



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *E. C. v Minister of Employment and Social Development*, 2020 SST 468

Tribunal File Number: AD-19-877

BETWEEN:

E. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: June 1, 2020

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

[2] The General Division made an error in law. Despite this, the evidence does not show that it is more likely than not that the Claimant had a severe disability before the end of the MQP.

OVERVIEW

[3] E. C. (Claimant) applied for a Canada Pension Plan disability pension and claimed that she was disabled. She has a number of medical conditions, including chronic pain, sleep apnea, depression, asthma and high blood pressure. She also has pain in her right shoulder, arm, wrist and hand with some weakness.

[4] The Minister of Employment and Social Development refused the application. The Claimant appealed the decision to the Tribunal. The Tribunal's General Division dismissed the appeal. It decided that the medical evidence did not support the Claimant's claim and that she did not have a severe disability.

[5] The Claimant requested leave to appeal this decision to the Tribunal's Appeal Division on a number of grounds. Leave to appeal was granted because the General Division may have made an error in law when it failed to consider the cumulative impact of all of the Claimant's conditions on her capacity to work.

[6] I have now read the General Division decision, the documents filed with the Appeal Division and the evidence filed with the General Division. I have listened to the recording of the General Division hearing and the parties' oral submissions. The General Division made errors in law. It failed to consider the cumulative impact of the Claimant's physical and mental health conditions, and it failed to fully consider her personal characteristics when it decided that her disability was not severe. Despite this, the evidence does not establish that the Claimant had a severe disability at the relevant time. Therefore the appeal is dismissed.

PRELIMINARY MATTERS

[7] At the hearing of the appeal it became clear that the Minister had received a copy of the recording of the General Division hearing. The Claimant had not. Therefore, a copy of the recording was sent to the Claimant and she was given time to make written submissions on this. These submissions were considered in making this decision.

ISSUES

[8] Did the General Division make at least one of the following errors in law?

- a) It failed to analyze the Claimant's mental health illness and its impact on her capacity regularly to pursue any substantially gainful occupation;
- b) It failed to consider the cumulative impact of all of the Claimant's conditions on her work capacity;
- c) It failed to consider all of the Claimant's conditions, including right shoulder, right arm, right hand and wrist pain, high blood pressure and asthma;
- d) it failed to consider whether the Claimant's reasons for failing to follow certain treatment recommendations were reasonable in light of her values and personal beliefs;
- e) It failed to consider the Claimant's personal characteristics, including her lack of English skills and formal education; or
- f) It ignored the Claimant's attempts to complete lighter work duties at her last job.

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

- a) It failed to properly weigh the medical and oral evidence before it;
- b) It failed to consider the Claimant's impairments regarding activities of daily living; or

- c) It failed to consider medical evidence that did not support the conclusion that it reached.

ANALYSIS

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 depression

[10] The Claimant argues that the General Division made an error in law because it failed to consider her depression. The General Division summarizes the written evidenced about this in the decision,² including:

- In the questionnaire that the Claimant filed with her disability pension application the Claimant wrote that she has depression along with a number of other conditions.³
- The Claimant testified that this was diagnosed in 2015 and that she took medication for it at that time. She did not explain what impact this had on her functional abilities.
- The Claimant's family doctor wrote that she had difficulty with concentration and prolonged depression.⁴ In June 2019, a psychiatrist wrote that the Claimant had major depressive disorder with anxious features. This was secondary to her worsening pain condition.⁵

¹ This paraphrases the grounds of appeal set out in s. 58(1) of the *Department of Employment and Social Development Act*

² General Division decision at paras. 6, 16

³ GD2-346

⁴ GD1-201

⁵ GD1-24

[11] The General Division decision contains a summary of this evidence but it does not contain any analysis of the Claimant's depression, how it was affected by her other conditions, or how it impacted her capacity regularly to pursue any substantially gainful occupation.

[12] The Federal Court of Appeal states that to decide whether a claimant is disabled, all of their medical conditions must be considered.⁶ In addition, the cumulative impact of all of a claimant's conditions must be examined along with their personal characteristics.⁷ The General Division decision does not set out that the cumulative impact of all of the Claimant's conditions was considered.

[13] The Minister argues that one can infer that the General Division considered all of the Claimant's conditions because the evidence about them is summarized in the decision. However, decisions must be read as a whole and in light of the record. A decision cannot stand appellate review if the reasons, read holistically, fail to reveal a rational chain of analysis.⁸ Therefore, without any analysis of the cumulative impact of all of the Claimant's conditions a rational chain of analysis is not established. Therefore, the General Division made an error in law by failing to analyze the Claimant's depression and the cumulative impact of the Claimant's conditions.

[14] Further, the General Division decision contains one paragraph that considers the Claimant's personal characteristics, including her age, Grade 6 education in Portugal, limited reading and writing ability in English, and work experience as a cashier and in factory work.⁹ It concludes that the Claimant would require only limited retraining for a less physically demanding job. In this analysis the General Division failed to consider that the Claimant has sleep difficulties and difficulties with concentration. This would impact her capacity to retrain. Thus, the General Division also failed to fully consider the Claimant's personal circumstances and their impact on her capacity regularly to pursue any substantially gainful occupation.

[15] The General Division must intervene because of these errors in law.

⁶ *Bungay v. Canada (Attorney General)*, 2011 FCA 47

⁷ *Villani v. Canada (Attorney General)*, 2001 FCA 248

⁸ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65

⁹ General Division decision at para. 27

Other issues

[16] The Claimant presents a number of other grounds of appeal. However, because I have decided that the Appeal Division must intervene for the reasons set out above, I need not consider the remaining grounds of appeal.

REMEDY

[17] The DESD Act sets out what remedies the Appeal Division can give when it intervenes in a case. 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 record is complete;
- b) The legal issues to be decided are straightforward;
- c) The parties have adequately addressed the relevant legal issues;
- d) The Minister requested that the Appeal Division give the decision that the General Division should have given;
- e) The Claimant requested that the Appeal Division give the decision that the General Division should have given if it would decide the appeal in her favour;
- f) The Claimant applied for the disability pension approximately three years ago. Further delay would be incurred if the matter were referred back to the General Division for reconsideration.
- g) The *Social Security Tribunal Regulations* requires that matters be concluded as quickly as the considerations of fairness and natural justice permit;
- h) The *Department of Employment and Social Development Act* (DESD Act) states that the Tribunal can decide questions of law and fact necessary to dispose of an appeal.

The Claimant's disability is not severe

[18] For the Claimant to be disabled under the *Canada Pension Plan* (CPP) she must prove that it is more likely than not that she had a severe and prolonged disability before the end of her minimum qualifying period (MQP – the date by which a claimant must be found disabled to receive the disability pension). The MQP ends on December 31, 2018. 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.¹⁰

[19] The Claimant's last job was head cashier. This involved cashier duties, filling shelves with product for sale and unloading skids of product. The Claimant testified that she was injured at work (repetitive strain injury), resulting in pain between her shoulder blades that extended to her neck and down her right arm to her hand. When the injury occurred she consulted her doctor and stayed off work for two weeks. She returned to work on light duties (straightening items on shelves, processing customer returns, etc.). This made her pain worse, and she could not lift her right arm. She was then laid off from work.

The Claimant's conditions

[20] The Claimant says that she has a number of medical conditions, including chronic pain, sleep apnea, depression, asthma and high blood pressure. She has pain in her right shoulder, arm, wrist and hand with some weakness, and has had some sciatica. The Claimant says that these conditions result in her being disabled.

[21] There was no testimony or written evidence about the Claimant's high blood pressure or asthma. Therefore, I cannot find that these conditions are severe.

[22] Only one medical report refers to the Claimant having migraines and insomnia.¹¹ Thus, there is insufficient evidence to find that these conditions are severe.

¹⁰ *Canada Pension Plan* s. 42(2)(a)

¹¹ GD3

[23] The Claimant's sciatica was resolved with medication.

[24] The Claimant testified that she sleeps for about seven hours each night.¹² She went to a sleep clinic and was diagnosed with mild obstructive sleep apnea.¹³ She testified that she used a CPAP for one night, but felt "like she was drowning" and had migraine headaches for the next three days.¹⁴ She did not use the CPAP again. The Claimant also testified that she investigated another device to treat sleep apnea on her own but could not afford it.

[25] There was little other evidence about any sleep issues or their impact on the Claimant's capacity regularly to pursue any substantially gainful occupation. The evidence is insufficient to prove that this condition was severe before the end of the MQP.

[26] The Claimant also has ongoing pain in her back, right shoulder, arm, wrist and hand. It has been described as myofascial pain and chronic pain syndrome. The Claimant testified that as a result of the pain she has difficulty walking, standing for long periods, sitting for long periods, lifting heavy items, and that her family members do many of the household tasks. The Claimant is able to attend to grocery shopping, and some household chores with breaks.¹⁵

[27] For the right wrist and hand issues (pain, tingling and weakness), the Claimant attended testing for carpal tunnel syndrome. She was prescribed splints to wear at night. She told her family doctor that these did not help.¹⁶

[28] Dr. Perara wrote that despite the pain the Claimant had normal range of motion in her upper and lower spine.¹⁷

[29] Physiotherapy has not resolved the Claimant's pain.

[30] The Claimant also attended a pain clinic. She completed classes there. Dr. Hatcher reported that many of the Claimant's symptoms resulted from a repetitive strain injury at work.

¹² General Division hearing recording Part 2 at approximate minute 14:00. The exact time may vary depending on the device used to listen to the recording.

¹³ GD1-82

¹⁴ General Division hearing recording Part 2 at approximate minute 14:30

¹⁵ General Division hearing recording at approximate minute 4:00

¹⁶ GD1-28

¹⁷ GD1-14

She told the Claimant to follow up with her family doctor regarding increases to some medication.¹⁸ In January 2019, just after the end of the MQP, Dr. Hatcher reported that flares in the Claimant's neck muscle pain were resolved with medication prescribed by the family doctor.¹⁹ She recommended other medication changes, and noted that the Claimant was not willing to try some new medications.

[31] This evidence does not demonstrate that the Claimant's pain condition was severe before the end of the MQP. It is not the diagnosis of a condition that makes it severe, but its impact on a claimant's capacity regularly to pursue any substantially gainful occupation. Thus, little weight is placed on the characterization of the Claimant's pain condition as chronic pain syndrome or myofascial pain.

[32] Rather, I place greater weight on Dr. Hatcher's January 2019 report because this doctor treated the Claimant's pain over a period of time, and the report is dated just at the end of the MQP. This evidence indicates that the pain condition was not severe.

[33] I do not place as much weight on the family doctor's evidence. It contradicts the Claimant's testimony. For example, he wrote that the Claimant had difficulty with grooming, lifting grocery bags, cleaning and doing laundry,²⁰ whereas the Claimant testified that she could do her own grooming, she does get groceries and completes household chores with breaks. In addition, this doctor wrote that the Claimant's depression began in October 2018,²¹ despite evidence of treatment for depression in 2015 and 2016.

[34] I accept that the Claimant has chronic pain. The Claimant's representative argues that because chronic pain is not shown on any objective medical test, it is characterized as pain amplification or exaggeration. I disagree. Chronic pain is a genuine medical condition even though it is not seen on medical imaging or other objective tests.²² Since its main feature is how the claimant genuinely experiences pain, this must be considered along with the other evidence

¹⁸ GD1-230

¹⁹ GD10-26

²⁰ GD1-200

²¹ GD3-9

²² *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54

that is presented.²³ This evidence may include evidence that a claimant is exaggerating or amplifying their symptoms. There is evidence that the Claimant exaggerated her symptoms.

[35] When examined as a whole, the evidence in this case does not prove that the Claimant's pain was a severe disability before the end of the MQP.

[36] Regarding depression, the Claimant testified that She was depressed because she could not work. She began to take Cymbalta for this in October or November 2015.²⁴ This is consistent with Dr. Dzirudzy's opinion that the Claimant's depression was secondary to her physical conditions.²⁵ In June 2017, this doctor wrote that the depression was minimal to mild,²⁶ and although The Claimant was despondent initially, her mood was improving, and she could concentrate and focus.

[37] The Claimant consulted another psychiatrist in June 2019. Dr. Van Impe reported that although she suspected that the Claimant was exaggerating her symptoms, there was still a genuine diagnosis of major depressive disorder with anxious features.²⁷ She recommended an increase in anti-depressant medication and referred the Claimant to counselling.²⁸ This doctor did not say that the depression was severe, or that the Claimant was unable to work as a result.

[38] The Claimant could not explain how her mental health illness affected her ability to work.²⁹

[39] Therefore, the evidence does not establish that this condition was a severe disability.

Failure to follow treatment recommendations

[40] In addition, the Federal Court of Appeal says that when a claimant has unreasonably refused to follow treatment recommendations, the impact of this on the claimant's disability

²³ *E.K. v. Minister of Employment and Social Development*, 2017 CanLII 81123 (Social Security Tribunal Appeal Division)

²⁴ General Division hearing recording Part 1 approximate minute 26:50

²⁵ GD1-25

²⁶ GD1-25

²⁷ GD10-25

²⁸ *Ibid.*

²⁹ General Division hearing recording Part 2 approximate minute 12:38

status must be considered.³⁰ I must consider this. The Claimant has not been compliant with all treatment recommendations. Dr. Matsos wrote that the Claimant was strongly opposed to trying medical cannabis. He recommended that she try yoga and water exercises as alternatives.³¹

[41] The Claimant testified that she had not done so.³² The Claimant testified that she is strongly opposed to taking cannabis because of her personal belief that this is a “drug” and her opposition to using it. I accept this as reasonable.

[42] The Claimant also testified that she did not know of the yoga and water exercise alternatives. However, these recommendations appear in two of Dr. Mastos’ reports, so it is more likely than not that the Claimant was aware of them. It was not reasonable for the Claimant to refuse to try these alternatives. There was no evidence of any potential risk to them, nor that the Claimant could not afford to pay for them.

[43] These treatments might be reasonably expected to provide the Claimant with some pain relief, which would then also improve her mental health.

[44] The Claimant also testified that although she had been prescribed medication to help with sleep she stopped taking it because it made her drowsy. However, there is no evidence that she discussed alternatives with her doctor. The Claimant also refused to continue with CPAP treatment after only trying it for one night. The Claimant failed to return to the sleep clinic to discuss alternatives.³³ Claimants must take a proactive approach to their treatment. The Claimant failed to do so. Her refusal to continue with medication for sleep or the CPAP, or to discuss alternatives with her treatment providers was unreasonable.

[45] It is reasonable to expect that effective treatment of the Claimant’s sleep problems, through medication or other devices, would have improved this condition. Therefore, the refusal to follow reasonable treatment recommendations weakens the Claimant’s legal case.

³⁰ *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211

³¹ GD1-33, GD2-273

³² General Division decision recording at approximate minute 56:00

³³ I accept that the Claimant investigated a “mouthguard” alternative, but there was no evidence that the treating sleep specialist recommended this, or was consulted about it.

[46] The Federal Court of Appeal also says that all of a claimant's conditions must be considered, and their cumulative impact assessed. I accept that the Claimant has some pain, and depression secondary to this. However, the evidence does not prove that it is more likely than not that because of all of the claimed conditions the Claimant was incapable regularly of pursuing any substantially gainful occupation before the end of the MQP. The Claimant could complete household tasks with breaks. She does the grocery shopping. She has normal range of motion in her back. She can drive for at least 30 minutes at a time.

[47] In addition, a claimant's personal characteristics, including age, education, language skills and work and life experience must be examined. The Claimant was 49 years old at the end of the MQP. Her age is not an impediment to finding work. She speaks English fluently, and can read and write English, although perhaps imperfectly. Her language skills have not prevented her from communicating or working in Canada. She has varied work experience in a bakery, factory and retail environments; she has transferrable skills. Although the Claimant says that she has difficulty with concentration and focus, she denied this in her report to her doctor in 2017. The testimony did not demonstrate that this would impact the Claimant's capacity to work. The Claimant's personal characteristics do not assist her.

[48] For all of these reasons, the Claimant's conditions, individually or cumulatively, was not a severe disability under the CPP before the end of the MQP.

[49] Because the disability was not severe, it is not necessary to consider whether it was prolonged.

CONCLUSION

[50] The General Division made errors in law under the DESD Act. Therefore the Appeal Division must intervene.

[51] Despite this error, the evidence does not establish that the Claimant had a severe disability before the end of the MQP. Therefore, the appeal is dismissed.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	May 13, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	E. C., Appellant Costanza Durin, Representative for the Appellant Susan Johnstone, Representative for the Respondent