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

Citation: *C. F. v Minister of Employment and Social Development*, 2020 SST 481

Tribunal File Number: AD-20-75

BETWEEN:

C. F.

Appellant
(Claimant)

and

Minister of Employment and Social Development

Respondent
(Minister)

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: June 4, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Claimant developed hand dermatitis in late 2011. At the time, she was working as a dietary aide in a nursing home. She was required to repeatedly wash her hands, which irritated her skin. Wearing gloves made things worse. She says that, by 2014, she was unable to do the job.

[3] She tried working as a customer service representative, but her hands broke out in rashes and blisters. She tried working from home, but she was not productive because she had difficulty typing. Protective creams had only a limited effect.

[4] In June 2018, when she was 25 years old, the Claimant applied for a Canada Pension Plan (CPP) disability pension, claiming that she could no longer work. The Minister refused the application because the Claimant had failed to demonstrate that she suffered from a severe and prolonged disability.

[5] The Claimant appealed the Minister's refusal to the General Division of the Social Security Tribunal. The General Division held a hearing by teleconference and, in a decision dated October 31, 2019, dismissed the appeal, finding insufficient medical evidence that the Claimant was disabled.

[6] On February 4, 2020, the Claimant applied for leave to appeal from the Appeal Division, alleging that the General Division committed various errors. I granted the Claimant leave to appeal because I thought her arguments had a reasonable chance of success on appeal.

[7] I called a hearing by teleconference because, in my view, the format respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness, and natural justice permit. On April 4, 2020, the Minister

filed written submissions arguing that, since the General Division did not commit any errors, its decision should stand.

[8] I have reviewed the parties' written and oral submissions and concluded that the General Division committed at least one error in coming to its decision. I have decided that the appropriate remedy in this case is to make my own assessment of the Claimant's disability claim and give the decision that the General Division should have given. As a result, I am overturning the General Division's decision, but I am substituting it with my own decision not to grant the Claimant a CPP disability pension.

ISSUES

[9] The Claimant alleges that the General Division committed three errors in coming to its decision:

- It failed to meaningfully consider evidence that the Claimant had made significant attempts to pursue alternative work;
- It failed to provide adequate reasons for finding that the Claimant had not made significant attempts to pursue alternative work; and
- It erroneously found that there was no evidence to indicate a significant worsening in the Claimant's health after mid-2017.

ANALYSIS

[10] There are only three grounds of appeal to the Appeal Division. A claimant must show that the General Division acted unfairly, interpreted the law incorrectly, or based its decision on an important error of fact.[1]

[11] Having considered the parties' submissions, I am satisfied that the General Division based its decision on an erroneous finding about the Claimant's effort to return to work. I also think that the General Division failed to explain why it felt that the Claimant had not made

[1] Section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

significant attempts to pursue alternative work. Since the General Division's decision falls for these reasons alone, I see no need to address the Claimant's remaining allegation of error.

The General Division failed to meaningfully consider evidence that the Claimant had made significant attempts to pursue alternative work

[12] I am satisfied that the General Division mischaracterized the Claimant's attempts to remain in the labour market after she left her job as a dietary aide.

[13] The Claimant's attempts to pursue alternative work are relevant because of *Inclima v Canada*. In that case, the Federal Court of Appeal held that, where claimants have at least some work capacity, they must also show that their efforts at obtaining and maintaining employment have been unsuccessful by reason of their health condition. Subsequent case law has confirmed that claimants must make genuine effort to find employment.

[14] In its written decision, the General Division found that the Claimant had made "very few attempts at finding alternate work" and had therefore "not shown that her efforts at obtaining and maintaining employment [had] been unsuccessful because of her health condition."[2] This came after the General Division detailed the Claimant's attempts to work after leaving her nursing home job. After 2014, she held the following positions:

- Cashier and customer service representative at X;
- Supervisory support role at X;
- Home business salesperson for X;
- Service representative and sales associate at X.; and
- Bakery trainee.

On the face of it, it is difficult to understand why the General Division concluded that this series of jobs and work trials amounted to "very few." The evidence shows that the Claimant did not remain idle but pursued a variety of different occupations in what she says was an ill-fated effort to remain employed, despite her hand dermatitis.

[2] General Division decision, paragraph 29.

[15] To be fair to the General Division, I must acknowledge that it qualified its conclusion: It said that the Claimant had made "very few attempts *at finding alternate work* [my emphasis]." Moreover, the context in which this sentence was written makes it clear that the General Division likely meant "very few attempts *at finding alternate work that would have been better suited to her medical condition* [again, my emphasis]."

[16] Did this conclusion correspond with the evidence? In my view, it did not. The General Division devoted several paragraphs[3] to summarizing the Claimant's work history after she left her nursing home job. It noted her testimony that her condition prevented her from succeeding at a series of jobs, even though she had sought out employment that did not involve wetting her hands. She tried working at X, first as a cashier, later as a supervisor, but she became immune to the barrier hand cream that she was using and developed bleeding rashes. She tried to work at a home-based business selling fragrance products but found it difficult to process orders because it involved typing and, in any event, she made very little money from the venture. She tried working as customer service representative but gave this job up because, again, it involved inputting data on a computer.

The General Division failed to provide adequate reasons for finding that the Claimant had not made significant attempts to pursue alternative work

[17] Later, in its analysis, the General Division addressed the Claimant's efforts to work despite her dermatitis, but it only did so glancingly. The General Division rightly dismissed the Claimant's short-lived job as a bakery assistant because it required frequent handwashing and use of latex gloves—both of them activities that were likely to aggravate her condition. However, while briefly acknowledging the Claimant's difficulty with typing,[4] the General Division did not explore the implications of her claim that she was precluded from doing anything that involved her hands. That claim, if true, would effectively rule out, not just manual or clerical work, but just about *any* conceivable occupation in our increasingly information-based economy—whether administrative, managerial, or otherwise.

[3] General Division decision, paragraphs 9 to 12.
[4] General Division decision, paragraph 26.

[18] The General Division not only found the *quantity* of the Claimant's work attempts insufficient; it also found the *quality* of her work attempts to be inadequate. The Claimant took on clerical and supervisory roles at X but says that they nonetheless placed unbearable stress on her hands. The Claimant also tried home-based jobs that promised comfort and flexibility but says that her impairments left her no choice but to give them up. The General Division concluded that none of these job attempts had failed because of the Claimant's health condition, but it not explain how it came to that conclusion. A reader of the General Division's decision left with the following unanswered question: If the Claimant did, in fact, have a skin condition that prevented her from fulfilling roles as a salesperson or supervisor, what other type of job could she be reasonably expected to do?

REMEDY

There are three possible ways to fix the General Division's error

[19] The Appeal Division has the authority to address whatever errors that the General Division may have committed.[5] I have the power to:

- confirm, rescind, or vary the General Division's decision;
- refer the case back to the General Division for reconsideration; or
- give the decision that the General Division should have given.

I also have the power to decide any question of fact or law necessary to carry out the above remedies.

[20] The Tribunal is required to conduct proceedings as quickly as the circumstances and the considerations of fairness and natural justice allow. In addition, the Federal Court of Appeal has stated that a decision-maker should consider the delay in bringing an application for a disability pension to conclusion. It is now two years since the Claimant applied for a disability pension. If this matter were referred back to the General Division, it would only delay a final resolution.

[21] In oral submissions before me, the Claimant and the Minister agreed that, if I were to find an error in the General Division's decision, the appropriate remedy would be for me to give the

[5] DESDA, section 59(1).

decision that the General Division should have given and make my own assessment of the substance of the Claimant's disability claim. Of course, the parties had different views on the merits of the Claimant's disability claim. The Claimant argued that, if the General Division had properly characterized her efforts to return to work, it would have found her disabled and ordered a different outcome. The Minister argued that, whatever the General Division's errors, the balance of the available evidence still pointed to a finding that the Claimant was regularly capable of substantially gainful employment.

The record is complete enough to decide this case on its merits

[22] I am satisfied that the record before me is complete. The Claimant has filed numerous medical reports with the Tribunal, and I have considerable information about her employment and earnings history. The General Division conducted a lengthy oral hearing, in which the Claimant was questioned about her medical condition, its effect on her work capacity, and her efforts to pursue alternative employment. I doubt that the Claimant's evidence would be materially different if the matter were reheard.

[23] As a result, I am in a position to assess the evidence that was available to the General Division and to give the decision that it should have given, had it not erred. In my view, even if the General Division had properly considered the Claimant's work history after she left her nursing home job, it would have come to the same result. My own assessment of the record satisfies me that the Claimant did not have a severe and prolonged disability as of the hearing date.

The medical evidence does not point to a severe disability

[24] Claimants for disability benefits bear the burden of proving that they had a severe and prolonged disability.[6] I have reviewed the record, and I have concluded that the Claimant did not meet that burden according to the test set out in the *Canada Pension Plan*. I have no doubt that the Claimant suffers from dermatitis, but I simply did not find enough evidence to suggest that

[6] *Canada Pension Plan*, section 44(1).

symptoms associated with this condition have prevented her regularly pursuing substantially gainful employment.

[25] The Claimant says that she is disabled because of chronic cracking, bleeding, and blistering of her hands and fingers. She maintains that her skin is persistently red, sore, and flaky. She insists that she cannot grasp or grip objects. Her doctors have advised her to minimize exposure to soap and other chemicals and to wear cotton and rubber gloves.

[26] Although the Claimant may feel that she is unable to work, I must base my decision on more than just her subjective view of her capacity. In this case, the evidence, looked at as a whole, does not suggest severe impairment that prevents her from performing suitable work within her limitations. The Claimant is subject to some limitations, but she is not incapacitated from all types of work.

[27] In addition to regular care from her family physician, the Claimant has seen numerous specialists. While all have confirmed that the Claimant is subject to restrictions, none have ruled out employment:

- In February 2014, Dr. Alam, a dermatologist, assessed diagnosed the Claimant with atopic hand dermatitis. Dr. Alam prescribed the Claimant with two topical ointments and recommended that she use moisturizing gloves.[7]
- In November 2014, another dermatologist, Dr. Kunynetz, reported that the Claimant presented with a rash on her hands that she said increased with stress but was better in the summer. Dr. Kunynetz diagnosed the Claimant with dyshidrotic eczema and prescribed her with CeraVe cream for work.[8]
- In June 2015, Dr. Fischer, an immunologist, reported that the Claimant had recurrent rashes between her fingers. On examination. Dr. Fischer noted “some” hand dermatitis on the palmar surfaces and “a little bit” between her fingers. Testing revealed positive results for nickel and cobalt allergies, and Dr. Fischer remarked that

[7] Handwritten consultation note dated February 18, 2014 by Dr. Maryam Shayesteh Alam, dermatologist, GD2-63.
[8] Report dated November 20, 2014 by Dr. Rodion Kunynetz, dermatologist, GD2-65

the Claimant's boyfriend, who worked in a factory, came home from work "covered in metal shavings."[9]

- In November 2016, Dr. Cote, a dermatologist, reported that the Claimant had hand dermatitis. Dr. Cote recommended urged the Claimant to use a barrier cream, to avoid fragranced products, and to wear cotton gloves under rubber gloves for wet work.[10]

[28] In the medical questionnaire that accompanied her disability application, Dr. McNaull wrote that the Claimant's prognosis was "guarded."[11] In a series of prenatal checkups throughout 2017, the Claimant's obstetrician described the Claimant's health as "good," other than gestational diabetes.[12] In his clinical notes from July 2018 to June 2019,[13] Dr. McNaull mentioned medical issues such as depression, sleeplessness, and dental pain, but he said nothing about the Claimant's dermatitis. In December 2018, at the request of the Claimant's legal representative, Dr. McNaull wrote a letter explaining that the Claimant had visited his office for conditions other than her hand dermatitis. He repeated his previous prognosis of "guarded" and noted that the Claimant had significant flare-ups that were "occasionally" debilitating.[14]

The Claimant's other health problems are not significant contributors to any impairment

[29] I have concluded that, by itself, the Claimant's hand condition does not prevent her from regularly pursuing substantially gainful employment. Furthermore, I do not think that the Claimant's dermatitis, in combination with her other medical issues, amount to a disability. Her obstetrician mentioned gestational hypertension and diabetes but there is no indication that these conditions required treatment after her pregnancy. In October 2018, Dr. McNaull diagnosed her with depression dating to the birth of her child.[15] He prescribed her with Ativan and Cipralex and, after seeing some improvement in her mood, decided not to refer her for psychiatric counselling.

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[9] Reports by Dr. David Fischer, immunologist, dated June 30, July 2, and July 16, 2015, GD2-66.
[10] Report dated November 18, 2016 by Dr. Stephanie Cote, dermatologist, GD2-67.
[11] CPP Medical Report by Dr. Ben McNaull dated June 1, 2018, GD2-58.
[12] Reports by Dr. Khaled Adbdel-Razek dated September 17, 2017 (G6-4) and December 14, 2017 (GD6-8).
[13] Clinical notes by Dr. McNaull, GD6-13-15.
[14] Letter by Dr. McNaull dated December 10, 2018, GD2-43.
[15] Dr. McNaull's clinical note dated October 14, 2018, GD6-14.

The Claimant's background and personal characteristics are not barriers to work

[30] *Villani v Canada*[16] is a leading case that requires disability to be assessed in a real world context. At the time of her General Division hearing, the Claimant was only 26 years old—years from the typical age of retirement and young enough to adapt to changed circumstances. She is a native-born English speaker and has a high school education. The Claimant undoubtedly has medical issues, but I do not see how they, seen through the lens of her background and personal characteristics, would prevent her from working or retraining.

The Claimant's attempts to return to work do not prove that she was disabled

[31] As we have seen, the Claimant held a series of short-lived jobs after leaving her nursing home job. She claims that these work attempts were unsuccessful because of her medical conditions. Having reviewed the evidence, I must disagree. It is true that a pattern of sporadic employment is sometimes an indicator of disability, particularly where it occurs toward the end of a working career, but it such a pattern not conclusive. Not everyone with a health problem who has difficulty finding and keeping a job is entitled to a disability pension.[17]

[32] The Claimant's attempts to remain in the labour market are admirable, but a series of short-lived jobs is not by itself evidence of disability. There are any number of reasons why someone leaves a job besides illness or impairment. The Claimant insists that poor health repeatedly forced her off the job—as a cashier and later an assistant supervisor at X, a home business salesperson for X, a home-based telemarketer for X, and a bakery trainee. This last job, which the Claimant held for a less than a day, does not qualify as a serious attempt to return to work because it exposed her hands to liquids—precisely the kind of conditions her doctors advised her to avoid.

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[16] *Villani v Canada (Attorney General)*, [2002] 1 FCR 130, 2001 FCA 248.
[17] *Villani*, paragraph 50.

[33] The remaining jobs, whether at home or in a retail environment, all required some form of data input, such as writing or keyboarding. The Claimant testified that such tasks irritated her skin, causing pain, dryness, and bleeding and that use of gloves or creams did little good.

[34] The Claimant's testimony is the only evidence on the record about these jobs and why they ended. However, this evidence is difficult to reconcile with other statements that the Claimant and her mother made at her hearing. The Claimant insisted that her dermatitis has rendered her hands essentially useless, but she also testified that she stays at home all day and takes care of her daughter. Although I do not doubt that the Claimant suffers from a skin condition, I found it difficult to believe that the Claimant is as impaired as she says she is, in light of the fact that she has been the primary caregiver of a baby—now a toddler—for the past two years.

[35] At the General Division hearing, the Claimant testified that she is unable to perform any household and parental tasks. She said that she cannot cook, clean, drive, wash dishes, or do laundry. She said that she cannot dress, bathe, or feed her daughter and is even prevented from reading to her because she cannot turn the pages of a book. When asked how she manages to care for an infant given such limitations, the Claimant replied that she relies heavily on help from her husband and mother.

[36] The Claimant testified that, despite having full-time jobs, both her husband and her mother perform all the domestic tasks that she, herself, is unable to do. She said that her husband is a welder who leaves the house at 6:00 a.m. and works long hours six days per week.[18] Despite that, she says, her husband does nearly all the cooking, cleaning, and washing. The Claimant's mother testified that her son-in-law makes all of his daughter's food and gives her baths: "He does everything."[19] The Claimant's mother, who is employed as a personal support worker, also testified that she frequently receives calls from either Claimant or her husband asking for help. On such occasions, she said, she has to take time off work to mind her granddaughter. Asked to specify how often these absences occur, the Claimant's mother replied once or twice a month.[20]

[18] Recording of General Division hearing, 54:30.
[19] Recording, 13:50.
[20] Recording, 21:00.

[37] This evidence suggests that, despite the Claimant's insistence that she is unable to manage any of the tasks associated with childcare, the fact remains that she routinely spends long periods of time alone with her young daughter. I acknowledge that the Claimant receives some assistance from her husband and mother, but that does not change the fact that her daughter, who is now two years old, presumably has immediate needs that cannot be delegated to family members who are away most of the time. Taking care of an infant is a demanding job, and it defies belief that the Claimant could have managed to do so over a two-year period if her hand condition was as severe as claimed.

There is insufficient evidence that the Claimant has a prolonged disability

[38] The evidence indicates that the Claimant has had eczema since she was a child. She testified that she developed hand dermatitis in late 2012 when the nursing home at which she was working changed the type of disinfectant soaps that they were using. She has seen specialists and has tried to address her condition with various topical creams and ointments, apparently to little effect.

[39] However, there are several indications in the file that the Claimant has not yet tried all treatment options. At least two specialists have recommend Toctino, an orally administered drug that is used to treat severe chronic eczema and dermatitis that has not responded to other measures. In February 2014, Dr. Alam discussed Toctino with the Claimant and noted that the "patient will decide."[21] In November 2016, Dr. Cote wrote that she would consider Toctino "if topicals not helpful and [the Claimant] is not trying to conceive or if she is pregnant."[22]

[40] As we have seen, the Claimant did get pregnant, a little more than a year later. In his December 2018 letter, Dr. McNaull suggested that Toctino was still on the table, although he advised caution.[23] At the General Division hearing, the Claimant testified that, after she had given birth, she and Dr. McNaull had discussed Toctino again. She said that they were going to

[21] Dr. Alam's note, *supra* Note 7.
[22] Dr. Cote's report, *supra* Note 10.
[23] Dr. McNaull's letter, *supra* Note 14.

proceed with it, but it was not covered under her plan: "It would cost $1,200 plus, depending on how much I would need of it."[24]

[41] It is not clear whether the cost cited by the Claimant refers to a single dose or the amount required over a period of a week, a month, or a year. It is also not clear whether Dr. McNaull, or a specialist, was contemplating prescribing Toctino on a trial or permanent basis. Whatever the case, I would think it reasonable for the Claimant to give serious consideration to at least trying a medication, even a fairly expensive one, to see whether it produced any therapeutic effect. If, as the Claimant insists, her hand dermatitis has robbed her of her ability to actively raise her daughter or pursue a career, then I would expect her to show more willingness to make a short-term financial sacrifice to investigate a potential solution to her health problems.

[42] For a disability to be prolonged, it must be "likely to be long continued and of indefinite duration or is likely to result in death."[25] Since the Claimant has not yet tried a recommended medication that might alleviate her symptoms, then I cannot be satisfied that her condition is indefinite.

CONCLUSION

[43] I am dismissing this appeal. While the General Division erred by mischaracterizing the Claimant's work history, my own review of the evidence does not convince me that she had a severe and prolonged disability.

Member, Appeal Division

HEARD ON:	May 1, 2020
METHOD OF PROCEEDING:	Teleconference

[24] Recording, 1:19:10.
[25] *Canada Pension Plan*, section 42(2)(a)(ii).

APPEARANCES:	C. F., Appellant C. Y., Representative for the Appellant Susan Johnstone, Representative for the Respondent