



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *G. F. v Minister of Employment and Social Development*, 2020 SST 289

Tribunal File Number: AD-20-32

BETWEEN:

G. F.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: April 6, 2020

DECISION AND REASONS

DECISION

[1] The appeal is dismissed

OVERVIEW

[2] G. F. (Claimant) has a Master's degree in social work. Her last employer was a bank in 2012. She applied for a Canada Pension Plan disability pension in 2010, 2012 and 2018. She claimed that she was disabled by a number of conditions including carpal tunnel syndrome; knee, back and shoulder pain; urinary incontinence; and mental illness including anxiety.

[3] The Minister of Employment and Social Development (as it is now called) dismissed each of the Claimant's applications. The Claimant appealed the Minister's decision on the 2010 application to the Office of the Commissioner of Review Tribunals, but later withdrew it. She also appealed the Minister's decision on the 2012 application and the Office of the Commissioner of Review Tribunals dismissed the appeal on June 20, 2012.

[4] The Claimant appealed the Minister's decision on the 2018 application to this Tribunal. The Tribunal's General Division decided that the 2012 decision was final and that the legal doctrine of *res judicata* (the matter has been decided) applied. It also decided that the Claimant was not disabled and dismissed the appeal.

[5] Leave to appeal this decision to the Tribunal's General Division was granted on the basis that the General Division may have based its decision on an important factual error. I have considered the parties written and oral arguments. I have also examined the General Division decision and the documents filed with the Tribunal. After considering all of this, I am not persuaded that the General Division based its decision on an important factual error. The appeal is therefore dismissed.

PRELIMINARY MATTER

[6] The Claimant presented a number of documents as new evidence just prior to the hearing

of the appeal.¹ These documents include her research regarding carpal tunnel syndrome and the risks of surgery for this, as well as documents regarding her children's special needs and services offered to them. These documents were not considered in making the decision on the appeal because it is new evidence. New evidence is not ordinarily accepted on an appeal under the DESD Act.² The only exceptions to this rule are evidence that is general background information, evidence to establish procedural defects, or evidence that highlights that there was no evidence before the decision maker.³ The Claimant's new evidence does not fall within these exceptions.

[7] The Claimant also provided additional written submissions with the new evidence. I gave the Minister one week to consider the documents presented and to make written submissions on them. Submissions are not evidence and can be considered. The Minister had the opportunity to respond to these submissions and chose not to. They were considered when making the decision on this appeal.

ISSUES

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

- a) That the Claimant did not adequately mitigate her circumstances by undergoing carpal tunnel syndrome surgery;
- b) That the risk of surgery for carpal tunnel syndrome was not significant;
- c) That the Claimant was represented at the 2012 hearing;
- d) That the Claimant was working in June 2012;
- e) That the Claimant had earned income in 2012;
- f) That the Claimant had significant help at home from her older children;

¹ AD4, AD5 and AD6

² *Canada (Attorney General) v. O'Keefe*, 2016 FC 503

³ *Marcia v Canada (Attorney General)*, 2016 FC 1367

- g) That the Claimant was not fully credible because of inconsistencies in her testimony;
or
- h) That her urinary incontinence condition is minor.

ANALYSIS

[9] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It sets out the only grounds of appeal that can be considered by the Appeal Division.⁴ One ground of appeal is that the General Division based its decision on an important factual error.⁵ 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.

The Claimant argues that the General Division based its decision on a number of important factual errors. They are examined below in this context.

Carpal tunnel surgery

[10] Paragraph 35 of the General Division decision states that to obtain the disability pension a claimant must not only present evidence about the nature of their disability, but also evidence of their efforts to manage their medical condition. In particular, when a claimant refuses to undergo a recommended treatment that is likely to affect their disability status, they must show that their refusal was reasonable. The General Division decided that the Claimant's reasons for refusing carpal tunnel syndrome were not reasonable.⁶

⁴ DESD Act s. 58(1) sets out the only grounds of appeal: that the General Division breached the principles of natural justice or made an error in jurisdiction; made an error in law; or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material that was before it.

⁵This paraphrases the ground of appeal set out in DESD Act s 58(1)(c)

⁶ General Division decision at para. 38

[11] The Claimant argues that the finding of fact that her refusal to undergo carpal tunnel surgery was unreasonable was an important factual error. The General Division decision refers to the surgeon's evidence that he strongly recommended this surgery.⁷ It also examined the Claimant's reasons for not undergoing surgery, including that the surgeon told her it was optional, that she would require a lengthy period of recovery which would interfere with her child-care responsibilities, and that she could not pay for the necessary physiotherapy.⁸ The General Division considered all of the evidence regarding the surgery recommendation and the Claimant's refusal to undergo this. There was an evidentiary basis for the finding of fact that it made. Therefore it was not made in error.

[12] The Claimant also argues that the General Division based its decision on an important factual error when it stated that the risk of carpal tunnel surgery was not significant. However, the General Division did not make this finding of fact. The decision states that there was nothing in the evidence to indicate that the risks of surgery were high or disproportionate to the benefits of having the surgery done.⁹ Again, there was an evidentiary basis for this finding of fact. It was not made in error.

[13] Therefore the appeal fails on the basis that the General Division based its decision on an important factual error regarding carpal tunnel surgery.

Representation at the 2012 hearing

[14] The Claimant also argues that the General Division based its decision on an important factual error regarding whether she had a representative at the hearing in 2012. She says that although she had hired a lawyer before that hearing, she did not have any legal representation at the hearing itself.

[15] However, the General Division made no error in this regard. The decision states that the Claimant was not represented at the 2012 hearing.¹⁰

⁷ *Ibid.* at para. 36

⁸ *Ibid.* at para. 37

⁹ General Division decision at para. 39

¹⁰ General Division decision at para. 20

[16] In addition, the decision was not based on whether the Claimant was represented or not at a prior hearing. What the General Division had to decide was whether the Claimant was disabled under the *Canada Pension Plan*. Whether she was represented by counsel was not relevant to this issue.

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

The Claimant's work and income in 2012

[18] The Claimant argues, in addition, that the General Division based its decision on important factual errors regarding when she worked in 2012 and her income for that year. She argues that she did not work at all, but only attended a paid training program with the bank. Her other income for that year was from disability payments.

[19] The decision refers to inconsistencies in the evidence about when the Claimant worked.¹¹ For example, the Claimant told an orthopedic surgeon that she stopped working in June 2012 and wrote on her disability pension application questionnaire that she stopped working in February 2012. Again, there was an evidentiary basis for the General Division to find as fact that the Claimant likely worked until June 2012. It was not made in error.

[20] Regarding the Claimant's income for that year, the Record of Employment¹² shows that the Claimant earned approximately \$19,000 in 2012. However, the decision was not based on the amount that the Claimant earned or the source of her income.

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

Help from the Claimant's children

[22] The General Division decision also states that the Claimant appears to have significant help.¹³ The Claimant argues that this is an important factual error. She says that she did not get

¹¹ General Division decision at paras. 29, 30

¹² GD2-4

¹³ General Division decision at para. 40

significant help from her older children regarding their siblings, but that she got help from community programs. She also says that she needs more help than she gets.

[23] I am not satisfied that the General Division's finding of fact was made in error. The General Division clearly heard the Claimant's testimony about the heavy load she carries caring for seven children, some of whom have special needs. It also considered her son's testimony that he helps with child-care tasks. Therefore, there was an evidentiary basis for the finding of fact that the Claimant receives significant help in her home. It was not made in error, and the appeal fails on this basis.

The Claimant's credibility

[24] The General Division considered the Claimant's claim that her pain is a severe condition.¹⁴ It gave reasons for its conclusion that this was not a disabling condition. One reason is that the General Division had credibility concerns regarding the Claimant's testimony. The decision refers again to the inconsistencies in the evidence regarding when the Claimant stopped working, inconsistencies between the Claimant's testimony and that of her son regarding her pain-related limitations, and inconsistencies in the reasons the Claimant gave for not having carpal tunnel surgery.¹⁵

[25] Clearly, there is an evidentiary basis for the General Division's credibility concerns.

[26] In addition, the General Division's mandate is to receive the evidence from the parties, weigh it and draw conclusions from the evidence. The General Division is in the best position to do this since it hears the evidence directly from the parties and can ask questions about it, which the Tribunal Member did in this case (for example, she asked the Claimant to explain the inconsistencies in the evidence regarding when she stopped working).

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

Urinary incontinence

¹⁴ General Division decision at para. 45

¹⁵ *Ibid.* at para. 45e

[28] Finally, the Claimant argues that the General Division based its decision on an important factual error that her urinary incontinence was mild. However, the General Division did not find that the condition was mild. The decision refers to the Claimant's doctor describing this condition this way.¹⁶

[29] The General Division concluded that the evidence did not support that this condition prevented the Claimant from work.¹⁷ The General Division made no factual error in this regard. There was an evidentiary basis for its conclusion about this condition. The appeal fails on this basis.

CONCLUSION

[30] The appeal is dismissed because the General Division did not base its decision on any important factual error.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	March 31, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	G. F., Appellant Susan Johnstone, Representative for the Respondent

¹⁶ General Division decision at para. 47

¹⁷ *Ibid.*