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

Citation: *F. P. v Minister of Employment and Social Development*, 2020 SST 526

Tribunal File Number: AD-19-638

BETWEEN:

F. P.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: June 19, 2020

DECISION AND REASONS

DECISION

[1] I dismiss the appeal. These reasons explain why.

OVERVIEW

[2] F. P. (Claimant) was working as a car parts clerk when he had a heart attack in July 2011. After taking time off to recover, he returned to work as a drywall finisher. In February 2015, the Claimant injured his neck and back in a car accident. He has not worked since.

[3] The Claimant first applied for a disability pension under the *Canada Pension Plan* (CPP) in February 2012. The Minister refused the application. In June 2017, he applied again, stating that he could no longer work in any capacity because of heart disease and herniated discs in his back. The Minister refused the application initially and on reconsideration.

[4] The Claimant appealed to this Tribunal. The General Division dismissed the appeal. The General Division found that, while the Claimant was no longer capable of a physically demanding job such as the one he had in drywall and taping, he was capable of sedentary work. He did not show that efforts to get and keep employment were unsuccessful because of his health condition.

[5] The Appeal Division granted the Claimant permission (leave) to appeal the General Division's decision. I must decide whether the General Division made an error under the *Department of Employment and Social Development Act* (DESDA). If there is an error, I need to decide how to fix (remedy) that error.

ISSUES

[6] The issues are as follows:

1. Did the General Division make an error of law by failing to consider whether the Claimant was "incapable regularly" of any substantially gainful work?[1]

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

2. Did the General Division make an error of law by ignoring the evidence from the Claimant and his witnesses about his lack of capacity for work?

3. Did the General Division make an error of fact by ignoring medical evidence about the Claimant's capacity for work?

4. Did the General Division make an error of law by failing to consider all of the Claimant's conditions (particularly his chronic pain, depression, anxiety, fatigue, and lack of mobility)?

5. Did the General Division make an error of law by failing to analyze whether the Claimant would require a benevolent employer to work?

6. Did the General Division make an error of law by failing to apply the correct legal tests when considering the Claimant's treatment?

ANALYSIS

Reviewing General Division Decisions

[7] The Appeal Division does not hear cases again from the beginning. At the Appeal Division, the question is whether the General Division made an error. The only errors the Appeal Division can focus on are ones listed in the DESDA.

[8] One of the errors that the DESDA describes is an error of law.[2] Another one of the errors that the DESDA describes occurs when the General Division "bases its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."[3] An error involving the facts has to be important enough that it could affect the outcome of the decision (that is a "material" fact). The error needs to result from ignoring evidence, from willfully going against the evidence, or from reasoning not guided by steady judgement.[4]

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[2] DESDA, s 58(1)(b).
[3] DESDA, s 58(1)(c).
[4] The Federal Court considered these ideas about perverse and capricious findings of fact in a case called *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319.

Issue 1: Did the General Division make an error of law by failing to consider whether the Claimant was "incapable regularly"?

[9] The General Division did not make an error of law by failing to consider whether the Claimant was incapable regularly of any substantially gainful work. The decision shows that the General Division considered the Claimant's partner's testimony on that issue and that it preferred the evidence from medical reports, which it found supported the notion that the Claimant could do sedentary work.

[10] A disability is severe for the purpose of the CPP when a person is incapable regularly of pursuing any substantially gainful occupation.[5] Each part of that definition has meaning. Each part of the definition requires consideration.[6] The General Division must consider not just whether the Claimant was incapable of any substantially gainful work, but also whether that incapacity was regular.[7] The Federal Court of Appeal has confirmed that "predictability is the essence of regularity within the CPP definition of disability."[8]

[11] The Claimant argues that the General Division made an error of law by failing to consider whether the Claimant was "incapable regularly" of any substantially gainful work. The Claimant makes two arguments about this. First, he argues that the capacity to work for only two to three hours a day at a sedentary job still means that the Claimant is "incapable regularly" of pursuing any substantially gainful occupation. Predictability is the essence of regularity. The Claimant argues that, although he has the capacity to work 14 to 16 hours a week, that is still "incapable regularly" when compared to an average full-time work week.

[12] Second, the Claimant argues that the General Division did not consider the evidence from his partner about whether he is incapable regularly of pursing any substantially gainful work. His partner testified that the Claimant would be an unreliable employee. The Claimant takes issue with the fact that the General Division preferred the medical assessors' evidence to that of the

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[5]CPP, s 42(2).
[6] The Federal Court of Appeal explained this in a case called *Villani v Canada (Attorney General)*, 2001 FCA 248.
[7] The Federal Court of Appeal explained this in a case called *D'Errico v Canada (Attorney General)*, 2008 FCA 164.
[8] The Federal Court of Appeal explained this in a cased called *Atkinson v Canada (Attorney General)*, 2014 FCA 187 at para 38.

Claimant's partner,[9] when the General Division acknowledged in another part of the decision that the Claimant's partner actually is a medical professional (a registered practical nurse).[10]

[13] The Minister agrees that the General Division must consider whether the Claimant was "incapable regularly" of any substantially gainful work. The Minister argues that the General Division did consider the evidence on that question. The General Division considered the Claimant's partner's testimony about whether the Claimant would be a reliable employee. The General Division decided to put little weight on that evidence because it preferred the medical evidence about the Claimant's capacity to work, specifically Dr. Muniz's evidence.[11]

[14] In my view, the General Division did not make an error of law. The General Division is required to consider, as part of the analysis about whether the disability was severe, whether the Claimant was "incapable regularly" of any substantially gainful work. In my view, the General Division did consider that question.

[15] First, the General Division did mention the Claimant's testimony that he thought he could manage working on a computer for perhaps two or three hours a day.[12] The General Division did not rely on that evidence to conclude that the Claimant was "incapable regularly" of any substantially gainful work. The failure to reach that conclusion based on the facts is an error of mixed fact and law, and I do not have the power to address that type of error.

[16] Second, the Claimant's partner gave evidence that the Claimant would not be a reliable worker, which is important in determining whether a person is "incapable regularly" of any substantially gainful work. The General Division expressly considered that evidence, weighed it, and decided it preferred the evidence from the medical assessors on the question of the Claimant's capacity for work. That is the General Division's job, and the DESDA does not give me the ability to find that the General Division made an error by weighing the evidence incorrectly.

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[9] General Division decision, para 55.
[10] General Division decision, para 17.
[11] General Division decision, para 55.
[12] General Division decision, para 15.

[17] It is true that the Claimant's partner also happens to be a medical professional, but she was not giving what the General Division member referred to as "lay evidence,"[13] which I understand to mean that she was testifying about her observations of her partner, not providing testimony of her professional opinion formed as a result of any kind of medical assessment.

Issue 2: Did the General Division make an error of law by failing to analyze the testimony about capacity for work?

[18] The General Division did not make an error of law by failing to analyze the testimony from the Claimant and his witnesses about his capacity to work. The General Division summarized that evidence, weighed it against the medical evidence, and decided that the Claimant had a capacity for sedentary work.

[19] The General Division decision summarizes the testimony from the Claimant and his witnesses about his lack of capacity for work.[14]

[20] The General Division member decided that the Claimant's co-worker's evidence did not assist the Claimant because he reiterated that the Claimant could not return to his former job as a drywall finisher/taper.[15]

[21] General Division considered the evidence from the Claimant's partner that the Claimant would be an unreliable employee.[16] However, the General Division weighed that evidence against the evidence from Dr. Muniz. The General Division preferred the medical assessor's report to that of the partner.

[22] The Claimant argues[17] that he provided extensive evidence about his physical and emotional restrictions and limitations. The General Division made no finding about any lack of credibility or reliability of his evidence. The Claimant argues that the General Division needed to discuss how the Claimant's emotional problems, fatigue, lack of motivation, and pain conditions

[13] General Division decision, para 55.
[14] General Division decision, paras 15 to 17.
[15] General Division decision, para 54.
[16] General Division decision, para 55.
[17] AD1-27.

would impact his employability in a real-world situation. The Claimant argues that failing to do that is an error of law.[18]

[23] The Claimant seems to argue that the way the General Division considered the witnesses' evidence also resulted in an error. The Claimant argues that, despite being concerned about the limitations of the testimony from the Claimant's former co-worker, the General Division member did not ask clarifying questions to draw out an opinion about whether the Claimant could do sedentary work.

[24] In my view, the General Division did not make an error of law by ignoring the testimony from the witnesses. The General Division specifically discussed the evidence from those witnesses.[19] The Claimant's argument about the weight that the General Division gave that evidence goes to the heart of the fact-finding role of the General Division and does not provide the Appeal Division with any legitimate path to intervene.

[25] In my view, there is also no error in the approach that the General Division took to the witness testimony at the hearing. The General Division preferred the medical evidence to the Claimant's partner's testimony. Another member might have chosen to ask the co-worker a follow-up question about whether he thought the Claimant was capable of any sedentary employment in another field. However, I cannot conclude that failing to ask that question of either of the Claimant's witnesses results in any error under the DESDA. The Claimant has the burden of proof. I am satisfied he was given a fair opportunity to present his evidence.

Issue 3: Did the General Division make an error of fact by ignoring medical evidence about the Claimant's capacity to work?

[26] The General Division did not make an error of fact by ignoring medical evidence about the Claimant's capacity to work.

[27] The Claimant argues that the General Division made an error by concluding that he had the capacity to do sedentary work. The Claimant argues that there is no medical evidence that

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[18] The Claimant relies on the Federal Court's decision in *Attorney General (Canada) v Dwight St.-Louis*, 2011 FC 492 (*St.-Louis*) for the principle that where there is a piece of evidence that directly addresses part of the legal test to apply, it needs to be discussed. See AD1-26, citing para 30 of the *St.-Louis* decision.
[19] General Division decision, paras 52 to 56.

confirms that, at the end of his minimum qualifying period (MQP) in December 2017, he was capable regularly of any substantially gainful occupation. The Claimant also listed several reports that he argues the General Division ignored in relation to the question of capacity to work:

- Dr. Ballard's examination from August 25, 2016,[20] for income replacement benefits. The report discusses the pain the Claimant experiences and Dr. Ballard concludes there is lumbar spine sprain and strain with radicular symptoms. The report concludes he cannot meet the standing sand stooping demands of his job as drywall taper. Dr. Ballard concluded, after comprehensive therapy sessions, that the Claimant's condition had plateaued and that he still had low back pain. The prognosis was guarded given the length of time that has passed since the car accident.

- Dr. Jones' September 8, 2016, report,[21] which states that the Claimant has very high levels of anxiety and phobic symptoms, as well as high levels of depressive symptoms. There were concerns about his physical symptoms, interpersonal relationships, and psychological health. The diagnosis was adjustment disorder with mixed anxiety and depressed mood, somatic symptom disorder (persistent with predominant pain), and specific phobia situational (driving related). His Global Assessment of Functioning score was 55.

- Dr. Shujah's (psychologist) psycho-vocational assessment report of October 24, 2016,[22] which states that the Claimant has major depressive disorder (moderate, single episode), adjustment disorder with anxiety, and somatic symptom disorder (moderate). The report states that, "[o]verall, the nature and severity of his accident-related psychological impairments deem him to be impaired in his current capacity to engage in any employment on a full-time basis for which he is reasonably suited by education, training and experience." Dr. Shujah recommended a multi-disciplinary pain management program.

[20] GD6-145 to 155.
[21] GD6-158 to 169.
[22] GD6-182 to 189.

- The pain management program report dated March 8, 2017,[23] which states that, even with the proposed six-week program, the prognosis was guarded for achieving fitness to work.

- Dr. Jett's psychological report dated December 7, 2017,[24] which concludes that the Claimant's emotional problems are moderate to severe and that they diminish his resources for coping with life in general and interfere with his ability to function effectively in work/home and social environments. Dr. Jett's progress report from November 30, 2018.[25] Dr. Jett states that his coping remains diminished, and he made little, if any, improvement.

- Dr. Muniz's report of January 29, 2019,[26] report. The report concludes that the Claimant has "a complete inability to engage in any occupation for which he is suited based on his education, training and experience as a result of injuries" from his car accident.

[28] The Minister argues that the General Division member explained which medical reports she relied on to support the conclusion that the Claimant had a residual capacity for work.

[29] The General Division did not make an error of fact by ignoring medical evidence about the Claimant's capacity to work. The General Division considered Dr. Ballard's report and concluded that it provides only an opinion on the Claimant's ability to perform his pre-accident job.[27]

[30] The General Division considered Dr. Jones' opinion and concluded that Dr. Jones did not believe that the Claimant's psychological impairments were the primary reason for his inability to perform his employment tasks. He provided the Claimant with a good prognosis.[28]

[31] The General Division considered Dr. Shujah's report and its conclusion about the fact that the Claimant's pain management issues and emotional difficulties would have to be

[23] GD6-291 to 294.
[24] GD6-350 to 365.
[25] GD5-2 to 7.
[26] GD9-2 to 8.
[27] General Division decision, para 33.
[28] General Division decision, para 34.

addressed before any vocational retraining could be considered. The General Division also specifically noted Dr. Shujah's opinion about the Claimant's psychological health impeding his performance in the type of jobs for which he was most suited.

[32] The General Division considered Dr. Jett's report, including the fact that he was experiencing constant pain that was exacerbated by prolonged sitting, standing, or walking.[29]

[33] The General Division considered Dr. Muniz's report. The General Division noted the very part of the report the Claimant highlights in the appeal, namely that the Claimant had a complete inability to do any job he was suited for based on education training and experience. However, the General Division also noted that Dr. Muniz agreed that the Claimant may have major impairments that prevented him from considering or exploring non-physical jobs.[30]

[34] The General Division mentioned the very reports that the Claimant says were important. However, the General Division weighed those reports and also considered additional reports, including those from Dr. Heitzner and Dr. Karp,[31] and decided that the Claimant had capacity for sedentary employment. I cannot conclude that the General Division ignored the medical reports. The General Division did not reach the conclusion that the Claimant would have liked about those reports, but that is not the basis for an error under the DESDA.

Issue 4: Did the General Division make an error of law by failing to consider all of the Claimant's conditions?

[35] The General Division did not make an error of law by failing to consider all of the Claimant's conditions. The General Division considered all of the medical conditions that impacted the Claimant's ability to work, including his chronic pain, depression, anxiety, fatigue, and lack of mobility.

[36] The General Division must consider all of the Claimant's conditions.[32] The General Division is presumed to have considered all of the evidence, even if it is not discussed in the

[29] General Division decision, para 29.
[30] General Division decision, para 43.
[31] General Division decision, paras 41 to 51.
[32] The Federal Court of Appeal explained this in a case called *Bungay v Canada (Attorney General)*, 2011 FCA 47.

decision.[33] That presumption can be overcome if the evidence is probative (important enough) that it needed to be discussed, and it was not.[34]

[37] The Claimant argues that the General Division did not consider the impact of his chronic pain, depression, anxiety, fatigue, and lack of mobility on his ability to work.

[38] The Minister argues that the General Division did consider the Claimant's condition in its totality, so there is no error. The Minister argues that the General Division summarized the testimony from the witnesses as well as the written evidence. The Minister argues that the decision specifically listed all of the Claimant's conditions. Then the General Division member stated that, after reviewing all the medical evidence, he was satisfied that the Claimant had the ability to do sedentary work.

[39] In my view, the General Division did not make an error of law by failing to consider all of the Claimant's conditions. The General Division decision describes many key aspects of the medical evidence in some detail.

[40] The General Division summarized the Claimant's position on the question of work capacity like this:

> The Claimant's legal representative submitted that the Claimant had been unable to return to any form of competitive employment because of chronic pain in his neck and back, which resulted in restricted range of motion. The Claimant's depression, anxiety, and non-restorative sleep led to fatigue, exhaustion and cognitive impairments that rendered him unemployable. The legal representative also submitted that the Claimant is not a suitable candidate for returning to any kind of employment, including sedentary occupations.

[41] This statement in particular shows that the General Division considered the Claimant's arguments about the impact of the chronic pain, the lack of range of motion, the depression, the anxiety, and the impact of the lack of sleep. The General Division member specifically explains why he rejected the Claimant's argument, referring to both medical reports and testimony.[35]

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[33] The Federal Court of Appeal explained this in a case called *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[34] The Federal Court explained this in a case called *Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498.
[35] General Division decision, para 40 and following.

Issue 5: Did the General Division make an error of law by failing to analyze whether the Claimant would require a benevolent employer to work?

[42] The General Division decision does not discuss the idea of a benevolent employer, but it was not required to do so in law.

[43] A claimant with a severe disability is incapable regularly of pursuing any substantially gainful occupation. A job with what is referred to as a "benevolent employer" is not considered to be an "occupation" for the purpose of determining whether a disability is severe.[36] According to the Minister's policy document, the Canada Pension Plan Adjudication Framework (Framework), a benevolent employer is someone who will vary the conditions of the job and modify their expectations of the employee based on their limitations beyond what is required in the competitive marketplace.

[44] The Claimant argues that he would not find a benevolent employer who would accommodate his physical restrictions, reduced stamina, and psychological restrictions (including depression and lack of motivation in the real-world context). The Claimant argues that the General Division made an error of law by not recognizing these issues.[37]

[45] The Minister argues that the issue of benevolent employment was not before the General Division and therefore cannot form the basis for an appeal at the Appeal Division. In the alternative, the Minister argues that the General Division decision does not have the effect of requiring the Claimant to find a benevolent employer. The General Division found, based on the medical evidence, that the Claimant had a capacity for sedentary work. The General Division found that he failed to pursue that type of work, so he was not eligible for a disability pension.

[46] In my view, the General Division did not make an error of law by failing to discuss whether the Claimant's accommodation needs were such that he would only be capable of sedentary work for a benevolent employer. The idea of the benevolent employer most often arises in assessing whether work that the Claimant has actually done (either during or after the MQP) was evidence of a capacity for work. It seems the Claimant argues that the concept of the

[36] *Atkinson v Canada (Attorney General)*, 2014 FCA 187 at para 7, quoting from the Framework.
[37] AD1-29 and 30.

benevolent employer must be discussed where the Claimant gives evidence about the limitations and accommodations he might need if he were to try to work.

[47] In this case, the General Division weighed the medical evidence and the testimony about the Claimant limitations and what both he and his witnesses thought that he could do, and decided he had capacity for sedentary work. The General Division has analyzed the evidence and then reached a conclusion that the Claimant had capacity for sedentary work. In this case, implicit in that finding is that the Claimant's capacity for sedentary work was not restricted to benevolent employer situations only.

Issue 6: Did the General Division make an error of law about the Claimant's treatment?

[48] Although the General Division did not consider whether the Claimant's refusal to try injections was reasonable, the General Division did not make an error of law in analyzing the Claimant's treatment. The General Division did not base its decision on the idea that the Claimant unreasonably refused treatment.

[49] Where a Claimant unreasonably refuses treatment, the General Division may decide that the Claimant is not eligible for the disability pension.[38]

[50] The Claimant argues[39] that the General Division made an error of law by drawing a negative inference about the fact that the Claimant decided against trying pain injections in his back, without considering first whether his decision was reasonable. The Claimant testified at the General Division hearing that he considered and researched the pain injections. He did not feel comfortable with having chemicals injected into his back. Then he learned that the doctor who recommended this treatment was involved in legal issues, which made him very uncomfortable to pursue that recommendation.[40]

[51] The Minister argues that the General Division did not make a legal error by mentioning the treatment that the Claimant did not try. The General Division did not make a negative inference about the Claimant's failure to follow recommended treatment, as this was not the basis for the decision that the Claimant was not eligible for a disability pension. The General

[38] *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.
[39] AD1-25.
[40] Recording of the General Division hearing, at about 34:00.

Division summarized the Claimant's testimony and noted that the Claimant testified that a doctor suggested pain injections, but that the Claimant researched the issue and decided against it.[41] There is no other reference in the decision to the failure to follow treatment recommendations.

[52] In my view, the General Division did not make an error of law. The General Division did not draw a negative inference from the fact that the Claimant did not agree to have pain injections in his back. The General Division merely discussed the Claimant's treatment, which is part of its obligation to consider the Claimant's medical conditions and his testimony about those conditions.

[53] Even if I am wrong about this and the General Division's mention of the testimony about the pain injections amounts to a negative inference, this error would have no impact on the outcome of the decision. The General Division decided that the Claimant was not eligible for the disability pension because he had a residual capacity to work. He did not show that efforts to get and keep employment were unsuccessful because of his health condition. The pain injections in his back (or lack of trying them) do not play a role in that analysis.

CONCLUSION

[54] I dismiss the appeal.

Kate Sellar
Member, Appeal Division

HEARD ON:	January 17, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	George Dietrich, Representative for the Appellant Viola Herbert, Representative for the Respondent

[41] General Division decision, para 14.