



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. B. v Minister of Employment and Social Development*, 2020 SST 775

Tribunal File Number: AD-20-636

BETWEEN:

J. B.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: September 14, 2020

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] J. B. (Claimant) worked for many years as a cashier. She developed knee and ankle problems. She stopped working when she also had cancer and required surgery. In December 2016, the Claimant began to receive a *Canada Pension Plan* retirement pension. In February 2018, she applied for a *Canada Pension Plan* disability pension and claimed that she was disabled by arthritis in her knees and her right ankle condition.

[3] The Minister of Employment and Social Development refused the Claimant's application for the disability pension. The Claimant appealed this decision to the Tribunal. The Tribunal's General Division dismissed the appeal. It decided that the Claimant could not replace her retirement pension with a disability pension because she was not disabled before she began to receive the retirement pension.

[4] Leave to appeal the General Division's decision to the Tribunal's Appeal Division was granted because the appeal had a reasonable chance of success on the basis that the General Division had made an error in law when it failed to consider her right ankle condition in making its decision. The General Division made this error. However, when this error is corrected, I reach the same conclusion as the General Division. The Claimant was not disabled before she began to receive the retirement pension.

ISSUES

[5] Did the General Division fail to provide a fair process by failing to allow the Claimant to fully present her case?

[6] Did the General Division make an error in law when it failed to consider the Claimant's ankle condition?

[7] Did the General Division make an error in law because it provided insufficient reasons for its decision?

[8] Did the General Division base its decision on an important factual error when it stated that the Claimant was not provided with any accommodation at her job?

[9] If the General Division made any of these errors, what remedy should the Appeal Division give?

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.¹

Failure to provide a fair process

[11] The Claimant wrote in her application to the Appeal Division that the General Division failed to provide a fair process and made an error in law. She wrote that she had not been able to present her case fully to the General Division because the Tribunal Member asked "programmed questions" and so she could not fully explain her case.

[12] However, at the hearing of the appeal the Claimant said that she was able to say everything that she wanted to at the General Division hearing. In addition, I have listened to the recording of the General Division hearing. The Claimant was given full opportunity to present her case, and to answer fully the questions asked of her.

¹This paraphrases the grounds of appeal set out in s. 58(1) of the DESD Act

[13] The General Division provided a fair process. The appeal fails in this regard.

Error in law

[14] The Claimant says that she is disabled by arthritis in both knees and her right ankle. In the medical report filed with the Tribunal, the Claimant's doctor referred to the Claimant having arthritis in both knees and her right ankle. In addition, a screw that had been put into her ankle was pushing out and would have to be removed.

[15] To decide whether a person is disabled, the decision maker must examine all of their medical conditions, not just the main one.² The General Division decision does not refer to the Claimant's ankle condition in its decision. Nothing in the decision suggests that the General Division examined this condition, or weighed any evidence regarding it. This is an error in law. The Appeal Division must therefore intervene and provide a remedy to the parties.

Other Issues

[16] Because the Appeal Division must intervene on the basis set out above, it is not necessary to consider the Claimant's remaining grounds of appeal.

REMEDY

[17] When the Appeal Division intervenes, it can provide different remedies. The Appeal Division has the power to:

- a) give the decision that the General Division should have given;
- b) refer the case back to the General Division for reconsideration; or
- c) confirm, rescind, or vary the General Division's decision.

[18] It is appropriate for the Appeal Division to give the decision that the General Division should have given in this case for the following reasons:

- a) The facts are not in dispute

² *Bungay v. Canada (Attorney General)*, 2011 FCA 47

- b) The record is complete. There is no further evidence to be provided
- c) Both parties request that the Appeal Division give the decision that the General Division should have given
- d) The legislation says that the Tribunal can decide questions of law and fact necessary to dispose of an appeal³
- e) The Tribunal must complete appeals as quickly and efficiently as the considerations of fairness and natural justice permit⁴
- f) This matter has been ongoing for over two years and further delay would be incurred if the matter were referred back to the General Division

The claimant is not disabled

[19] The Claimant completed Grade 12 before she entered the paid workforce. She worked in a bank and at a deli counter. Her last job was as a grocery cashier. She worked in this job from 2015 until she had surgery for cancer in 2017. The Claimant has not tried to work since she had this surgery.

[20] To be disabled under the Canada Pension Plan a claimant must have disability that is both severe and prolonged before the end of the minimum qualifying period. However, the Canada Pension Plan also says that if a claimant receives Canada Pension Plan retirement pension, to change this to a disability pension, they must prove that they were disabled before they began to receive the retirement pension.⁵ The Claimant began to receive a retirement pension in December 2016. Therefore, she must prove that she was disabled before the end of November 2016 in order to receive a disability pension.

[21] A person is considered to have a severe disability if they are incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long

³ *Department of Employment and Social Development Act* s. 64

⁴ *Social Security Tribunal Regulations* s. 3(1)

⁵ *Canada Pension Plan* s. 66.1(1) and s.70(3)

continued and of indefinite duration or is likely to result in death. A person must prove on a balance of probabilities their disability meets both parts of the test to be disabled.⁶

[22] The Claimant says that she is disabled by osteoarthritis in both knees and her ankle, and difficulties with a screw that was inserted in her ankle when she broke it a number of years ago. She also has some restrictions in one wrist, and in 2017 underwent significant surgery for skin cancer, which has left her with restrictions in her neck and right shoulder.

[23] The Claimant testified that before she stopped working at the grocery store she reduced her hours and worked fewer shifts.⁷ By January 2017, she would only work one four-hour shift each week, and often had to leave early because of pain and an inability to do her job.⁸

[24] When asked if the employer provided any accommodations for her, the Claimant testified that there was no job at the grocery store that did not involve standing. She tried working at the deli counter but this was worse than working as a cashier.⁹ The Claimant also said that she did not try to work in any other job because she is not qualified for them.¹⁰ She has difficulty transferring between sitting and standing,¹¹ which would also impact her ability to do a job that did not require her to stand.

[25] In the questionnaire filed with the application for the disability pension, the Claimant wrote that her knee goes numb after standing for about 30 minutes, and that she can walk ¼ block before her knees give out. She also cannot kneel, which impacts her ability to do some household chores, and she has some trouble sleeping.

[26] The Claimant has additional restrictions, but they are all due to her cancer and related surgery.¹² Because this medical condition arose after the Claimant began to receive the retirement pension, I cannot consider it when deciding whether she was disabled.

⁶ *Canada Pension Plan* s. 42(2)(a)

⁷ General Division hearing recording at approximate minute 12:24 although the exact time may vary depending on the device used to listen to the recording

⁸ General Division hearing recording at approximate minute 13:23

⁹ *Ibid.* at approximate minute 14:58

¹⁰ *Ibid.* at approximate minute 20:35

¹¹ GD2-62

¹² GD2-65

[27] I am sympathetic to the Claimant's situation. However, the medical evidence does not support her argument that her disability is severe. I acknowledge that the Claimant has had difficulty maintaining consistent medical care because the family doctor retired, and she had to attend at walk-in clinics for some time before she found a new doctor. However, the family doctor's report that accompanied the Claimant's disability pension application does not indicate that the Claimant's condition was severe. The doctor wrote that the Claimant's arthritis was mild to moderate in both knees and that she could not stand for four-hour shifts.¹³ Dr. Farnquist reviewed diagnostic images and concluded that the claimant's arthritis was mild in the left knee, and minimal to mild in the right knee.¹⁴

[28] The Claimant also had restrictions due to a screw that was pushing out from her right ankle. This is referenced in the doctor's report. However, the doctor does not set out any functional limitations that result from this. The Claimant did not testify about any limitations specifically as a result of this condition (although it would contribute to the limitations the Claimant testified about regarding her arthritis). Therefore, there is insufficient evidence to conclude that the Claimant had a severe disability based on this condition alone, or in conjunction with her other conditions.

[29] It is not the diagnosis of a condition that determines whether a person's disability is severe, but the impact that the condition has on their capacity regularly to pursue any substantially gainful occupation at the relevant time. The Claimant had such capacity before the end of November 2016. She continued to work for approximately 7 months this, although part-time. There is no evidence that she could not perform her duties when she was at work. Apart from reducing hours, she was not accommodated at work (for example she did not use a stool at the cash station, take extra breaks, or limit her cashier duties in any way).

[30] The Claimant's restrictions with walking, bending and kneeling would not prevent her regularly from pursuing a substantially gainful occupation that did not require her to do this. Therefore, the Claimant had capacity regularly to pursue a substantially gainful occupation before she began to receive the retirement pension.

¹³ GD2-48

¹⁴ GD2-53

[31] When there is evidence of work capacity, a claimant must show that they could not obtain or maintain work because of their health condition in order to receive the disability pension.¹⁵ The Claimant made no efforts to work in any other job. Therefore, she did not meet this legal obligation.

[32] Finally, I must consider the Claimant's personal characteristics to decide whether she had a severe disability at the relevant time.¹⁶ The Claimant was 60 years of age in 2016. She completed Grade 12. These factors may limit her ability to find work. However, the Claimant has transferrable skills from working as a cashier, at a deli counter and at a bank. There is no evidence that the Claimant has any language or learning limitations. Therefore, her personal characteristics would not prevent her regularly from pursuing any substantially gainful occupation.

[33] For these reasons, I find that the Claimant did not have a severe disability before she began to receive the retirement pension.

[34] Because I have found that the disability was not severe, I need not consider whether it was prolonged.

[35] I heard the Claimant's arguments regarding her dire financial situation. Unfortunately, this is not something that I can consider when deciding whether she is disabled.

CONCLUSION

[36] The appeal is dismissed for these reasons.

Valerie Hazlett Parker

Member, Appeal Division

HEARD ON: September 9, 2020

¹⁵ *Inclima v. Canada (Attorney General)*, 2003 FCA 117

¹⁶ *Villani v. Canada (Attorney General)*, 2001 FCA 248

METHOD OF PROCEEDING: Teleconference

APPEARANCES: J. B., Appellant

Viola Herbert, Representative for the Respondent