



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *L. M. v Minister of Employment and Social Development*, 2020 SST 552

Tribunal File Number: AD-19-799

BETWEEN:

**L. M.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: June 25, 2020

## **DECISION AND REASONS**

### **DECISION**

[1] The appeal is dismissed. The General Division made no errors.

### **OVERVIEW**

[2] L. M. (Claimant) was born in Romania, where she earned a Master's degree in physical education and worked as a swim coach. She continued to work as a swim coach and instructor when she came to Canada.

[3] In October 2005, the Claimant was in a serious car accident. She had a number of medical conditions as a result, including headaches, widespread soft tissue pain, depression and post-traumatic stress disorder. She applied for a Canada Pension Plan disability pension. This was granted. In 2017, the Minister of Employment and Social Development reassessed the disability pension claim and decided that the Claimant ceased to be disabled in January 2014. Because it had continued to pay the disability pension to the Claimant until 2017, an overpayment was assessed.

[4] The Claimant disagrees with the Minister's decision that she ceased to be disabled in 2014. The Claimant appealed the Minister's decision to the Tribunal. She says that she continued to be disabled until 2017. The Tribunal's General Division dismissed the appeal. It decided that the Claimant had regained capacity regularly to pursue a substantially gainful occupation in January 2014.

[5] Leave to appeal this decision to the Tribunal's Appeal Division was granted because the General Division may have based its decision on an important factual error without considering all of the medical evidence. I have now read the General Division decision and the documents filed with the Tribunal. I have considered the parties' written submissions and their oral arguments at the hearing. The appeal is dismissed because the General Division considered all of the evidence when it made its decision, provided a fair process, and did not make any error in law.

## **PRELIMINARY MATTER**

[6] The Claimant hired a lawyer to represent her at the Appeal Division. Less than one week before the hearing the lawyer wrote to the Tribunal and said that he no longer represented the Claimant. At the appeal hearing the Claimant was given the opportunity to request an adjournment of the hearing so that she could hire new representation. She said that she wanted to go ahead with the hearing without legal representation. The hearing therefore proceeded.

## **ISSUES**

[7] Did the General Division base its decision on an important factual error regarding her attendance with her doctor in 2014?

[8] Did the General Division fail to provide the Claimant with a fair process?

[9] Did the General Division make an error in law regarding her income in from 2015 to 2017?

## **ANALYSIS**

[10] 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.<sup>1</sup>

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

### **Important factual error**

[11] One ground of appeal the Claimant presents is that the General Division based its decision on an important factual error regarding how often she saw her doctor in 2014. In order to succeed on this basis, the Claimant must prove three things:

- a) that the finding of fact that she saw her doctor twice in 2014 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.

[12] The General Division decision states that the Claimant saw her family doctor twice in 2014, in January and July, and that in July the doctor signed a form for a person with disabilities to get a toll exemption.<sup>2</sup> The decision also refers to a specialist appointment and an X-ray in 2014.<sup>3</sup> The Claimant says that she saw her doctor for additional appointments in 2014 and in 2015 and 2016 so this finding of fact was made in error.

[13] However, the documents filed with the Tribunal only include notes for the two visits to the family doctor in 2014 that the General Division decision refers to. Therefore, there is an evidentiary basis for this finding of fact. It was not made without regard for additional evidence that was before the General Division. The General Division could not have considered documents that had not been filed with the Tribunal.

[14] Consequently, the General Division did not base its decision on an important factual error regarding the Claimant's attendance with her doctor.

[15] The Claimant also argues that the General Division erred because no medical evidence stated that she was better before 2017. However, it is for the General Division to receive all of the evidence from the parties, weigh it, and decide whether the Claimant had capacity regularly to pursue any substantially gainful occupation in January 2017. A substantially gainful

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<sup>2</sup> General Division decision at para. 17

<sup>3</sup> *Ibid.* at para. 18

occupation is not necessarily the same job that a claimant had before becoming disabled. It can be part-time or seasonal work.

[16] The General Division considered the medical evidence and the Claimant's testimony. She testified that she sometimes worked 5 to 10 hours per week at the swim club. This work included instructing, meeting with coaches and doing administrative tasks. She did not have a family doctor so attended at walk-in clinics, and used non-prescription medication. The General Division also considered the Claimant's earnings. Based on all of the evidence, the General Division decided that the Claimant had capacity regularly to pursue any substantially gainful occupation in January 2017. It did not overlook or misconstrue any important information in making this decision.

[17] Therefore, the appeal fails on this ground of appeal.

#### **Fair process**

[18] The Claimant also argues that the General Division failed to provide a fair process with respect to its treatment of her attendance with the family doctor. The requirement to provide a fair process means that the Tribunal must ensure that all parties have the opportunity to present their case to the Tribunal, to know and answer the other party's legal case, and to have a decision made by an independent decision maker based on the law and the facts.

[19] Nothing suggests that the General Division failed to provide this. The Claimant filed evidence with the Tribunal, attended at the General Division hearing. She testified and made oral arguments. She received copies of all the documents that the Minister filed with the Tribunal. The General Division also gave her additional time after the hearing to present financial records to support her position regarding her income.

[20] Therefore, the appeal fails on this basis.

#### **Error in law**

[21] The Claimant also argues that the General Division made an error in law regarding its conclusion that the Claimant had substantially gainful earnings in 2015 and 2016. The General

Division decision sets out what the Claimant earned in 2015, 2016, 2017 and 2018.<sup>4</sup> It refers to the Claimant's argument that her income in 2015, 2016 and 2017 was payment for work done before the car accident in 2005. The General Division gave the Claimant time after the hearing to produce accounting documents to substantiate this, but the Claimant did not file anything further.

[22] The General Division decision sets out how it calculated, based on the Claimant's salary from the swim club, the amount the swim club owed her for unpaid wages and its declining balance over the years, that at most approximately \$33,000 of her 2015 and 2016 income was attributable to work done before the car accident. The Claimant's total income in 2015 was approximately \$110,000 and in 2016 was approximately \$66,800.

[23] The General Division also considered the Claimant's testimony - that she spent time teaching and meeting with coaches at the swim club when she could during those years. The General Division decided that the Claimant earned a substantially gainful salary in 2015 and 2016, and that the most logical conclusion is that she earned it regularly by working at the swim club.<sup>5</sup>

[24] The General Division made no error in law. The *Canada Pension Plan* states that a person has a severe disability if they are incapable regularly of pursuing any substantially gainful occupation. The General Division considered this and concluded that the Claimant was capable of earning a substantially gainful income.

[25] The appeal fails on this basis.

## **CONCLUSION**

[26] The General Division made no errors. The appeal is consequently dismissed.

[27] The Tribunal has no authority to decide issues regarding the amount of any overpayment of the disability pension or repayment terms. The Claimant should contact Service Canada to discuss these matters.

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<sup>4</sup> General Division decision at para.29

<sup>5</sup> General Division decision at para. 36

Valerie Hazlett Parker  
Member, Appeal Division

HEARD ON:	June 23, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. M., Appellant  Susan Johnstone, Representative for the Respondent