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

Citation: *Y. F. v Minister of Employment and Social Development*, 2020 SST 280

Tribunal File Number: AD-19-612

BETWEEN:

Y. F.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: April 3, 2020

Canada

DECISION AND REASONS

DECISION

[1] I allow the appeal. The General Division made an error. I will give the decision that the General Division should have given: the Claimant is entitled to a disability pension under the *Canada Pension Plan* (CPP).

OVERVIEW

[2] Y. F. (Claimant) stopped working in January 2017 due to complex partial seizures. The Claimant has a seizure disorder, depression, and she experiences headaches.

[3] The Claimant applied for a disability pension under the CPP on March 9, 2017. The Minister denied her application initially and on reconsideration. The Claimant appealed to this Tribunal. On June 7, 2019, the General Division dismissed her appeal. The Claimant filed an application for leave (permission) to appeal the General Division's decision. I granted that application for leave to appeal.

[4] I must decide whether the General Division made an error under the *Department of Employment and Social Development Act* (DESDA).

[5] I allow the appeal. I find the General Division made an error of law. I will give the decision that the General Division should have given: the Claimant is entitled to a disability pension under the CPP.

PRELIMINARY MATTERS

[6] The Claimant provided some new information about her medical situation on the day before the hearing at the Appeal Division.

[7] The Appeal Division does not hear new evidence.[1] Generally speaking, to decide whether the General Division made an error, it makes sense to review the same evidence that the General

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[1] *Parchment v Canada (Attorney General)*, 2017 FC 354.

Division reviewed. In most circumstances, it is not an error for the General Division to fail to take into account a piece of evidence that the Claimant never provided.

[8] I will not consider the new evidence provided by the Claimant.

ISSUE

[9] Did the General Division make an error of law by failing to assess the functional limitations associated with all of the Claimant's conditions together?

ANALYSIS

Reviewing General Division decisions

[10] The Appeal Division does not hear cases again from the beginning. At the Appeal Division, the focus is on deciding whether the General Division made an error. The only errors the Appeal Division can focus on are ones listed in the DESDA. One of those errors falls into a category called an "error of law."[2]

Did the General Division make an error of law?

[11] The General Division made an error of law by failing to assess the many functional limitations associated with all of the Claimant's conditions together.

[12] When deciding whether a disability is severe, the General Division must take into account all of the impairments, not just the biggest impairment or the main impairment. The Tribunal must consider the cumulative impact of the conditions on the claimant's capacity to work.[3]

[13] The General Division accepted that the Claimant had a history of seizure disorder, headaches, and depression.[4] Yet, the General Division decided that the Claimant had some capacity to work because:

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[2] DESDA, s 58(1).
[3] The Federal Court of Appeal explained this in a case called *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[4] General Division decision, para 19.

- her nighttime seizures were under control;
- she continued to have daytime seizures but she had worked with them in the past; and
- her depression was treated “conservatively.”[5]

[14] The Claimant argues that the General Division made an error. General Division failed to assess the functional limitations associated with each of the Claimant’s three key conditions together: complex seizures, headaches and depression. By deciding that she had some capacity for work, the General Division ignored evidence, including:

- the Claimant’s testimony about the effects of her depression (including on her memory and concentration); and
- the evidence about why she was not prescribed medication for her depression.

[15] The Minister argues[6] that the General Division considered the evidence about all of the conditions together in light of her age, education and work history, and concluded that the Claimant had some capacity for work. According to the Minister, the General Division weighed the evidence and reached a reasonable outcome and the Appeal Division should not interfere because there is no error.

[16] At the Appeal Division hearing, the Minister also argued that in a perfect world, when the General Division is discounting some evidence in favour of other evidence, it should do so openly. To the extent that the General Division seems to have preferred the specialists’ reports to some of the Claimant’s testimony about her limitations, it may have been better if the decision contained a clear statement to that effect. However, the Minister’s representative argued a plain reading of the General Division’s decision here requires us to infer that the General Division did not prefer the testimony of the Claimant to the information in her medical records.

[17] In my view, the General Division made an error of law. The General Division is required to consider the functional limitations that affect capacity to work from all of the conditions, not

[5] General Division decision, paras 20 to 23.
[6] AD3-8.

just the main condition. The General Division did not consider the functional limitations associated with the Claimant's depression. The General Division dismissed with that aspect of the analysis because it found that she was treated "conservatively."

[18] It is unclear what "conservative" means in this context. From a medical perspective, the use of this term often refers to treatment that does not involve surgery. The record was clear that the Claimant was not taking prescription medications for her depression because of interactions with her other medications to prevent seizures.[7]

[19] The fact that the Claimant was not taking medication for her depression does not excuse the General Division from considering the functional limitations associated with the depression. The General Division needs to consider the affect of all the conditions, not just the main condition.

[20] The Claimant testified[8] that her depression meant that she felt useless. She had low energy, and cried a lot. She testified that she had little motivation and that she did not get dressed and leave the house often. She testified that she could handle being in a crowd (for church) for an hour or two at most. She gets dressed two to three times a week. Otherwise, she stays in bed. At the General Division hearing, the Claimant responded to a question by saying that she was not being treated for depression. It is hard to know what this means, as on the face of the record it is clear that her family doctor has diagnosed depression and has tried medications that did not work due to her seizure disorder.

[21] On its face, it would seem that those kinds of challenges the Claimant described about her depression would negatively affect the ability to work. It appears to be a "serious" medical condition. If the General Division member did not find the testimony about those symptoms reliable, they needed to explain why.

[22] I find that the General Division failed to analyze the functional limitations associated with the depression when deciding whether the Claimant had any capacity for work. There was no reason in law to skip over the functional limitations associated with the Claimant's

[7] GD3-2.
[8] Recording of the General Division hearing, at about 41:57.

depression. The fact that the Claimant could not take medication for this condition that her doctor diagnosed does not change the requirement to analyze all of the functional limitations for the conditions together. By not doing so, the General Division made an error of law.

REMEDY

[23] Once I have found an error by the General Division, I can return the case to the General Division for reconsideration, or I can give the decision that the General Division should have given.[9]

[24] At the Appeal Division hearing, the Claimant argued that if I found an error, I should give the decision that the General Division should have given. The Minister argued that the General Division did not make an error, so there was no need for me to give any remedy at all.

[25] However, at the hearing, the Minister's representative also stated that if there were any problem with the General Division decision, it would be that the General Division failed to make a clear finding about the credibility of the Claimant. It may be that the General Division preferred other evidence to the Claimant's testimony without sufficient explanation. The Minister's representative was not conceding that this problem was an error under the DESDA. However, the Minister's representative argued that if I found that type of error, I would need to return the case to the General Division for reconsideration. This would allow the General Division to make the proper findings of fact because that is the General Division's job.

[26] The General Division's error was a legal error that involved failing to consider the impact of one of the Claimant's conditions on her capacity for work. I did not decide that the General Division gave low weight to the Claimant's evidence. I found that the General Division did not consider any of the evidence of the functional limitations associated with the depression.

[27] In any event, once I find an error, even an error of fact, I have the authority to give the decision that the General Division should have given, even when that exercise involves weighing evidence.[10]

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[9] DESDA, s 59. See also *Nelson v Canada (Attorney General)*, 2019 FCA 222.
[10] The Federal Court of Appeal considered this in *Nelson v Canada (Attorney General)*, 2019 FCA 222.

[28] The record is complete. I will give the decision that the General Division should have given. This is the most fair and efficient way forward.[11]

[29] The Claimant proved that she had a severe and prolonged disability on or before the end of her minimum qualifying period (MQP). The MQP ended on December 31, 2018.

[30] The Claimant stopped working in January 2017. Although her nighttime seizures were eventually controlled, she did not return to work. I am satisfied that she experienced functional limitations associated with her daytime seizures, her headaches, and her depression.[12] These limitations, considered all together (and along with her personal circumstances), mean that her disability was severe before the end of her MQP. The Claimant has taken reasonable steps to manage her conditions and she has not refused treatment. Her disability is severe and prolonged and she is entitled to a disability pension under the CPP.

Proving a disability is "severe"

[31] A person is entitled to a disability pension when they can show that they had a severe and prolonged disability on or before the end of the MQP. The Minister calculates the MQP based on the person's contributions to the Canada Pension Plan. A person's disability is severe if it makes them incapable regularly of pursuing any substantially gainful occupation.[13]

[32] Claimants must show that they have taken reasonable steps to manage their medical conditions.[14] If claimants refuse treatment unreasonably, they may not be entitled to the disability pension (and the impact of the refused treatment is relevant in that analysis).[15]

Functional limitations that affect Claimant's capacity to work

Seizure Disorder

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[11] *Social Security Tribunal Regulations*, s 2.

[12] The Claimant was also treated for thyroid cancer, but I do not find that she has any functional limitations associated with that condition that affect her ability to work.

[13] *Canada Pension Plan*, s 42(2).

[14] The Federal Court of Appeal explains this in a case called *Sharma v Canada (Attorney General)*, 2018FCA 48.

[15] The Federal Court of Appeal explains this in a case called *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

[33] The Claimant's seizure disorder affects her ability to work.

[34] The Claimant has had a seizure disorder (epilepsy) since childhood. She has tuberous sclerosis and a giant astrocytoma. In January 2017, the Claimant was working as a machine operator full time. She had a complex partial seizure that month as she was about to leave home. She lost consciousness without warning and hit her head. Her neurologist, Dr. Koo, adjusted her medications and referred her for follow-ups at an epilepsy clinic.[16] The Claimant did not return to work. She applied for a disability pension under the CPP.

[35] In the CPP Medical Report dated February 3, 2017,[17] the Claimant's family doctor, Dr. Rammo, confirmed that the Claimant had complex partial seizure disorder secondary to tuberous sclerosis. The Claimant had multiple persistent break through seizures, despite medication. Dr. Rammo stated that the Claimant's prognosis was to be determined.

[36] Dr. Rammo provided a more detailed letter for the CPP disability pension in May 2018,[18] which confirmed that the Claimant's prognosis was "guarded" and that the conditions were severe given the depth and diversity of the systems affected. Dr. Rammo stated that the Claimant was unlikely to be able to pursue any type of employment for at least a year. Dr. Rammo updated her letter one more time in June 2018,[19] stating that the treatment plan was to continue seeing specialists but that in the meantime the Claimant was unable to pursue any type of employment.

[37] When Dr. Koo retired, Dr. Del Campo became the Claimant's neurologist. Dr. Del Campo's report from March 2017[20] states that the Claimant's nighttime seizures were eliminated, but that she was left with daytime episodes associated with palpitations and an "ill-described fuzziness in her head." Dr. Del Campo's medical student took the Claimant's medical history, and that Claimant had a friend translating for her.

[38] After a follow-up visit in August 2017, Dr. Del Campo[21] noted that the Claimant was "overall stable" since March 2017, although since her last visit she had about six episodes of her

[16] GD2-98.
[17] GD2-94 and following.
[18] GD3-2.
[19] GD5-3.
[20] GD3-17.
[21] GD3-20.

daytime seizures lasting about three minutes each. These seizures start with palpitations, blank staring and incoherent answers. These partial seizures during the day did not result in her falling if she was standing up. They lasted 5 minutes, and Dr. Del Campo noted that she might have one or two per week, or none for an entire month. She had not had another generalized tonic-clonic seizure since the one in January 2017 after which she stopped working. Dr. Del Campo increased her medications and planned an MRI and a CT scan.

[39] The Claimant testified that at the time she applied for the disability pension, she was having 2 to 3 daytime seizures per month.[22] She falls to the ground, and sometimes hits her head. After the seizure is over, she feels poorly: she has low energy and shaking and it can take 3 hours for her body to feel relaxed again.

[40] The Claimant testified that she does not feel capable working given the frequency of her daytime seizures. The work she had been doing would not be safe if she were to have a daytime seizure. In addition, she feels that there is no job that would accommodate the time she would need during and after these seizures.

[41] The Minister argued[23] that the neurologist reports show that the Claimant's seizure disorder is "treatable and manageable." Without tonic clonic daytime seizures (and with nighttime seizures over) the Claimant had capacity to work.

[42] I find that the Claimant has significant functional limitations associated with her seizure disorder. These limitations present a real barrier to employment. I accept that the nighttime seizures are resolved, and that the type of seizure the Claimant had in January 2017 did not re-occur. However, the Claimant's ability to operate machinery safely is impacted by her daytime seizures, even the partial ones (as described in her evidence and documented in the medical reports).

[43] I accept the Claimant's testimony that she requires time to recover from these partial seizures. Even if she were doing less safety-sensitive work, in my view, the frequency and unpredictability of these seizures is an important consideration. Her specialists have described

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[22] Recording of the General Division hearing, at about 27:00.
[23] GD4-8 and 9.

the gains made in controlling the type of seizure she had in January 2017. However, I find that the partial daytime seizures still have an impact, including on the Claimant's memory and concentration, in addition to the time she requires during and after the seizure to feel well enough to work.

[44] The Claimant has taken steps to manage her seizure disorder. Her family doctor and a neurologist are involved in her care. She takes medication to control her seizures to the best of her ability.

Headaches

[45] Headaches also affect the Claimant's ability to work.

[46] Dr. Rammo documented headaches as one of the Claimant's medical conditions.[24] After the seizure in January 2017, Dr. Koo noted that the Claimant had been complaining of intermittent headaches since January 2014.[25] Dr. Koo noted that the headaches were responsive to Tylenol.

[47] Later, Dr. Del Campo[26] also noted that the Claimant has headaches, and that they happen infrequently "perhaps 3 or 4 times a year, but they can last up to a week." Dr. Del Campo acknowledged that the headaches were quite intense and that they respond poorly to over-the-counter medication. He provided a prescription for Tylenol #1.

[48] The Claimant testified that she has headaches 5 to 6 times a month, and that usually the headache lasts for 3 days, but can last a whole week.[27] The Claimant explained that during her headaches, she could do nothing but go to her room to rest. She explained that her doctor prescribed a medication but it made her too drowsy so the doctor advised her to stop taking it. She testified that she takes naproxen, which brings the pain down to an eight on a scale of 1 to 10, but her doctor advised that it is not good to take that medication too often.

[24] GD2-94.
[25] GD2-51.
[26] GD5-7.
[27] Recording of the General Division hearing, at about 34:31.

[49] There is some confusion about how often the Claimant has headaches. The Claimant acknowledged in her testimony that while Dr. Del Campo's report stated that the Claimant has three to four headaches per year, this was a misunderstanding because of language interpretation. She said she has three to four headaches per month.

[50] I accept the Claimant's explanation for the inconsistency in the evidence. The record shows that Dr. Del Campo's medical student took the initial medical history, and that the Claimant had a friend translating for her. It is reasonable to infer that some communication errors in this particular medical file are more likely to take place given that more than one person is involved in the file, and the Claimant brought someone with her to interpret.

[51] I find that the Claimant's headaches are not well managed. Even when she takes prescription medication for these headaches, they can last days at a time. The pain from these headaches is such that the Claimant is in bed. The frequency and severity of these headaches means that the Claimant would experience barriers in reliability and predictability required for any substantially gainful work.

[52] The Claimant has taken steps to manage her headaches. Both her neurologist and her family doctor are aware of her headaches, and she has tried the medication her doctors prescribed.

Depression

[53] Depression also affects the Claimant's ability to work.

[54] Dr. Rammo has noted the Claimant's depression in the CPP medical report[28] and in the letters she wrote on behalf of the Claimant in support of the application.[29] She explained that the Claimant did not tolerate several medications due to their interactions with her epilepsy medication. Dr. Rammo did not provide any further information about treatment plans for the Claimant's depression.[30]

[28] GD2-94.
[29] GD3-2.
[30] GD3-2.

[55] The Claimant testified[31] that her depression means that she feels useless and that she has low energy and cries a lot. She testified (and I accept) that she has little motivation, and that she does not get dressed and leave the house often. She can handle being in a crowd (for church) for an hour or two. She gets dressed two to three times a week. Otherwise, she stays in bed. In response to a question during the hearing, the Claimant said that she was not receiving treatment for her depression.

[56] The Claimant described problems she has with memory and concentration. The Claimant explained that she leaves the stove on during the one time a week that she cooks. She says that when she tries to learn something like English as a Second Language (ESL), she will forget it within a week. As a result, she says that it has taken her three years to get to the second level in ESL.

[57] In my view, the Claimant's depression has an impact on her ability to work. Certainly, having trouble getting dressed and out of bed, and being unable to get out in public is significant when assessing capacity for work. The Claimant experiences emotional reactions like crying and feeling useless. These reactions affect negatively on her capacity for work.

[58] The Claimant has taken reasonable steps to manage her depression. I put little weight on her statement that she is not receiving treatment for her depression. The record shows that her family doctor has diagnosed her and tried medication. I find that the Claimant's family doctor is treating her depression, but that medication has not been possible. It may be in the future that her doctor suggests more or other treatment including some other form of counselling or therapy. Regardless, the Claimant has taken reasonable steps to address her depression. She has tried the treatment recommended by her physician to date. There is no evidence that she has refused any specific treatment related to her depression.

The cumulative impact of these conditions

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[31] Recording of the General Division hearing, at about 41:57.

[59] Considered together, the Claimant has functional limitations that mean she has no residual capacity for work. My finding is consistent with Dr. Rammo's most recent opinion about the Claimant's ability to work.

[60] Dr. Koo stated, "based on my last assessment of [the Claimant] in April 2017, I do not see any change in her neurological conditions that prevents her from work."[32] My conclusion about the Claimant's ability to work takes into account the impact of all of the Claimant's conditions, not only neurological. It is the interplay of the Claimant's depression along with the headaches and seizure disorder, which means that the Claimant has no capacity for work. Dr. Koo was not treating or considering the Claimant's depression. Further, Dr. Koo's opinion about the Claimant's ability to work is dated in the sense that she stated that the Claimant's headaches were responsive to Tylenol. Dr. Del Campo's treatment of the Claimant suggested that in fact, the headaches were no longer responsive to Tylenol. He prescribed more and different medication, trying to address the Claimant's headaches.

[61] The evidence showed that the Claimant had not had a tonic-clonic seizure since the one she had in January 2017. I understand that the Claimant used to work with the daytime seizures. However, the Claimant's depression also had an impact on her ability to return to work. I also find that her headaches worsened after she stopped working, as evidenced by the increased medications that Dr. Del Campo suggested. The Claimant's functional limitations do not leave her with any capacity for work. She is often in bed – either because of a headache or because of the symptoms of depression. She also needs time to recover from the daytime seizures.

[62] The Claimant's evidence was forthright. She explained that her nighttime seizures have improved with medications and that she would like to upgrade her English. However, she was also honest about the fact that her memory and concentration has been a barrier to her completing that kind of upgrading.

[63] I am satisfied that when considering the Claimant's medical evidence, her testimony, and her treatment history, she does not have a capacity to work.

[32] GD2-51.

The Claimant's personal circumstances

[64] When deciding whether the Claimant has a severe disability, I need to consider how employable the Claimant is in the real world, given her:

a) age;
b) level of education;
c) ability to speak, read, and write English; and
d) past work and life experience.[33]

[65] At the time of the General Division hearing, the Claimant was only 34 years old. She got as far as grade 11 in Columbia. In Canada, she took three years to get to level 2 in her English as a Second Language (ESL) classes. As a result, she has limited ability to speak, read or write in English. In Canada, she worked in an industrial laundry for two years and could not keep up. She worked for her husband for two years after that. She went on to work in carpentry until she had a seizure and stopped working.

[66] The Minister argued that while the Claimant may not be able to return to work as a machine operator, she is very young and alternate work or retraining remain reasonable options.

[67] I accept the Claimant's evidence that from a physical perspective, she is afraid of returning to physical work given the risks associated with falling during a daytime seizure.

[68] Age is a single factor. If a person has other barriers to employment, retraining, and upgrading, age alone does not decide the issue of employability. The Claimant is young and therefore otherwise might be a good candidate to upgrade her English skills and then train for work. However, I find that the Claimant is likely to have difficulty upgrading her English skills or retraining for any other sedentary type of work. The Claimant has memory and concentration problems and her depression has a real impact on her ability to prepare for and then work outside the home.

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[33] This "real-world" approach, using these four criteria, comes from the Federal Court of Appeal in a case called *Villani v Canada (Attorney General)*, 2001 FCA 248.

[69] Considering personal circumstances injects a sense of the "real world" into the question of whether a claimant is employable. The Claimant here is young, with many years ahead of her in what would be an average work life. However, the Claimant's lack of education, combined with her lack of ability to upgrade her English so far because of her poor memory and concentration, render her age less important to this analysis. The Claimant is not likely to be able to upgrade her skills or train for a job that is suitable given her medical conditions.

[70] The Claimant has proved that she has a severe disability. She is incapable regularly of pursuing any substantially gainful occupation. In my view, the Claimant's functional limitations mean that she cannot reliably work at a substantially gainful level. Her limitations also prevent her from upgrading her English enough to allow for retraining.

The Claimant's disability is prolonged

[71] The Claimant's disability is likely to be long continued and of indefinite duration. This means it is prolonged within the meaning of the CPP.[34]

[72] The Claimant has had seizure disorder since she was a child. It is long continued. Although her nighttime seizures are well controlled, she has daytime seizures, which are ongoing. Medication management for her depression is an issue because of her complex partial seizure disorder, and her team has had little success in treating her headaches.

[73] The Claimant's prognosis is guarded.[35] In my view, her disability is likely to be long-continued and of indefinite duration.

[74] The Claimant proved that she had a severe and prolonged disability starting in January 2017 when she stopped working. The Claimant applied for the disability pension under the CPP in March 2017. Payments start four months after the disability began, in May 2017.

[34] *Canada Pension Plan*, s 42(2).
[35] GD3-2.

CONCLUSION

[75] I allow the appeal. The General Division made an error. I have given the decision that the General Division should have given: the Claimant is entitled to a disability pension under the CPP.

Kate Sellar
Member, Appeal Division

HEARD ON:	December 3, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Mary Ellen McIntyre, Representative for the Appellant Sandra Doucette, Representative for the Respondent