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

Citation: *T. H. v Minister of Employment and Social Development*, 2020 SST 569

Tribunal File Number: AD-19-838

BETWEEN:

T. H.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: June 30, 2020

Canada

DECISION AND REASONS

DECISION

[1] I dismiss the appeal. The General Division did not make an error. The Claimant is not entitled to the disability pension under the *Canada Pension Plan* (CPP).

OVERVIEW

[2] T. H. (Claimant) was a logistics coordinator from 2013 to 2016. She worked as a property management assistant until early in 2018. She applied for a disability pension under the *Canada Pension Plan* (CPP) in January 2018. In her application, she explained that she stopped working in October of 2016 because of carpal tunnel syndrome. She also has depression and anxiety.

[3] The Minister denied her application initially and on reconsideration. The Claimant appealed to this Tribunal. The General Division decided that the Claimant did not prove that she had a severe disability as of the date of the hearing. I granted the Claimant permission (leave) to appeal the General Division's decision. I found that it was arguable that the General Division made an error of law by failing to consider all of the Claimant's conditions in their totality.

[4] I must decide whether the General Division made an error under the *Department of Employment and Social Development Act* (DESDA). If the General Division did make an error, I need to decide what I will do to fix (remedy) it.

[5] In my view, the General Division did not make an error. I dismiss the appeal.

PRELIMINARY MATTERS

[6] At the Appeal Division level, the Claimant provided an update on her health and her medical treatment since the General Division hearing.

[7] I explained to the Claimant during the Appeal Division hearing that I would not consider any of the new evidence that she provided. My job is to decide whether the General Division made an error in its decision about whether the Claimant's disability was severe and prolonged at

the time of the General Division hearing. The evidence about her condition after that time will not help me to make that decision.[1]

[8] The Claimant's updated medical condition is important in the sense that her minimum qualifying period (MQP) is not over yet, she can always re-apply for the disability pension, providing all the updated medical information about how her conditions result in a severe and prolonged disability.

ISSUES

[9] The issues are:

1. Did the General Division make an error of law by failing to consider all of the Claimant's conditions together?

2. Did the General Division make an error of law in the way that it considered the Claimant`s treatment?

ANALYSIS

Reviewing General Division decisions

[10] The Appeal Division does not give people a chance to re-argue their case in full at a new hearing at this level. 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 (or reasons for) appeal.[2] If the General Division makes an error of law, the DESDA makes it clear that the Appeal Division can address it.[3]

[1] The Federal Court explained that the Appeal Division does not consider new evidence in a case called *Parchment v Canada*, 2017 FC 354.
[2] DESDA, s 58.
[3] DESDA, s 58(1)(b).

Severe disability within the meaning of the CPP

[11] To have a disability pension under the CPP, a person must have a severe and prolonged disability on or before the end of their MQP. A disability is severe if the person is incapable regularly of pursuing any substantially gainful occupation.[4]

[12] To decide whether a disability is severe, the General Division must consider whether the Claimant's medical conditions result in any functional limitations that impact the Claimant's ability to work. The General Division must assess the Claimant's condition in its totality, which means considering all of the possible impairments, not just the biggest impairments or the main impairment.[5]

Did the General Division make an error of law by failing to consider all of the medical conditions together?

[13] The General Division did not make an error of law by failing to consider all of the medical conditions together. The General Division did not seem to analyze in any detail the impact of the "Cluster B" personality disorder on the Claimant's ability to work. However, I am satisfied that this was because the reports on file do not say enough about the impact that this disorder might have had on her ability to work.

[14] It seems that there are three key reports about the Claimant's mental health conditions in the General Division's file. First, there is a medical report from the Claimant's family doctor dated April 25, 2017. That report lists the Claimant's mental health impairments as depression and anxiety.[6]

[15] Second, in a letter dated August 21, 2017,[7] the Claimant's psychotherapist stated that the Claimant likely had Generalized Anxiety Disorder rather than Major Depressive Disorder but that personality issues are most likely of significance. The Claimant was rejected as a candidate for insight-oriented psychotherapy and the assessor described her as not intelligent, as well as "governed by rigid ideas, is very vague, has poor insight." It seems to me that the

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[4] *Canada Pension Plan*, s 42(2).
[5] The Federal Court of Appeal explained this in a case called *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[6] GD2-60.
[7] GD2-65 to 68.

psychotherapist was confused by much of what the Claimant told her, and was unable to gather a psychiatric history from the Claimant.

[16] Third, there is a mental health assessment signed on July 5, 2018,[8] which appears to have been completed for the Claimant's long-term disability provider. In that report, Dr. Grabovac (a psychiatrist), found that the Claimant had "Cluster B" traits (narcissistic, borderline, histrionic). Dr. Grabovac stated that the Claimant did not have a mood disorder.

[17] In her application for leave to appeal, the Claimant argued that the General Division should have found that she met the test for a severe and prolonged disability.[9] I granted leave to appeal because it was possible that the General Division did not consider all of the Claimant's conditions together (particularly her mental health conditions and the "Cluster B" personality traits evidenced in two of the three reports above).

[18] The Minister argues[10] that although the General Division did not specifically refer to the 2018 report in its decision, it was not required to do so. The General Division does not need to refer to every piece of evidence in its decision. The reports about the Claimant's "Cluster B" personality disorder were not important (probative) enough that the General Division needed to discuss them in the decision. We presume that the General Division member considered all the evidence in reaching the decision, and that presumption is not overcome in this case.[11]

[19] The Minister argues that:

- The 2018 report contains little probative evidence concerning whether the "Cluster B" traits had any impact on her ability to work.

- The 2018 report was concluded fifteen months before the hearing, it does not make any reference to functional limitations caused by the "Cluster B" traits.

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[8] GD1-4 to 11.
[9] And the Claimant provided an update on her medical conditions. AD1-1
[10] AD9-8 to 10.
[11] The Federal Court of Appeal explain how this presumption works in a case called *Simpson v Canada (Attorney General)*, 2012 FCA 82. The Federal Court explained that the presumption can be overcome when the evidence is probative (important) enough that it needed to be discussed. That Federal Court case is *Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498.

- The 2018 report did not state that Claimant's medical condition prevented her from doing any type of work.

- The Claimant did not provide any more or more recent reports that explained any more about the diagnosis, treatment or prognosis of the "Cluster B" traits.

- The Claimant did not list personality disorders (narcissistic, borderline, histrionic) as one of her disabling conditions in her CPP Questionnaire.

[20] The Minister also notes that during the hearing, the General Division specifically asked the Claimant why she stopped working.[12] The General Division member told the Claimant that he had reviewed the psychiatric reports and noted she had a psychiatric diagnosis. The General Division member asked the Claimant whether that diagnosis had been a factor explaining why she could not continue her employment with X. The Claimant agreed it had been a factor but then went on to explain forgetfulness as the reason why she could not continue in that job.

[21] In my view, the General Division did not make an error of law by failing to discuss and analyze in more detail the "Cluster B" traits together with the other diagnoses. The family doctor's medical report does not mention the "Cluster B" personality traits, but there are mention of these traits in both the psychotherapist's letter and the 2018 mental health report. While it would have been ideal for the General Division to acknowledge this diagnosis, the General Division did not make an error of law. It seems that the General Division did not focus on the "Cluster B" personality disorder because there was not enough information about what impact this disorder had on the Claimant's ability to work.

[22] Some of what Dr. Grabovac wrote sounds on its face like it would impact the Claimant's ability to work, especially the reference to chronic affective dysregulation, relationship conflict, mild identity diffusion, mild impulsivity, and sensitivity to perceived rejection or criticism. And the Claimant did write about challenges she was experiencing in terms of focus, concentration and "interpersonal communication."[13]

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[12] Audio recording of the General Division hearing at about 22:10.
[13] GD2-95.

[23] However, even when the General Division member did ask during the hearing about her mental health conditions and whether that was part of why she stopped working, the Claimant's testimony in this point was vague. There was not enough information there for the General Division to analyze whether the "Cluster B" personality traits had an impact on the Claimant's ability to work.

[24] In my view, the General Division decision could have grappled more squarely with these facts about the Claimant's mental health diagnoses (especially the "Cluster B" personality traits). However, the failure to do so did not rise to the level of an error because there was not enough evidence there to analyze the impact of that particular condition on the Claimant's ability to work.

Did the General Division make an error of law in the way it considered the Claimant's treatment?

[25] The General Division did not make an error in the way that it assessed the Claimant's treatment. It is difficult to assess how the Claimant's disability may be impacting the decisions she makes about treatment. However, the General Division did not make an error in this case by noting that the Claimant was not following the recommendation to take prescribed medication.

[26] To decide whether a disability is severe, the General Division considers (among other factors) whether the Claimant took steps to manage her disability.[14] The General Division can also find that a Claimant is not eligible for a disability pension if the Claimant has refused treatment unreasonably.[15] The impact that the treatment is expected to have on the disability is relevant.

[27] The General Division concluded that "significant treatment for her carpal tunnel syndrome is only beginning. She is not following treatment recommendations for taking medications."[16]

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[14] The Federal Court of Appeal explained this in cases called *Sharma v Canada (Attorney General)*, 2018 FCA 48; and *Klabouch v Canada (Social Development)*, 2008 FCA 33.
[15] *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.
[16] General Division decision, para 13.

[28] In the decision granting leave to appeal, I welcomed submissions about whether the General Division made an error of law in its approach to the analysis of the Claimant's treatment. It was unclear to me whether the General Division needed to give an analysis about the Claimant's refusal to take medication, and to consider what role the Claimant's "Cluster B" personality traits (like a lack of insight and poor judgement) may have played in her decision not to strictly follow treatment recommendations.

[29] The Minister notes that the General Division concluded the Claimant's application was premature because she had not undergone any significant treatment for her carpal tunnel syndrome. There was no recent medical evidence in the record at the General Division to show that the Claimant tried any significant treatment for carpal tunnel syndrome. In the past, the Claimant refused to try surgery for this condition.[17] The General Division decision noted that the Claimant was attending group therapy once a week for depression and anxiety. She was not taking her prescribed medication for her anxiety and depression. In fact, she testified she was currently not taking any medication and, in the last year, she was only taking vitamins, natural supplements and over the counter items such as Advil.[18]

[30] The Minister notes that the Claimant had a prescription for an anti-depressant. In the mental health assessment with Dr. Grabovac, the Claimant was initially vague as to whether or not she had been taking it, but ultimately she told him she had not been taking it because she ran out and had not gotten a refill.[19] The Claimant said that she frequently did not take it and she gave the impression that when she did, it was for less than 25% of the time. The Claimant also had a prescription for another medication that she did not know the name of and that she was not taking.

[31] The Minister also notes that Dr. Gabovac's assessment describes another example of the Claimant failing to follow up on a treatment recommendation.[20] Dr. Grabovac states that the Claimant saw Dr. Colpes (a psychiatrist) in 2018. Dr. Colpes recommended that the Claimant see a psychologist. The Claimant interpreted her conversation with Dr. Colpes as the doctor refusing

[17] The Minister references the General Division decision at para 10, but also the document at GD2-65.
[18] General Division decision, para 11.
[19] GD1-7.
[20] GD-17.

to work with her again. However, she also acknowledged that the psychiatrist asked her to schedule a follow up appointment with her, which the Claimant failed to do.

[32] The Minister concludes that unreasonably refusing to follow treatment recommendations and attend follow-up appointments shows that the Claimant did not take steps to manage her disability. The Claimant did not provide any reasonable explanation for failing to take the medication or for failing to schedule the follow-up appointment.

[33] Dr. Grabovac concluded that although treatment with medication can be helpful in treating affective dysregulation in borderline personality disorder, the medication would need to be taken consistently in order to decide whether it was working.

[34] The Minister argues that because the record showed that the Claimant has a "disinterest" in following treatment, the General Division had "no alternative" but to decide that the Claimant failed in her duty to manage her medical conditions.[21]

[35] In my view, the General Division did not make an error of law in the way that it considered the Claimant's treatment.

[36] Some mental health diagnoses (like personality disorders) can involve unpredictable thinking and behaviour, as well as poor insight into the condition. A person with that kind of diagnosis may well have refused treatment at some point: for example, some people with a personality disorder might stop taking, refuse to take, or inconsistently take prescribed medication. Some people with a personality disorder might also fail to be consistent or reliable in describing how often they take their medication.

[37] If a claimant refuses treatment, the General Division must decide whether that decision is reasonable.[22] In this case, the medical record shows a diagnosis of "Cluster B" personality disorder traits. Documents in this file describe the Claimant as being unintelligent and having mild impulsivity. She is described as being a poor historian who regularly contradicted herself (including about whether she takes her medication). An independent medical assessor stated that

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[21] AD9-12.
[22] The Federal Court of Appeal explained this in a case called *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

it was “extremely challenging to elicit any details of symptoms or events of the last two years.” She was “very vague” about whether she was taking her medication. She was rejected for insight-oriented psychotherapy.

[38] It is the General Division’s job to decide whether the Claimant refused to take her medication, and if she did refuse, whether she acted reasonably.[23] In this case, the General Division decided that she was not taking medications for her anxiety and depression. The General Division did not provide detailed reasons showing that it grappled with the evidence about whether that decision was reasonable.

[39] However, that is not an error of law here given that the General Division already decided that there was a lack of medical evidence about her condition to show that she lacked regular work capacity. If the General Division had decided that the Claimant was not entitled to disability pension for the sole reason of unreasonably refusing treatment, then analysis of the evidence about the Claimant’s “Cluster B” personality disorder traits (especially lack of insight) might have been more critical. But that is not the case in this appeal.

A final note about possible next steps for the Claimant

[40] Based on the information that the General Division had at the time of the hearing, the Claimant’s MQP ends December 31, 2021. As the Claimant’s medical situation changes over time, she might choose to re-apply for the disability pension. If she decides to re-apply, she would be well advised to provide updated medical information to show how her disability became severe between the date of the General Division’s hearing and by the end of her MQP on December 31, 2021.

[23] It would have been helpful if the decision stated that if a Claimant unreasonably refuses treatment, they may not qualify for a disability pension. The failure to set out that test in this particular case was not an error of law because the General Division had already decided that the Claimant did not show that she lacked capacity for work.

CONCLUSION

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

Kate Sellar
Member, Appeal Division

HEARD ON:	May 26, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	T. H., Appellant Suzette Bernard, Representative for the Respondent