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

Citation: *L. O. v Minister of Employment and Social Development*, 2020 SST 431

Tribunal File Number: AD-20-136

BETWEEN:

L. O.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: May 22, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

[2] Although the General Division made an error under the DESD Act, the Claimant has not proven that she was disabled before the end of the minimum qualifying period.

OVERVIEW

[3] L. O. (Claimant) applied for a Canada Pension Plan disability pension in 2017[1] and says that she is disabled by mental health illnesses including depression and anxiety. She last worked as a plant administrator, and left this job in September 2010 because of her conditions.

[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 by the end of her minimum qualifying period (MQP – the date by which a claimant must be disabled to receive the disability pension).

[5] The Tribunal's Appeal Division granted leave to appeal this decision because the General Division may have based its decision on an important factual error that the Claimant was well enough to stop psychiatric treatment.

[6] I have read the General Division decision and the documents filed with the Tribunal. I have heard the parties' oral submissions and listened to the recording of the General Division hearing. The General Division based its decision on an important factual error regarding the Claimant stopping psychiatric treatment in 2015 or 2016. The Appeal Division must therefore intervene. Despite this, the evidence does not prove that the Claimant was disabled before the end of the MQP. Therefore, the Claimant's appeal is dismissed.

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[1] The Claimant first applied for the disability pension in 2015. The Minister of Employment and Social Development refused the application and the Claimant did not appeal the decision.

PRELIMINARY MATTER

[7] The Minister requested and received a copy of the recording of the General Division hearing. The Claimant did not receive this before the Appeal Division hearing. Therefore, a copy of the recording was sent to the Claimant's counsel, and he was given an opportunity to make written submissions based on the recording after the hearing. These submissions were considered in making this decision.

[8] The Minister told the Tribunal that it had no further submissions after receiving the Claimant's submissions on this.

ISSUES

[9] Did the General Division base its decision on an important factual error that the Claimant was well enough to stop seeing her psychiatrist and stop taking medication?

[10] Did the General Division base its decision on an important factual error that the Claimant was not being treated by a psychiatrist in December 2016?

ANALYSIS

[11] 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.[2]

[12] The Claimant argues that the General Division based its decision on two important factual errors. To succeed on this basis, she must prove three things:

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

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.[3]

Was the Claimant well enough to stop treatment in 2015 or 2016?

[13] In April 2015, the Claimant's doctor wrote that the Claimant had been diagnosed with panic disorder, chronic adjustment disorder, obsessive-compulsive disorder and mixed anxiety-depressive disorder. The Claimant stopped seeing her mental health professional in 2015 or 2016 (the Claimant was unsure of the exact date she stopped seeing him). The Claimant testified that she stopped seeing her doctor because she wanted to do things on her own,[4] and she felt that she was improving.[5]

[14] The Claimant also stopped taking medication for her mental health illness during this time.

[15] Based on this evidence, the General Division concluded that the Claimant was well enough to stop treatment, and that she had some residual capacity to work.[6] The Claimant says that this finding of fact was an error under the DESD Act.

[16] I am satisfied that this finding of fact was made in error. The Claimant's doctor wrote that the Claimant was still in therapy indefinitely.[7] Also, the Claimant's evidence was not that her doctor had released her from treatment, but that she stopped going to see the doctor and stopped taking medication because she wanted to try to do it on her own. This evidence does not establish that the Claimant had some capacity to work.

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[3] DESD Act s. 58(1)(c)
[4] General Division decision at para. 24; General Division hearing recording approximate minute 21:30 although the exact time may differ depending on the device used to listen to the recording.
[5] General Division hearing recording approximate minute 22:50
[6] General Division decision at para. 28
[7] GD2-142

[17] In addition, a claimant's condition may improve while still being severe under the legislation. The General Division failed to explain how the Claimant's condition was never severe in light of the evidence, had improved, or why her condition was no longer severe. The evidence does not support this. Rather, the Claimant testified that after she stopped seeing her doctor in 2015/2016 she began talking to "X" (although it is not clear when exactly she started this).[8] In addition, the Claimant again began to take medication for her mental health illness after she began to see a new doctor.[9] This evidence suggests that the Claimant was not well enough to stop treatment when she did.

[18] This finding of fact was made without regard for all of the evidence that was before the General Division. Specifically, the General Division failed to have regard for the evidence that the Claimant's mental health illness did not improve after she stopped treatment in 2015/2016. The General Division also did not explain why it seems to have ignored the doctor's opinion that she would require treatment indefinitely.

[19] The General Division decision was based on this finding of fact that the Claimant retained some capacity to work.

[20] Therefore, the General Division made an error under the DESD Act and the Appeal Division must intervene.

[21] The Claimant's counsel also argued that the Appeal Division should take judicial notice of the fact that those with mental health illness often stop treatment when they should not, and that this results in relapse and a return to treatment, as happened in this case.

[22] Judicial notice is the acceptance of a fact without proof.[10] The legal test to be met for a decision maker to take judicial notice of a fact is that the fact (1) is either so generally accepted as not to be subject to debate among reasonable people, or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.[11]

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[8] General Division hearing recording at approximate minute 21:00
[9] *Ibid.* at approximate minute 26:44
[10] *R v. Williams,* [1998] 1 S.C.R. 1128 para. 54
[11] *R v. Find,* 2001 SCC 32

[23] This legal test has been further clarified if the fact at issue is not adjudicative (the when, where and why to be decided in the case).[12] Where the fact that is sought to be judicially noticed is a social fact (facts that are related to the fact-finding process and are social science research used to construct a frame of reference for deciding crucial factual issues), some different considerations may also apply.[13]

[24] However, the fact that the Claimant argues should be judicially noticed does not meet the legal test. Nothing before me demonstrates that this fact is so generally accepted that it is not subject to debate, or that it is capable of immediate and accurate demonstration by reference to accurate accessible sources. Without this I cannot take judicial notice of this fact. This argument fails.

Other issue

[25] The Claimant presented additional grounds of appeal. However, since the Appeal Division must intervene for the reasons set out above, I need not consider the remaining grounds of appeal.

REMEDY

[26] The DESD Act sets out what remedies the Appeal Division can give when it intervenes. It is appropriate that the Appeal Division give the decision that the General Division should have given in this case. The reasons for this are

a) The parties both requested that the Appeal Division give the decision that the General Division should have given if it intervened;

b) The record before me is complete;

c) The parties had the opportunity to address all of the legal issues that are to be decided;

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[12] *R v. Spence*, 2005 SCC 71
[13] *Ibid.*

d) The Claimant applied for the disability pension in 2017. A long time has passed without resolution of the appeal, and further delay would be incurred if the matter were returned to the General Division for reconsideration;

e) The DESD Act states that the Tribunal can decide questions of fact and law necessary to dispose of an appeal;[14] and

f) The *Social Security Tribunal Regulations* requires that appeals be concluded as quickly as the circumstances and considerations of fairness and natural justice permit.[15]

The Claimant's disability is not severe

[27] The facts are undisputed. They are found in the written record and are summarized below:

a) The Claimant's MQP ends on December 31, 2015;

b) The Claimant completed Grade 10 before entering the paid workforce;

c) The Claimant worked in a factory in production and packing, then in administration;

d) The Claimant says that she is disabled by mental health illnesses, including anxiety, depression and panic attacks;

e) In 2012 the Claimant was diagnosed with mixed anxiety depressive disorder, obsessive-compulsive disorder and panic disorder;[16]

f) The Claimant's doctor set out the same diagnoses in April 2015, and wrote that the Claimant would require therapy indefinitely, but not permanent disability;[17]

g) The Claimant stopped seeing her mental health practitioner in 2015 or 2016;

[14] DESD Act s. 64(1)
[15] *Social Security Tribunal Regulations* s. 3(1)
[16] GD2-55
[17] GD2-139

h) On the disability pension questionnaire, the Claimant reported that her memory is sometimes not good, and that sleep and concentration are not good.[18]

i) The Claimant began to see a new family doctor in December 2016. She reported to this doctor that she had taken Cipralex before for depression but stopped. Cipralex was again prescribed;[19]

j) The Claimant reported an improvement in mood two weeks later;[20]

k) In January 2017, the family doctor noted that the Claimant was doing well on medication, and that counselling was not indicated;[21]

l) The Claimant was in a car accident in March 2017, and this aggravated her medical conditions;

m) In March 2018, the Claimant reported to her doctor that she feels better when taking her medication regularly, and that she has not attended counselling because it is painful to talk about her low mood and anxiety.[22]

[28] For a claimant to be disabled under the *Canada Pension Plan*, they must prove that it is more likely than not that they have a disability that is both severe and prolonged before the end of the MQP. A disability is severe if it makes a claimant incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is long-continued and of indefinite duration.[23]

[29] The evidence is insufficient to prove this.

[30] There is only one medical report dated before the end of the MQP. It sets out the mental health illness diagnoses, and states that the Claimant will require indefinite treatment. It makes no statement about the Claimant's capacity to work.

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[18] GD2-104
[19] GD2-88
[20] GD2-89
[21] GD2-90
[22] GD2-69
[23] *Canada Pension Plan* s. 42(2)

[31] The Claimant wrote in the disability pension questionnaire that her concentration, sleep, and memory were not good. She did not explain in writing how this impacted her capacity regularly to pursue any substantially gainful occupation. Her testimony did not expand on this.

[32] The Claimant testified that she stopped working in 2010.[24] The Claimant worked only for one company, starting on the factory floor and ending in administration. The employer knew of her conditions, but could not give her any light duties.

[33] The Claimant testified that she has panic attacks, and passed out at work a lot as a result. Her condition is better now and she doesn't pass out as much.[25]

[34] The Claimant was prescribed medication for her mental health illness. She stopped taking this in 2015 or 2016, and later began to take it again after she met with her current family doctor in December 2016, which was after the MQP.

[35] The General Division Member asked the Claimant a number of questions at that hearing. The Claimant testified in response about her condition at that time rather than before the end of the MQP. The General Division did not make an error in questioning the Claimant. It is for the Claimant to present her legal case to the Tribunal, not for the Member to ensure that all of the relevant evidence is presented. The General Division member gave the Claimant the opportunity to add to the evidence given in response to questions asked.

[36] The Claimant did not present any evidence about how her mental health illnesses impacted her daily activities before the end of the MQP. For example, she testified that at the time of the hearing she goes with her husband to buy groceries and is scared to drive,[26] but did not testify whether she could do these things on her own before the end of the MQP.

[37] I must also consider the Claimant's personal characteristics. She was 47 at the end of the MQP. She has no post-secondary education. Despite this, she has work experience in physically demanding jobs and administration. She therefore has transferrable skills. She was also young at

[24] General Division hearing recording approximate minute 5:30
[25] *Ibid*. approximate minute 13:00
[26] *Ibid*, approximate minute 48:45

the end of the MQP and has no language barriers. The Claimant's personal characteristics do not assist her.

[38] The evidence is not sufficient to prove that the Claimant was incapable regularly of pursuing any substantially gainful occupation before the end of the MQP because of her disability. Her disability is not severe.

[39] Because I have decided that the Claimant's disability is not severe, it is not necessary for me to decide whether it is prolonged.

CONCLUSION

[40] The General Division based its decision on an important factual error. The Appeal Division must intervene.

[41] However, there is not enough evidence to prove that the Claimant had a severe disability before the end of the MQP.

[42] Therefore, the Claimant's disability claim is dismissed.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	May 6, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. O., Appellant David Edwards, Counsel for the Appellant Susan Johnstone, Representative for the Respondent