.[10] The Claimant argues that the finding of fact that she has transferrable skills was erroneous and was made without considering that her computer skills are limited and she obtained this training approximately 30 years ago. As such, she argues, she does not have transferrable skills.

[21] The appeal fails on this basis. The General Division did not find as fact that the Claimant had skills that could immediately be transferred to a different job, but that her educational history shows that she could succeed in an academic or retraining setting.[11] There is an evidentiary basis for this finding of fact. It was not made in error.

Sufficiency of reasons

[22] Another ground of appeal is that the General Division made an error in law. Providing insufficient reasons for a decision can be such an error.

[10] General Division decision at para. 21
[11] *Ibid.*

[23] The Supreme Court of Canada teaches that a decision maker's written reasons need not be perfect. They must allow the reader to understand what decision was made, why it was made, and permit appellate review of the decision.[12] In addition, where there are significant inconsistencies or conflicts in the evidence that are not addressed in the decision, the contradictory evidence relates to a key issue, and the record does not otherwise explain the decision in a satisfactory way, the decision maker has made an error in law.[13]

[24] In this case, the evidence was not clear about the Claimant's capacity to work. The family doctor and physiotherapist both wrote that the Claimant could not work at the time of their reports. The Claimant testified that she was incapable of working because of her pain and limitations. The General Division did not address the differences in the evidence. It gave no reasons for giving no weight to the evidence that was contrary to its decision.

[25] Therefore, the General Division's reasons were insufficient. The Appeal Division must intervene on this basis also.

REMEDY

[26] The DESD Act sets out what remedies the Appeal Division can give when it intervenes.[14] It is appropriate for the Appeal Division to give the decision that the General Division should have given in this case. The record is complete. The legal issue to be decided is clear and straightforward. Both parties asked that the Appeal Division give the decision that the General Division should have given, and made submissions on the merits of the disability claim.

The evidence

[27] I have read the documents filed with the Tribunal and listened to the recording of the General Division hearing. The facts are summarized as follows:

- The Claimant was born in 1967

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[12] *Newfoundland and Labrador Nurses Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62
[13] *R. v. Sheppard* 2002 SCC 26 at para. 28
[14] DESD Act s. 59(1)

- the Claimant completed Grade 12 and obtained college diplomas in secretarial and computer programming.

- The Claimant worked in a secretarial position and a data entry position for a short time shortly after she obtained these diplomas.

- The Claimant then stayed home to raise her family.

- When the Claimant returned to the paid workforce, she worked in the retail sector.

- The Claimant last worked in retail sales part-time from 2012 to 2016.

- The Claimant had a fairly significant disc herniation. Surgery was performed to correct this in March 2017.

- After surgery, the Claimant no longer needed a walker.

- The Claimant continues to have constant back pain, and tingling in her left foot. This makes her unsteady on her feet. She does little housekeeping, and requires frequent breaks to wash dishes or prepare a meal.

- The Claimant can sit for approximately 30 minutes, cannot bend, and cannot walk for longer than it takes to complete grocery shopping.

- Although the Claimant has been prescribed medication for pain, she prefers not to take this. She takes over-the-counter medication when needed.

- The Claimant was referred to a doctor for epidural or nerve block injections, but did not attend because she could not travel to see him due to her pain. She is to see a pain specialist closer to her home.

- The Claimant’s family doctor wrote in February 2019 that the Claimant continued to have pain in her back, and left leg. The pain increases with any activity including

physiotherapy or activities such as walking slowly on the treadmill for 5 minutes and doing arm exercises. Her foot is continuously either numb, cold or painful.[15]

- The Claimant testified that she has been unable to change/increase her physiotherapy exercises during the last year because of her pain.

- The minimum qualifying period is December 31, 2018.

Analysis

[28] 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 it makes the person incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is long continued and of indefinite duration.[16] The Claimant must prove that she was disabled before the end of the minimum qualifying period, which is December 31, 2018, to receive the disability pension.

[29] To decide whether a person is disabled, I must consider all of the written and oral evidence. The Claimant testified in a straightforward and honest manner. Her answers to questions were consistent with what she wrote in her application for the disability pension. The Claimant's family doctor and physiotherapist were also consistent in their written evidence about the Claimant's condition, treatment and her limitations. I placed significant weight on this evidence.

[30] The Claimant has ongoing pain and limitations from her herniated disc. As a result, when she stopped working she required a walker to move around. She could not complete her duties as a part-time retail sales associate, including standing, lifting, and bending.

[31] The Claimant had back surgery in March 2017. Her condition improved after this. She no longer requires a walker. However, she continues to be limited. She cannot wash a sink full of dishes or prepare a meal without taking breaks. She can walk/stand only long enough to get groceries. She cannot lift or bend to accomplish tasks. She does not do much housekeeping.

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[15] GD3-13
[16] *Canada Pension Plan* s. 42(2)(*a*)

[32] The family doctor wrote a number of letters that are in the written record. In August 2017, he wrote that he would provide a note for the Claimant to stay off work for another three months.[17] In March 2019, he wrote "for now [the Claimant] is unable to return to work in any capacity".[18] He did not write that she had no capacity to return to work at all.

[33] The Claimant's physiotherapist wrote that the Claimant improved after surgery but was not ready to function in a work environment.[19] This opinion also does not preclude any work at any time.

[34] The surgeon made no comment on the Claimant's capacity to work.

[35] It is for the Tribunal, not the medical professionals, to decide whether the Claimant is incapable regularly to pursue any substantially gainful occupation. So while this evidence is helpful, it is not determinative of the legal issue in this appeal.

Mitigation

[36] The Claimant's family physician has prescribed medication for the Claimant's pain. The Claimant testified that she has not taken this, but uses over-the-counter pain killers on occasion (she testified that she takes this medication "a handful of times" each month).[20] She has not followed this treatment recommendation because she does not want to become dependant on medication, and is concerned that if her pain is masked she might cause further injury.

[37] The Federal Court of Appeal teaches that I must consider whether the Claimant's failure to follow this treatment recommendation was reasonable and what impact the failure to follow it has on her disability status.[21] While I appreciate that the Claimant does not wish to become dependant on pain medication, her failure to try the prescribed medication was not reasonable. There is no indication that the Claimant's condition will worsen if she is more active or takes

[17] GD2-70
[18] GD3-2
[19] GD6-2
[20] General Division hearing recording approximate minute 27:30
[21] *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211

prescribed pain medication. In fact, the Claimant attended physiotherapy to increase her functioning.

[38] In addition, the Claimant was referred to a pain doctor for epidural or nerve block injections. She did not attend because of the distance that she would have to travel. This is reasonable. However, the Claimant is now waiting for an appointment with a different doctor for the same treatment.

[39] It is realistic to expect that the Claimant's pain condition would improve with further treatment by medication, injections or other treatment from a pain specialist.

[40] The Federal Court of Appeal also teaches that when deciding if someone is disabled, I must also consider their personal characteristics, including their age, education, language skills, and life and work experience.[22] The Claimant was 51 at the minimum qualifying period. This is not near the customary age of retirement. She has a post-secondary education. She is fluent in English. Her work experience is in physically active jobs including retail sales and housekeeping. These skills could not be transferred to a sedentary job.

[41] I must also consider whether the Claimant could retrain. Her computer and secretarial skills are dated. The Claimant testified that she uses the computer only for Facebook and that others conduct internet searches for her. This could make finding a job more difficult but would not preclude her from all work or retraining.

[42] The Claimant also testified that she can sit for approximately 30 minutes without discomfort. However, this could change with better pain management.

[43] I find that the Claimant has some capacity regularly to pursue sedentary work or retraining.

[44] The Federal Court also teaches that where there is evidence of some work capacity a claimant must show that they could not obtain or maintain work because of their health

[22] *Villani v. Canada (Attorney General)*, 2001 FCA 248

condition.[23] The Claimant has not made any efforts to work since her back surgery. She has not complied with this legal requirement.

[45] For these reasons I find that the Claimant does not have a severe disability at defined in the *Canada Pension Plan*.

[46] Because I have decided that the Claimant's disability is not severe, there is no need for me to consider whether it is prolonged.

CONCLUSION

[47] The appeal is dismissed.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	January 21, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	T. G., Appellant Nick Romano, Representative for the Appellant Hilary Perry, Counsel for the Respondent

[23] *Inclima v. Canada (Attorney General)*, 2003 FCA 117