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

Citation: *G. L. v Minister of Employment and Social Development*, 2020 SST 551

Tribunal File Number: AD-19-657

BETWEEN:

G. L.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: June 25, 2020

DECISION AND REASONS

DECISION

[1] I dismiss the appeal. The General Division did not make an error.

OVERVIEW

[2] G. L. (Claimant) was completing her PhD in 2011 when she became ill. She had a series of symptoms including severe gastroesophageal reflux and then a post-viral fatigue. She returned to the university when that illness improved. In 2013, she began experiencing pain and discomfort sitting at her desk and with weight bearing. She had pain and spasm with hip flexion after long work days. By May 2013, she says that she was working from home full-time on her computer from a reclined position. By September 2014, she explains that she was completely unable to sit in a straight-backed chair. She applied for a disability pension under the *Canada Pension Plan* (CPP) on November 30, 2017.

[3] The Minister denied the Claimant's application initially and on reconsideration. The Claimant appealed to this Tribunal. The General Division dismissed her appeal on June 15, 2019. I granted the Claimant permission (leave) to appeal the General Division decision. I found that there was an arguable case that the General Division made an error of fact. An arguable case is a low threshold to meet.

[4] I must decide whether the General Division made an error under the *Department of Employment and Social Development Act* (DESDA).

[5] I dismiss the appeal. The General Division did not make an error.

ISSUES

[6] The issues are:

1. Did the General Division make an error of fact by ignoring evidence from 2016 and after that may have supported the Claimant's testimony about her limitations from late 2013 to 2016?

2. Did the General Division make an error of fact by ignoring or misunderstanding the evidence that the Claimant was under pressure to complete her schooling?
3. Did the General Division make an error of fact about the Claimant's efforts to seek treatment from 2013 to 2016?
4. Did the General Division make an error of fact by focussing on the Claimant's GI reflux issues rather than her diagnosis of a post-viral illness?
5. Do the Claimant's arguments raise any other error under the DESDA that I should address concisely?

ANALYSIS

Reviewing General Division decisions

[7] The Appeal Division does not give people a chance to re-argue their case in full at a new hearing. Instead, the Appeal Division reviews the General Division's decision to decide whether there is an error. That review is based on the wording of the DESDA, which sets out the grounds of appeal. The DESDA states that the General Division makes an error when it fails to follow the principles of natural justice (which are about fair process).[1]

[8] The DESDA says that it is an error 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."[2] A mistake involving the facts has to be important enough that it could affect the outcome of the decision (that is called a "material" fact). The error needs to result from ignoring evidence, willfully going against the evidence, or from reasoning that is not guided by steady judgement.[3]

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[1] DESDA, s 58(1)(a),
[2] DESDA, s 58(1)(c).
[3] 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.

Did the General Division make an error of fact by ignoring evidence from 2016?

[9] The General Division did not make an error of fact by ignoring evidence from 2016 and following that may have supported the Claimant's testimony about the extent of her limitations from late 2013 to 2016.

[10] The Claimant had to show that her disability was severe within the meaning of the CPP:

- on or before December 31, 2012 (the end of her minimum qualifying period); or
- in 2015 between January 1, 2015 and April 30, 2015 (the "period of proration" based on some additional contributions the Claimant made to the Canada Pension Plan).

[11] The General Division is presumed to have considered all of the evidence, even if the decision does not contain discussion of every piece of evidence.[4] That presumption does not apply if the evidence was of such importance that it needed to be discussed.[5]

[12] The General Division did not accept the Claimant's evidence about the severity of her physical limitations between late 2013 and 2016. The General Division found it hard to accept that the Claimant would not have continued to seek treatment during that time if her condition was as disabling as she said that it was.[6] The General Division decided that it was more likely that the symptoms gradually increased from late 2013 to 2016 until the Claimant sought further treatment in early 2016.[7]

[13] As I understand it, the Claimant argues that the General Division ignored the nature of the medical evidence from October 2016 and following. There was no medical evidence of leg or hip problems between the emergency report in October 2013 and the June 2016 medical note. But the Claimant argued that the General Division failed to consider and discuss whether the evidence that came later (like the 2016 MRI which showed a subchondral cyst), supported her

[4] The Federal Court of Appeal explained this in a case called *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[5] The Federal Court of Appeal explained this in a case called *Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498.
[6] General Division decision, para 13.
[7] General Division decision, para 13.

testimony about the severity of her functional limitations during the MQP and the period of proration.[8]

[14] I granted permission to appeal (leave) because I found that there was an arguable case that the medical evidence that came after the end of the period of proration was important enough that the General Division needed to discuss whether it supported the Claimant's testimony about the severity of her limitations from 2013 to 2016. An arguable case is a low threshold to meet.

[15] The Minister argues that the General Division did consider the Claimant's evidence from 2016 and forward. The Minister argues that the issue the Claimant has is actually with the conclusions that the General Division reached about that evidence. The General Division had difficulty accepting the Claimant's testimony as to the extent of her limitations due to her leg and hip pain between 2013 and 2016. The Minister argues that the General Division considered Dr. Naug's report from December 2018. Dr. Naug began treating the Claimant in March 2017. The Minister explains that Dr. Naug's report makes a link between the Claimant's 2013 shin splint diagnosis and hip problems. The General Division found that the Dr. Naug's report on its own did not establish that the Claimant's condition met the test for a severe disability as of April 2015.

[16] In my view, the General Division did not make an error of fact by ignoring evidence starting from 2016 that may have provided insight into her condition during the MQP or the prorated period. I am persuaded by the Minister's argument: the General Division decision mentions the MRI report from the summer of 2016, which led to a diagnosis of a subchondral cyst. The General Division decision also considers Dr. Naug's December 2018 report, stating:

> The Claimant relies on a December 2018 report from Dr. Naug who began treating her March 2017. Dr. Naug makes the link between her 2013 shin splints diagnosis and her hip problems. That may very well be the case, and even if so, it does not establish, on its own that her condition was disabling in April 2015. One indication that the condition

> was disabling would be to seek medical treatment, which she did not pursue until 2016 and well after her prorate date.[9]

[17] The General Division also considered Dr. Naug's report from April 2019.[10] The General Division did not ignore the connection Dr. Naug was making between the Claimant's condition before he began treating her and her diagnoses as of December 2018. The General Division concluded that the evidence was not sufficient to show that the Claimant's condition was severe within the meaning of the CPP by the end of the period of proration. There is no error of fact here – the General Division considered the evidence but came to a conclusion that the Claimant does not agree with.

Did the General Division ignore or misunderstand the evidence about completing school?

[18] The General Division did not ignore or misunderstand the evidence about the pressure the Claimant was under to finish school. There is no error of fact relating to this part of the evidence.

[19] The Claimant argues that the General Division never appreciated the type of pressure the Claimant was under to complete her studies. The Claimant argues that this piece of information is critical to understanding her case. It explains why she managed to complete her PhD despite her disability. That pressure to complete her PhD also explains why the letters from her family doctor in August 2012 and September 2013 were written the way that they were: to ensure that the university did not terminate her doctorate unfairly based on her illness.

[20] The Minister argues that the General Division did not ignore the evidence that the Claimant was under pressure to complete her studies. The General Division decision specifically makes note of the letters the Claimant's family doctor wrote August 2012 and September 2013[11], as well as the Claimant's testimony that the letters were written to ensure that the university would not terminate her doctorate due to past illness. The General Division decision specifically references Dr. Naug's December 2018 letter. Dr. Naug noted the pressure the Claimant was under to complete her degree. The Minister argues that the General Division was alive to these

[9] General Division decision, para 15.
[10] General Division decision, para 12.
[11] General Division decision, para 8.

circumstances because the General Division member heard the Claimant's testimony and reviewed the documents in the case. The Minister notes that the General Division member must, as the trier of fact, sift through the facts and weigh them as he saw fit. The Minister argues that the General Division met its obligation and did not ignore the evidence the Claimant relied on.

[21] In my view, the General Division did not make an error by ignoring or misunderstanding the evidence about the pressure the Claimant was under to complete her degree. The General Division decision states:

> The Claimant testified that the letters written by her family physician in August 2012 and August 2013 were to ensure that the university would not terminate her doctorate because of her past illness and suggested they did not reflect the actual extent of her illness at that time. While I accept that her doctor may wish to assist by putting her condition in the best possible light, I give significant weight to Dr. Monroe's clear statement of her capacity to work in September 2012 and August 2013. In fact, she continued on working and defended her thesis in December 2013.[12]

[22] The General Division grappled with the evidence the Claimant gave about how to interpret the doctor's letters about her condition from 2012 and 2013. The General Division decided to give "significant weight" to the statement about the Claimant's ability to work, despite the Claimant's evidence about the idea that the letters did not reflect the state of her illness at the time. I am satisfied that the General Division understood that the pressure to complete her PhD was real. However, the problem for the Claimant is that the demonstrated ability to do that work (even though it was the result of tremendous pressure) may well have been consistent with a capacity to work.

Did the General Division make an error of fact about the Claimant's efforts to seek treatment?

[23] The General Division did not make an error of fact about the Claimant's efforts to seek treatment. The Claimant argues that it was a mistake for the General Division to rely on the fact that there are no medical reports about her back and hip after she went to the emergency department in late 2013 until 2016.

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[12] General Division decision, para 8.

[24] The General Division noted that there was no medical evidence of leg or hip problems between the emergency report in October 2013 and a June 2016 medical note from her family doctor referring her for a consultation due to left hip pain.[13] Ultimately, the General Division had trouble accepting the Claimant's testimony about the extent of her limitations due to her leg and hip between late 2013 and 2016. The General Division decision states:

> She told me that she did not seek any treatment from her family physician or others for her leg conditions, which she claims to be disabling during this period. She felt it was a soft-tissue injury which could only be helped with stretching, which she did when she was able to do so. While I do not doubt that the Claimant continued to have some leg pain issues during this time, I find it hard to accept that she would not have continued to seek treatment if it was disabling to the extent of her testimony. It is more likely that the symptoms gradually increased over that time until she finally sought further treatment in early 2016, which is one year after the latest date she could qualify.

[25] The Claimant argues that the General Division made an error of fact by relying on this idea that the she did not seek treatment from late 2013 to 2016. The Claimant argues that she made Olympic style efforts to seek treatment, but that when she mistakenly believed that the injury was soft tissue, she simply followed the advice for that type of injury and powered through.

[26] She argues that the General Division should have considered Dr. Naug's letter[14], which makes the connection between the shin splints and pain she was having during sitting (during the MQP and the period of proration) to the MRI results in 2016 that showed a large subchondral cyst and the impact the cyst had on the femoral head. The Claimant did not present as a typical osteoarthritis patient, and she argues that she should not be faulted for not seeking more assistance during the MQP and period of proration because doctors did not diagnose her properly.

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[13] General Division decision, para 12.
[14] GD1-46.

[27] The Claimant argues that Dr. Naug's additional letter[15] puts her decision into context because it shows that she did not simply have osteoarthritis, but that she had femoroacetabular impingement and will likely require a total hip replacement on the right side as well.

[28] In my view, the General Division did not make an error of fact here. The General Division did not ignore either the Claimant's evidence or Dr. Naug's evidence about the nature of her conditions from 2013 to 2016. The General Division weighed the evidence and decided that if the limitations were as significant as the Claimant described, she would have continued to follow up with medical professionals during that time. It is not capricious or perverse to reach that conclusion, even in light of the information from Dr. Naug about the Claimant not presenting as a typical osteoarthritis patient and the possible connection between the Claimant's shin splints and her hip problems. In any event, the General Division clearly grappled with that issue and discussed Dr. Naug's reports in the decision.

Did the General Division make an error of fact by focussing on the Claimant' GI reflux issues?

[29] The General Division did not make an error of fact by focussing on the Claimant's GI reflux issues rather than her diagnosis of a post-viral illness.

[30] The General Division noted that the Claimant's GI reflux issues were resolved by April 2015.[16] The General Division did not reference any post-viral illness or fatigue.

[31] The Claimant argues that the General Division made an error of fact by focussing on her GI reflux symptoms rather than her post-viral illness. Dr. Overington's clinical note from March 8, 2012[17] states that the Claimant had ongoing issues with fatigue, "though feels much better than last fall." Dr. Overington stated that the Claimant had episodes when she gets overwhelmingly fatigued and short of breath. She stated that she discussed with the Claimant that the Claimant was "getting better – however slowly – suggests episode of illness ie viral rather than progressive disorder and we will just continue to monitor as time goes on she will gradually increase her exercise as able."

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[15] GD8-3.
[16] General Division decision, para 11.
[17] GD2-30.

[32] The Minister argues that although the General Division did not specifically list the post-viral illness when discussing the Claimant's conditions, it was still alive to all of the Claimant's conditions. The Minister argues that by referencing Dr. Overington's letters of August 2012 and September 2013[18], the General Division considered all the information about the Claimant's conditions, including the post-viral illness. The 2012 letter from Dr. Overington contain statements including that the Claimant had "some significant medical issues over the past 20 months" but also that the Claimant was "quite well and able to perform the work required."[19] The 2013 letter states that the Claimant had significant medical issues over the past two and a half years but that while the Claimant does continue to have medical issues "they are not incapacitating as they were previously."[20]

[33] The General Division did not make an error of fact. The General Division is presumed to have considered all of the evidence. That presumption does not operate when the evidence is probative (important enough) that it needed to be discussed but it was not. In this case, the General Division gave great weight to Dr. Overington's letter which stated that the etiology of the Claimant's symptoms was

> probably multi-factorial – an initial viral illness, with post-viral fatigue and asthma, as well as significant gastro-esophageal reflux . She is now quite well and able to perform the work required, but certainly her medical issues have had a great impact on her productivity over the past year and a half.[21]

[34] I find that the failure to specifically address the post-viral illness in the decision in not an error of fact. I presume that the General Division considered the post-viral illness. It was not significant enough that it needed to be discussed in light of:

a) Dr. Overington's conclusion about the Claimant's ability to work;

b) Dr. Overington's assessment of the post-viral fatigue (the statement about it improving, albeit slowly, and the impact that it had on exercise); and

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[18] General Division decision, para 8.
[19] GD3-27.
[20] GD3-28.
[21] GD2-32.

c) The Claimant's own statement in the materials[22] that in May of 2012 "what my doctor thought was post-viral fatigue had lifted enough for me to begin a graduated return to work"; and that "at the end of August or first part of September 2012 I reported to my doctor that my energy level had continued to improve."

Are there other alleged errors to address?

[35] The Claimant alleged several other errors by the General Division that I can address concisely.

[36] The Claimant argued that the General Division made an error of law by failing to decide whether her disability was prolonged. To be eligible for a disability pension, the Claimant's disability must be both severe and prolonged. As a result, when the General Division decides that a disability is not severe, it is not an error stop the analysis there.[23]

[37] The Claimant argued that the General Division made an error of fact by stating that it appeared that the Claimant "is now getting the treatment she requires and her prognosis is positive."[24] This is not an error of fact. In addition to the fact that the statement is supported by Dr. Naug who listed the Claimant's prognosis as "good",[25] it is also not material in that the finding does not change the General Division's findings about the Claimant's condition at the time of the MQP.

[38] The Claimant argues that the statement that she worked full time from home beginning in May 2013 was an error of fact. I am satisfied that this statement is not an error and is supported by the record, including in the Claimant's letter from July 12, 2018.[26]

[39] The Claimant argues that the General Division member's decision shows a bias in that it supports the notion that a person with a doctorate level of education must be fit to work. To decide whether there is a reasonable apprehension of bias, the correct legal question is to ask is: what would a reasonably well-informed person, viewing the matter realistically and practically,

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[22] GD2-52 and 53.
[23] The Federal Court of Appeal explained that in a case called *Klabouch v Canada (Social Development)*, 2008 FCA 33.
[24] General Division decision, para 17.
[25] GD2-134.
[26] Starting at GD2-52.

having thought the matter through, conclude?[27] The person considering the bias must be reasonable and the apprehension of bias must be reasonable in the circumstances of the case.[28] The General Division provided a full analysis of the legal issues in the case, and the Claimant can point to no specific comment or aspect of the decision that shows this bias, other than the conclusion that she is not entitled to the pension. The Claimant has not met the test for showing that the there is a reasonable apprehension of bias by the General Division member that would give rise to an error about the fairness of the process.[29]

CONCLUSION

[40] I dismiss the appeal. The General Division did not make an error.

Kate Sellar
Member, Appeal Division

HEARD ON:	March 4, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	G. L., Appellant Susan Johnstone, Representative for the Appellant

[27] This test comes from the Supreme Court of Canada in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 SCR 369, 1976 CanLII 2 (SCC).
[28] *R. v. S. (R.D.)* 1997 CanLII 324 (SCC), [1997] 3 SCR 484.
[29] A reasonable apprehension of bias would be a fair process error under s. 58(1)(a) of the DESDA, which requires the General Division to follow the rules of natural justice.