



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *E. B. v Minister of Employment and Social Development*, 2020 SST 214

Tribunal File Number: AD-19-874

BETWEEN:

E. B.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: March 6, 2020

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] E. B. (Claimant) finished Grade 12 in Hungary before moving to Canada. In Canada the Claimant completed a Care Aide course. She worked as a care aide and as a plumbing helper until she was in a car accident in December 2015. She then applied for a Canada Pension Plan disability pension and claimed that she was disabled by car accident injuries, including limitations in her right arm, and pain in that arm, her shoulder and neck.

[3] 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 that Claimant did not have a severe disability.

[4] Leave to appeal to the Tribunal's Appeal Division was granted on the basis that the General Division may have made an error under the *Department of Employment and Social Development Act* (DESD Act). However, after considering the documents filed with the Appeal Division, the General Division decision and the parties' submissions on appeal I am not persuaded that the General Division made any such errors. The appeal is therefore dismissed.

GROUND OF APPEAL

[5] The 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 below in this context.

[6] ISSUES

[7] Did the General Division made an error in law because it failed to consider the following?

- a) Whether the Claimant's incapacity to work was regular; or
- b) The Claimant's personal characteristics?

[8] Did the General Division make an error when it failed to state what sedentary work the Claimant was capable of doing?

[9] Did the General Division based its decision on an important factual error as follows?

- a) it gave greater weight to occupational therapy reports than doctors' reports; or
- b) it ignored the Claimant's evidence about her pain and its impact on her functioning.

ANALYSIS

Errors in law

[10] The *Canada Pension Plan* states that a person has a severe disability if they are incapable regularly of pursuing any substantially gainful occupation.² The Federal Court of Appeal teaches that a person's incapacity must be regular for them to be disabled.³ The Claimant says that the General Division made an error in law because it failed to consider whether the Claimant's incapacity to pursue a substantially gainful occupation was regular.

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

² *Canada Pension Plan* s 42(2)(a)

³ *Canada (Minister of Human Resources Development) v. Scott*, 2003 FCA 34

[11] However, the General Division decision considered this. The decision states that the Claimant testified that her condition varies from day to day,⁴ and that she could sit for one to two hours, walk and stand for 20 minutes.⁵ She managed her pain with Tylenol when needed,⁶ herbal medications, and creams for her shoulder.⁷

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

[13] The Federal Court of Appeal also teaches that when deciding if a claimant is disabled, their medical condition and their personal characteristics, including age, education, language skills and work and life experience must be considered.⁸ The Claimant argues that the General Division made an error in law because it failed to consider her personal characteristics.

[14] However, the General Division did consider the Claimant's personal characteristics. The decision states

In deciding if the Claimant had work capacity I have to look at things like her age, level of education, language proficiency, and past work and life experience. In December 2017 she was 57 years old with a Grade 12 education with a diploma from College as a care aide. She was 43 when she took her care aide course which demonstrated that she had an ability to make change and retrain. She has been a hard worker. She had work and life experience and was adaptable and resilient. She was proficient in the English language. She also immigrated to Canada in 2000 and moved from Toronto to Vancouver in 2006, which again showed me she was adaptable to change and had a willingness to try new things. I do not think she was unemployable. I think education, language proficiency, work and life experience, flexibility and adaptability traits outweigh the Claimant's age. She may not have as many employment options. However, I do not think this means she has no work capacity. She told me she owns a cell phone and computer and does her own on-line banking.⁹

[15] The Claimant disagrees with how the General Division weighed this evidence. For example, she argues that the fact that the Claimant owns a cell phone and does online banking

⁴ General Division decision at para. 11

⁵ General Division decision at para. 26

⁶ *Ibid.*

⁷ *Ibid.* at para. 24

⁸ *Villani v. Canada (Attorney General)*, 2001 FCA 248

⁹ General Division decision at para. 28

does not demonstrate that she could complete sedentary job duties. However, it is for the General Division to receive the evidence from the parties, weigh it and reach a decision. It is not for the Appeal Division to reweigh the evidence to reach a different conclusion.¹⁰ The General Division did so. Therefore, the appeal fails on this basis

Sedentary work the Claimant could do

[16] The Claimant argues, further, that the General Division made an error because it failed to set out what sedentary job she could do. However, the General Division made no error in this regard. It is for the Claimant to prove her case – that she is incapable regularly of pursuing any substantially gainful occupation, not for any other party or the Tribunal to prove what she is capable of doing. In addition, it is not for the Minister or the Tribunal to describe specifically what type of work is within the Claimant’s capabilities or whether such employment is available. The issue is the Claimant’s capacity to perform some type of alternative employment.¹¹

[17] Therefore, the appeal fails on this basis also.

Important factual errors

[18] The Claimant also argues that the General Division based its decision on two important factual errors. To succeed on appeal on this basis, she 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.¹²

[19] First in this regard, the Claimant argues that the General Division based its decision on an important factual error because it placed greater weight on reports written by the Claimant’s occupational therapists than her doctors. She says that the occupational therapists deferred to the

¹⁰ *Gaudet v. Attorney General of Canada* 2013 FCA 254

¹¹ *Kostoglou v. Minister of Human Resources Development* (September 3, 1998) CP 5623 (PAB)

¹² DESD Act s 58(1)(c)

doctors' opinions, and the 2019 occupational therapy report states that the Claimant was not able to return to work in any capacity.

[20] Again, it is for the General Division to receive the parties' evidence, weigh it and reach a decision based on the law and the facts. The General Division explained why it gave greater weight to the occupational therapy reports. The decision states that more weight was given to these reports because they show the Claimant had multiple ongoing concerns, considered her overall medical condition, and the occupational therapists saw the Claimant several times in a two-year period including the year of the minimum qualifying period (the date by which a claimant must be found to be disabled in order to receive the disability pension).¹³

[21] The General Division also considered the doctors' evidence. The decision states that although the Claimant saw the family doctor more than the occupational therapists, there were no clinical notes from him at the MQP. Also, the Claimant was not seeing Dr. Cameron on a regular basis.¹⁴

[22] There was an evidentiary basis for the General Division to make the findings of fact that it did based on the medical evidence. These were not made in error. Therefore, the appeal fails on this basis.

[23] Finally, the Claimant argues that the General Division based its decision on an important factual error because it ignored evidence about her pain and its impact on her functioning. However, the General Division considered the Claimant's pain and its impact. The decision states that the Claimant's primary condition is her regional chronic pain.¹⁵ It summarizes the Claimant's testimony about this, including that she has trouble sleeping because of the pain, that she takes Tylenol and uses cream and ice to manage it. In 2018, the Claimant's doctor prescribed medication for pain, and stated that the Claimant had to go to physiotherapy as well.¹⁶ Despite

¹³ General Division decision at para. 25

¹⁴ *Ibid.* at para. 24

¹⁵ *Ibid.* at para. 13

¹⁶ *Ibid.* at paras. 11-13

this, the Claimant is able to look after her grandchildren some days after school and goes to church once each week.¹⁷

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

CONCLUSION

[25] The appeal is dismissed for these reasons.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	March 3, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	E. B., Appellant Sepideh Alimirzaee, Counsel for the Appellant Viola Herbert, Representative for the Respondent

¹⁷ *Ibid.* at para. 15