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

Citation: *B. J. v Minister of Employment and Social Development*, 2020 SST 527

Tribunal File Number: AD-20-608

BETWEEN:

B. J.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: June 22, 2020

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] B. J. (Claimant) completed high school. She worked for many years as a florist, then as a personal support worker in a home for the aged. In January 2016, she was in a car accident. As a result she has chronic pain and limitations in her neck, right shoulder, arm and hand.

[3] The Claimant applied for a Canada Pension Plan disability pension and claimed that she was disabled by these conditions. 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 and that she had not made efforts to work within her limitations.

[4] I have now read the General Division decision and the documents filed with the Tribunal. I have listened to the parties' oral submissions. The appeal is dismissed because the General Division did not base its decision on any important factual error, it was not biased, and it made no error in law.

ISSUES

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

a) that Dr. Richard's opinion was based on the Claimant's reporting of symptoms, without regard for the documentary review and examination that he conducted, and the other evidence presented by the Claimant;
b) it failed to demonstrate that it considered the impact of the Claimant's chronic pain on her capacity regularly to pursue any substantially gainful occupation;
c) it equated the Claimant's ability to work at a computer for 20 minutes with capacity regularly to pursue substantially gainful work

d) that the Claimant's disability was not severe

[6] Did the General Division exceed its jurisdiction when it substituted its opinion of the evidence for that of the Claimant's doctors?

[7] Was the General Division Member was biased?

[8] Did the General Division make an error in law as follows

a) by failing to consider the Claimant's lack of formal education or work experience limited to physically demanding positions?
b) by failing to consider whether the Claimant could work predictably?

ANALYSIS

[9] An appeal to the Tribunal's Appeal Division is not a re-hearing of the original claim. Instead, the Appeal Division can only 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]

[10] First, the Claimant argues that the General Division based its decision on a number of important factual errors. To succeed on appeal on this basis, the Claimant must prove three things:

a) that a finding of fact was erroneous (in error);

b) that the finding was made perversely, capriciously, or without regard for the material that was before the General Division; and

c) that the decision was based on this finding of fact.

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

Dr. Richards' reports

[11] The Claimant argues that the General Division made a number of reviewable errors because of the way it dealt with medical evidence from Dr. Richards. His first report is dated January 26, 2018.[2] In it the doctor summarizes the Claimant's injury from the car accident and all of the treatment she underwent as a result. He states that despite treatment the Claimant continued to have significant and severe symptoms, including pain, headaches, stiffness, weakness, sleep disturbance and inability to return to her pre-injury level of activity. It also states that the Claimant has chronic right arm/shoulder pain and neck pain, and takes Tylenol extra strength for it.

[12] This report also outlines that although the Claimant was completely responsible for the following tasks prior to her injury, she still completes them now with some assistance from family members:

- Cooking, using her left hand to stir, and difficulty with reaching and using a can opener
- Cleaning, with difficulty mopping and cleaning bathrooms
- Laundry, although her husband carries the basket up and down stairs
- Grocery shopping with assistance
- She no longer does yard work, or pottery

[13] Dr. Richards' report also summarizes her mobility and strength tests results. He concludes that the Claimant has permanent limitations for impact activity, heavy lifting, overhead activity, climbing and any repetitive or forceful use of her right arm against resistance, and that her position in the workplace has been negatively affected.

[14] Dr. Richards' second report is dated August 2018.[3] This report disputes the conclusions reached by another doctor. In this report Dr. Richards concludes that the Claimant continues to

[2] GD2-100
[3] GD1-17

have the same conditions, and that she is unable to work at any occupation for which she is qualified by education, training and experience.[4]

[15] The General Division reviewed this evidence and heard the Claimant's submissions regarding it. The General Division decided that this evidence was not persuasive because it was based on the doctor's limited attendance with the Claimant.[5]

[16] The Claimant argues that the General Division erred regarding this evidence. First, she argues that the General Division failed to consider Dr. Richards' second report. However, the General Division is presumed to have considered all of the evidence that is presented to it, and need not mention each and every piece of evidence in its written decision.[6]

[17] This presumption can be rebutted if the decision maker does not demonstrate that they have considered important evidence, especially if that evidence is contrary to the decision reached.[7] It is not rebutted in this case. The General Division decision does not specifically cite Dr. Richards' second report in its summary of the evidence. It does, however, state that Dr. Richards countered the other doctor's report,[8] and refers to the conclusion that the Claimant is unable to work at any occupation for which she is qualified by education, training and experience.[9] These statements are only found in the second report.

[18] The Claimant also argues that the General Division erred in its consideration of Dr. Richards' evidence because it stated that Dr. Richards opinion was based mainly on the Claimant's subjective complaints, when in fact he reviewed her treatment, conducted testing of his own and listened to her subjective complaints. The General Division decision states

> A review of Dr. Richards' Report indicates he spends most of his time repeating subjective information disclosed by the Claimant. He does a physical examination but much of his opinion was based on reviewing reports that were made available to him. He notes permanent limitations for impact activity, heavy lifting and repetitive or forceful use of the right

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[4] The is the wording of the legal test to be met in civil proceedings that arose from the accident
[5] General Division decision at para. 20
[6] *Simpson v. Canada (Attorney General)*, 2012 FCA 82; *Canada v. South Yukon Forest Corporation*, 2012 FCA 165
[7] *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667
[8] General Division decision at para. 19
[9] General Division decision at para. 20

> upper extremity against resistance. He concludes these impairments translate to her being unable to work at any occupation. He wrote that his opinion was based on the history he took from the Claimant, his physical examination of the Claimant and review of the medical brief.[10]

There was an evidentiary basis for its findings of fact regarding this evidence. Therefore, the General Division made no reviewable error in this regard. The appeal fails on this basis.

Chronic pain

[19] The Claimant also argues that the General Division based its decision on an important factual error because it failed to consider the impact of her chronic pain on her capacity regularly to pursue any substantially gainful occupation. The General Division decision refers to the Claimant's testimony about her pain, and that as a result of it she has a number of limitations, including only being able to drive for 15 minutes.[11] It also refers to the disability pension application where the Claimant wrote that her concentration, focus and learning new skills were "fair", in spite of her pain. The General Division decided that this condition did not make the Claimant unable regularly to pursue any substantially gainful occupation.

[20] There was an evidentiary basis for this finding of fact. Therefore, the General Division made no reviewable error in this regard.

Computer work

[21] The Claimant argues further that the General Division based its decision on an important factual error because it equated her ability to look at a computer screen for twenty minutes with capacity regularly to pursue any substantially gainful occupation. However, the General Division did not do so. The decision states that to assess whether the Claimant has a severe disability under the *Canada Pension Plan* the General Division must keep in mind factors such

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[10] *Ibid.*
[11] General Division decision at para. 12

as her age, education, language skills and work and life experience.[12] It then considered these things. The decision states

> The Claimant was only 48 years of age at the time of the MQP. She obtained a high school education. She is proficient in English. Work experience included working in the floral business for many years as well as P.S.W. Her career gives her some transferable skills. She has the ability to concentrate, focus her attention, learn new things, write an e-mail, stare at a computer screen for at least 20 minutes, use a computer keyboard, and sit for twenty minutes. These abilities indicate an ability to retrain, learn new skills or upgrade her education to improve her employment skills.[13]

The General Division did not equate being able to look at a computer for twenty minutes with capacity to work. It considered all of the Claimant's relevant personal characteristics, and decided based on all of them, that she could retrain or learn new skills, and was not precluded regularly from pursuing any substantially gainful occupation.

[22] It made no reviewable error in this regard.

Severe disability and jurisdiction

[23] Second, the Claimant argues that the General Division erred when it found that her disability was not severe. She says that the uncontested medical evidence establishes that it is. However, it is not for the medical practitioners to decide whether the Claimant meets the legal test for severe disability under the *Canada Pension Plan*. It is for the General Division member to receive all of the evidence from all of the parties, to weigh it, and reach a decision based on the law and the facts. This is what the General Division did.

[24] It did not base its decision on the Tribunal Member's personal beliefs.

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[12] General Division decision at para. 21
[13] *Ibid.* at para. 22

[25] The General Division did not act outside of its jurisdiction. It accepted the parties' evidence, weighed it, and made a decision based on the law and the facts. The written reasons explain why the General Division made the decision it did.

[26] It is not for the Tribunal's Appeal Division to reweigh the evidence to reach a different conclusion.

[27] These grounds of appeal fail.

Bias

[28] The Claimant also argues that the General Division was biased because it did not assess the evidence fairly. It is difficult to prove that a Tribunal Member was biased. Decision makers are presumed to be impartial and unbiased. The legal test for bias is what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude. Would he think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly.[14]

[29] Nothing before me suggests that a reasonable person would conclude that the General Division would decide this appeal unfairly. The decision summarizes the evidence that was presented to it, including evidence that favoured each party's legal position. It explains the law, and applies it to the facts before it. The decision is, logical, intelligible and reasonable.

[30] Therefore, this ground of appeal also fails.

The Claimant's formal education and work experience

[31] The Claimant also argues that the General Division made two errors in law. First she argues that the General Division erred in its consideration of her formal education and work experience. As stated above, the General Division must consider a claimant's personal characteristics as well as their medical conditions when deciding whether they have a severe disability.[15] The General Division did so. The decision states that the Claimant was 48 years old at the end of the MQP, that she has a high school education, work experience as a florist and

[14] *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 SCR 369
[15] *Villani v. Canada (Attorney General)*, 2001 FCA 248

personal support worker which would give her transferrable skills. She can also concentrate, use a computer and sit for 20 minutes, which information the Claimant set out in her disability pension application and confirmed to be true in testimony. The General Division concludes that this indicates an ability to retrain or learn new skills.[16]

[32] The General Division clearly considered the Claimant's personal characteristics along with her medical conditions. That the Claimant disagrees with the conclusion reached is not sufficient for the appeal to be allowed on this basis. The appeal fails on this ground of appeal.

Predictability

[33] Second, the Claimant argues that the General Division made an error in law because it failed to consider whether she could work predictably. The Federal Court of Appeal has said that each word in the definition of severe (incapable regularly of pursuing any substantially gainful occupation) must be given meaning.[17] It also said that predictability is the essence of regularity.[18] Therefore, the General Division must consider whether a claimant could work predictably when deciding whether they have a severe disability.

[34] The General Division considered whether the Claimant could work predictably. The decision states that the Claimants right arm/shoulder/had limitation and associated pain would not result in her being an unpredictable employee.[19] Therefore, it made no error in law.

CONCLUSION

[35] The General Division made no reviewable error.

[36] Therefore the appeal is dismissed.

Valerie Hazlett Parker
Member, Appeal Division

[16] General Division decision at para. 22
[17] *Villani*, above
[18] *Atkinson v. Canada (Attorney General)*, 2014 FCA 187
[19] General Division decision at para. 22

HEARD ON:	June 17, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	David Wallbridge, Counsel for the Appellant Viola Herbert. Representative for the Respondent