



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. D. v Minister of Employment and Social Development*, 2020 SST 172

Tribunal File Number: AD-19-852

BETWEEN:

S. D.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: March 2, 2020

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] S. D. (Claimant) moved to Canada after completing her education. She worked as a seamstress for approximately 13 years, then left the paid workforce to raise her family. She later returned to work as a cleaning technician for a flood and fire restoration company.

[3] In 2013, the Claimant was in a car accident and had soft tissue injuries. She did not return to work after this. She applied for a Canada Pension Plan disability pension and claimed that she was disabled by a number of conditions, including back, neck, shoulder and left foot pain, headaches, right-hand numbness, anxiety, depression and high blood pressure.

[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's disability was not severe.

[5] Leave to appeal this 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 failed to provide a fair process because of problems with the interpretation provided at the General Division hearing. However, after reading all of the documents filed with the Appeal Division, listening to relevant portions of the General Division hearing recording and considering the parties' submissions, the appeal is dismissed. The General Division made no errors under the DESD Act.

ISSUES

[6] Did the General Division fail to provide a fair process at the hearing because of problems with interpretation?

[7] Did the General Division make an error in law when it considered whether the Claimant had “work capacity” instead of “capacity regularly to pursue any substantially gainful occupation”?

[8] Did the General Division make an error in law by failing to consider the totality of the Claimant’s conditions?

[9] Did the General Division make an error in law by failing to make a credibility finding about the Claimant?

[10] Did the General Division base its decision on an important factual error regarding Dr. Khan’s opinion about the Claimant’s work capacity?

ANALYSIS

[11] 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’s grounds of appeal are examined in this context below.

Interpretation problems

[12] One ground of appeal that the Appeal Division can consider is whether the General Division failed to provide a fair process. A fair process means that each party should have the

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

opportunity to present their legal case to the Tribunal, to know and answer the other party's legal case, and to have a decision made by an impartial decision maker based on the law and the facts.

[13] The Claimant says that the General Division failed to provide a fair process because the interpretation provided at the hearing was substandard. The Tribunal has considered this issue and provides guidance.² It follows the teaching of the Federal Court, which says that a person should raise issues with interpretation at the first reasonable opportunity, and that the failure to do so is an implied waiver of this concern.³

[14] The Minister argues that the Claimant should have raised all of her concerns about the interpretation at the hearing, and because this was not done, she has waived her right to do so. However, the Claimant did raise a concern during the hearing. It was addressed by the Member when it was raised. Therefore, the Claimant did not waive this concern.

[15] Tribunal and Court decisions also teach that interpretation is presumed to meet the standard required.⁴ Therefore, the Claimant must prove that it did not. Interpretation need not be perfect. The Supreme Court of Canada teaches that interpretation must be continuous, precise, impartial, competent and contemporaneous. Precise means that the interpretation should reflect the evidence given without any improvement of form, grammar or any other embellishment. Competent means that the quality of the interpretation must be high enough to ensure that justice is done and seen to be done.⁵

[16] The Claimant says that the General Division failed to provide a fair process because the interpreter did not properly translate her answers to questions at the hearing. She points to five examples of this in the General Division hearing recording. On one of these occasions, the Claimant's representative told the General Division member that there appeared to be a problem with the interpretation of an answer to a question. The General Division member allowed the Claimant's representative to ask the question again and the answer was fully translated. After this, the General Division member asked the representative if there were any more questions and

² *S.N. v. Minister of Employment and Social Development*, 2018 SST 155

³ *Ibid.* citing *Nsengiyumva v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 190

⁴ *S. N.* above

⁵ *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 17118

the representative said that her questioning was finished. Therefore, any issues with interpretation at this point in the hearing were resolved.

[17] The Claimant also says that the interpreter only summarized the Claimant's testimony and did not translate every word of it. As examples, she points to the following:

- a) Once, the English translation of the Claimant's testimony was much shorter than what was said in Punjabi.⁶ However, the fact that the answer was shorter in English is not proof that the statement was not properly translated. An answer could have been shorter simply because fewer words were required in English than in Punjabi to say the same thing.
- b) On another occasion it appears that the interpreter and the Claimant had a short conversation in Punjabi before he translated the Claimant's response to a question into English.⁷ The Claimant argues that this shows that the interpreter was either not clear about what the Claimant said, or told the Claimant that she had not answered the question. However, what actually happened is not known. It is equally possible that the interpreter asked the Claimant for clarification of something to ensure that the translation was accurate. The Claimant is speculating about this.
- c) On another occasion, the Claimant says the interpreter answered the question about how often the Claimant went to temple before translating the question for the Claimant.⁸ This is certainly unusual. However, the Claimant does not argue that the answer given was incorrect or inaccurate.
- d) In addition, the Claimant says that the interpreter used the English word "question" when speaking to the Claimant after she answered the question in Punjabi.⁹ The Claimant asks the Appeal Division to infer from this that the interpreter was telling

⁶ General Division hearing recording at approximate minute 58:29

⁷ General Division hearing recording at approximate minute 38:00

⁸ General Division hearing recording approximate minute 53:39

⁹ *Ibid.* at approximately 1:00:00

the Claimant that she had not answered the question. Again, however, this is speculation by the Claimant, with no evidence to support it.

[18] The Claimant has speculated about some things that the interpreter said during the hearing. She has not established that the interpretation provided was not precise and competent. The appeal fails on this basis.

Work capacity

[19] Another ground of appeal that the Appeal Division can consider is whether the General Division made an error in law. The Claimant says that it did so because it used the wrong legal test to decide that the Claimant's disability was not severe. Under the *Canada Pension Plan*, a disability is severe if it makes a person incapable regularly of pursuing any substantially gainful occupation. This is correctly set out in the decision.¹⁰ The decision also states that this means that the disability prevents the Claimant from earning a living at any type of job,¹¹ which is also correct. This demonstrates that the General Division was considering whether the Claimant was incapable regularly of pursuing any substantially gainful occupation.

[20] The General Division decision does refer to the Claimant's work capacity. In doing so, it followed the Federal Court's teaching that where there is evidence of work capacity a claimant must prove that they could not obtain or maintain employment because of their health condition.¹² The decision states, "If [the Claimant] had tried lighter, sedentary work and failed, that might have persuaded me her condition was severe despite what the medical evidence showed."¹³

[21] Having work capacity and being incapable regularly of pursuing any substantially gainful occupation are not the same.¹⁴ The Minister's argument that they are fails.

[22] Therefore, the appeal fails on this basis.

¹⁰ General Division at para. 7

¹¹ *Ibid.*

¹² *Inclima v. Canada (Attorney General)*, 2003 FCA 117

¹³ General Division decision at para. 29

¹⁴ *Villani v. Canada (Attorney General)*, 2001 FCA 248

Totality of the Claimant's condition

[23] The Federal Court of Appeal also teaches that the General Division must consider the totality of a Claimant's condition, and not just their main impairments.¹⁵ The General Division did this. It listed all of the Claimant's conditions¹⁶ and described their impact on her daily functioning.¹⁷ It also examined the medical evidence, which showed that the Claimant had some work capacity in spite of her numerous medical conditions.¹⁸ The General Division weighed all of the evidence to reach its decision. This is what the General Division is to do. The appeal fails on this basis.

Credibility finding

[24] The Claimant argues that the General Division made another error in law. She says that the Federal Court teaches that when a disability claim is based on chronic pain, the General Division must make a finding regarding the Claimant's credibility. She relies on the *Garvey* decision of for this.¹⁹ However, this decision does not say this. Rather, regarding chronic pain, the decision says

Proof that a claimant suffers from chronic pain syndrome does not automatically mean that a claimant is entitled to disability benefits under the *Canada Pension Plan* or that the lack of medical evidence to support a claimed disability must be disregarded. Rather, entitlement to disability benefits depends on whether a claimant meets the definition of disability set out in section 42 of the *Canada Pension Plan*, which requires consideration of whether the claimed disability is severe and prolonged.²⁰

[25] While it may be that credibility is a factor to be considered in chronic pain cases, a credibility finding is not necessary to decide whether someone with chronic pain is disabled under the *Canada Pension Plan*.

[26] The General Division made no error in this regard. This ground of appeal also fails.

¹⁵ *Bungay v. Canada (Attorney General)*, 2011 FCA 47

¹⁶ General Division decision at para. 4

¹⁷ *Ibid.* at paras. 9-14

¹⁸ *Ibid.* at para. 25

¹⁹ *Garvey v. Canada (Attorney General)*, 2018 FCA 118

²⁰ *Ibid.* at para. 12

Important factual errors

[27] Last, the Claimant says that the General Division based its decision on important factual errors. In order to succeed on this basis, the Claimant must prove three things:

- a) that a finding of fact was made 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.²¹

[28] The Claimant says that the General Division based its decision on four such errors

Dr. Khan's opinion

[29] First, the Claimant says that the General Division based its decision on an important factual error when it stated that Dr. Khan meant that there were no psychological barriers preventing the Claimant from working.²² The General Division summarized Dr. Khan's report²³ in the preceding paragraph of the decision. It states, correctly, that Dr. Khan told the Claimant that rather than consuming herself with her physical complaints she should do some exercise, yoga and meditation, and "if she wants to consider another job if she was physically capable".²⁴

[30] It is reasonable to conclude from this that the Claimant did not have any psychological barriers to working, which is what the General Division did. There is an evidentiary basis for this finding of fact. Therefore, it was not made in error and the appeal fails on this basis.

[31] Second, the Claimant also argues that the General Division should have considered Dr. Khan's later report, where he wrote that over the years he had known the Claimant she has struggled with severe anxiety, and on and off depressive episode.²⁵ The General Division decision does not refer to this report. However, it is presumed to have considered all of the

²¹ *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319

²² General Division decision at para. 23

²³ Found at GD2-241

²⁴ *Ibid.* quoted in General Division decision at para. 22

²⁵ GD2-269

evidence that was before it, and need not recite every single piece of evidence that is presented.²⁶ In addition, this report is dated approximately two years after the Minimum Qualifying Period (the date by which a claimant must prove that they are disabled in order to receive the disability pension), so its relevance is limited. Therefore, the failure to specifically mention this report does not rebut the presumption that the General Division considered it.

[32] Therefore this ground of appeal fails.

Ms. Tong's evidence

[33] The Claimant also argues that the General Division based its decision on an important factual error because it failed to reconcile Ms. Tong's (occupational therapist) evidence that the Claimant had psychological limitations that affected her functioning²⁷ with its finding that she had no psychological barriers to working. However, the General Division decision summarizes both Dr. Khan's and Ms. Tong's evidence.²⁸ Ms. Tong did not perform any psychological tests or provide any mental health treatment to the Claimant. The report in question refers to the Claimant meeting her psychiatrist (Dr. Khan) monthly. The General Division weighed all of the evidence before it. It placed greater weight on Dr. Khan's evidence about the Claimant's mental illness. The General Division's mandate is to weigh the evidence to reach a decision. It made no error in doing so.

Work as a seamstress

[34] Finally, the Claimant says that the General Division based its decision on an important factual error when it stated that the Claimant did not provide any evidence to explain why she could not work as a seamstress or something similar in December 2015²⁹ because it failed to ask her any questions about this. However, it is for the Claimant to present her case to the Tribunal. The General Division is not required to elicit any particular evidence from any party. Therefore, the appeal fails on this basis.

²⁶ *Canada v. South Yukon Forest Corporation*, 2012 FCA 165

²⁷ GD2-226

²⁸ General Division decision paras. 14-23

²⁹ *Ibid.* at para. 28

CONCLUSION

[35] The appeal is dismissed for these reasons.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	February 24, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. D., Appellant Abisola Omotayo, Counsel for the Appellant Viola Herbert, Representative for the Respondent