



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. L. v Minister of Employment and Social Development*, 2020 SST 645

Tribunal File Number: AD-19-301

BETWEEN:

K. L.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: July 27, 2020

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] K. L. (Claimant) completed high school and earned a college diploma. She last worked in a managerial position at a fast food restaurant. She has a number of medical conditions, including carpal tunnel syndrome, tendonitis in both shoulders and elbows, degenerative disc disease and fibromyalgia.

[3] The Claimant applied for a Canada Pension Plan disability pension and claimed that she was disabled by these conditions and their resulting limitations. The Minister of Employment and Social Development refused the application. The Claimant appealed the Minister's decision to the Tribunal. The Tribunal's General Division dismissed the appeal. It decided that although the Claimant has pain and physical limitations she still has capacity regularly to pursue a substantially gainful occupation.

[4] Leave to appeal this decision to the Tribunal's Appeal Division was granted on the basis that the General Division may have failed to provide a fair process if it did not allow the Claimant to present her entire legal case to the Tribunal. I have now read all of the documents filed with the Tribunal, including the parties' written submissions to the Appeal Division and the medical documents filed with the General Division. I have read the General Division decision and heard the parties' oral submissions. I listened to the recording of the General Division hearing. The General Division provided a fair process to the Claimant. It did not base its decision on an important factual error. Therefore, the appeal is dismissed.

PRELIMINARY MATTER

[5] At the Appeal Division hearing, the Claimant said that she was not feeling well. She could not remember everything that she wanted to say to support her appeal. Therefore, the Claimant was given time after the close of the oral hearing to file further written submissions. She wrote a letter to the Tribunal that explained her condition and included a copy of a letter

written by her family doctor that had been filed with the Tribunal. The Minister's representative was also given the opportunity to respond to these submissions. It did not do so.

ISSUES

[6] Did the General Division fail to provide a fair process?

[7] Did the General Division fail to consider the totality of the medical evidence?

[8] Did the General Division base its decision that the Claimant had capacity to work on an important factual error?

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

The General Division provided a fair process

[10] The Tribunal must provide all parties with a fair process. This means that each party must have the opportunity to present their legal case to the Tribunal, to know and answer the other party's legal case, and to have a decision made by an impartial decision maker based on the law and the facts. The Claimant says that the General Division failed to provide this because it only allowed her to answer the Tribunal Member's specific questions, and because the Tribunal Member's tone of voice was such that she was scared and unable to properly present her case.

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

[11] A Tribunal member is permitted latitude in how they conduct a hearing as they are the master of the proceedings and have to balance what may be competing priorities of informality, speed and fairness. The Federal Court has set out the following guiding principles:

- a) Within limits, decision makers have the right to cross-examine witnesses;
- b) Decision makers can interrupt witnesses during their testimony to clarify the answers given to questions;
- c) The tone and content of a decision maker's questions must be judicious; and
- d) Harassing comments and unfair questions to a witness are not acceptable.

Whether a Tribunal member has followed these principles will depend on the facts and circumstances of each case.²

[12] I have listened to the recording of the General Division hearing. The General Division member did not contravene any of these principles. At the start of the hearing, the Member said that after he asked questions, he would give the Claimant the opportunity to make additional comments.³ Near the end of the hearing he asked the Claimant if there was anything she wanted to add that had not been asked about, and the Claimant responded that there was nothing that she could think of.⁴ He then asked if she wanted to make any closing comments.⁵ Finally, the General Division member asked the Claimant if she thought she'd had a fair chance to tell him what to consider, and she answered that she had.⁶

[13] This demonstrates that the General Division provided the Claimant with the opportunity to fully present her case to the Tribunal.

[14] Regarding the General Division Member's tone of voice, I listened carefully to the hearing recording. The Member was polite in his questioning. He did not raise his voice or show

² *Mohammad v. Canada (Minister of Citizenship & Immigration)* (2000), 4 Imm. L.R. (3d) 152; *S. B. v. Minister of Employment and Social Development*, 2018 SST 405

³ General Division hearing recording approximate minute 4:32 although the exact time may vary depending on the device used to listen to the recording

⁴ General Division hearing recording approximate minute 48:48

⁵ General Division hearing recording approximate minute 49:13

⁶ General Division hearing recording approximate minute 50:36

any anger. He was not intimidating. The Member conducted the hearing in an appropriate manner.

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

The General Division considered the totality of the evidence

[16] The Federal Court of Appeal stated that to decide whether a claimant is disabled the decision maker must consider all of their medical conditions, not just the main one(s).⁷ This is set out in the decision.⁸ The General Division did not overlook or misconstrue any important information. The decision summarizes all of the medical evidence, including:

- a) The family doctor's report regarding rotator cuff tendinitis, tennis elbow and carpal tunnel syndrome;⁹
- b) The orthopedic surgeon's report regarding neck and shoulder pain;¹⁰
- c) The neurologist's report regarding nerve conduction testing and carpal tunnel syndrome;¹¹ and
- d) The rheumatologist's report regarding many conditions including fibromyalgia.¹²

The decision acknowledges that the Claimant has a number of symptoms and medical conditions. However, she worked without absences related to her health until she was fired in 2016. The Claimant also testified that she was good at her managerial duties and has been able to do sedentary and managerial work since then.¹³ The General Division considered this evidence as well as the medical evidence and concluded that the Claimant had some capacity regularly to pursue a substantially gainful occupation.

⁷ *Bungay v. Canada (Attorney General)*, 2011 FCA 47

⁸ General Division decision at para. 20

⁹ General Division decision at para. 12, 15, 18

¹⁰ General Division decision at para. 13

¹¹ General Division decision at para. 15

¹² General Division decision at para. 18

¹³ General Division decision at para. 21

[17] The General Division considered all of the Claimant's conditions as well as her personal circumstances to make its decision. It made no error in this regard. Therefore, the appeal fails on this basis.

The General Division made no important factual error

[18] The Claimant also says that the General Division based its decision that she did not have a severe disability on an important factual error. To succeed on this she 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.¹⁴

The General Division decision summarizes the medical evidence and the testimony that was presented. This included evidence regarding the Claimant's medical conditions (see above), the Claimant's statements that she was good at her managerial duties, and that she was capable of performing this type of work after she was fired from her last job.

[19] After considering this evidence, the General Division concluded that the Claimant retained some capacity to work. There was an evidentiary basis for this finding of fact. It was not made in error.

[20] The General Division decision also correctly states that where there is evidence of work capacity, a claimant must show that they could not obtain or maintain employment because of their health.¹⁵ The Claimant did not present any evidence that she had done this.¹⁶ Therefore, the General Division decided that she had not met her legal obligation, and her disability was not severe under the *Canada Pension Plan*.

[21] There was an evidentiary basis for this conclusion also. Therefore, the appeal also fails on this basis.

¹⁴ *Department of Employment and Social Development Act* s. 58(1)(c)

¹⁵ General Division decision at para. 21

¹⁶ General Division decision at para. 22

CONCLUSION

[22] The appeal is dismissed for these reasons.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	July 7, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	K. L., Appellant Viola Herbert, Representative for the Respondent