



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *SM v Minister of Employment and Social Development*, 2020 SST 827

Tribunal File Number: AD-20-732

BETWEEN:

S. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: September 28, 2020

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] S. M. (Claimant) entered the paid workforce just before she graduated from high school. She has worked in a number of different jobs. She last worked giving first aid training and at a wellness facility. The Claimant applied for a Canada Pension Plan disability pension and claimed that she was disabled by mental health illness and a back condition.

[3] The Minister of Employment and Social Development refused the application. It decided that the Claimant did not have a severe disability before the end of the minimum qualifying period (MQP – the date by which a claimant must prove that they are disabled to receive the disability pension). The Claimant appealed this decision to the Tribunal. The Tribunal's General Division dismissed the appeal. It also decided that the Claimant's disability was not severe before the end of the MQP, which was December 31, 2016.

[4] Leave to appeal this decision to the Tribunal's Appeal Division was granted. The appeal had a reasonable chance of success because the General Division may have failed to provide a fair process by not giving the Claimant an opportunity to respond to some documents that were filed with the Tribunal.

[5] I have now listened to the parties' oral submissions and read the documents filed with the Appeal Division. I have also considered the General Division decision. The General Division provided a fair process to the parties. It made no error in law and did not base its decision on an important factual error. Therefore the appeal must be dismissed.

PRELIMINARY MATTERS

[6] The General Division decision states that to decide whether the Claimant was disabled it was necessary to consider her age, level of education and other personal characteristics.¹ In the

¹ General Division decision at para. 9

Application to the Appeal Division the Claimant wrote that she was discriminated against due to her age. At the hearing I explained to her that a specific process had to be followed in order to advance a claim of discrimination under the *Canadian Charter of Rights and Freedoms*. The Minister's representative suggested that the hearing be adjourned to allow the Claimant to decide whether she wished to pursue this.

[7] The Claimant abandoned her discrimination claim. She stated that she wished the hearing to proceed without any such claim being made.

[8] The Claimant also stated at the start of the hearing that she was not feeling well, and not having a good day. I gave her the option to adjourn the hearing to a day when she felt better. The Claimant declined this. She wanted to proceed. Therefore the hearing proceeded as scheduled.

ISSUES

[9] Did the General Division fail to provide a fair process when it failed to allow the Claimant to respond to some documents that were filed with the Tribunal?

[10] Did the General Division make an error in law when it relied on the wrong section of the law?

[11] Did the General Division base its decision on an important factual error that the Claimant could have worked with mental health illness and a neck injury?

[12] Did the General Division make an error by failing to consider that the Claimant was approved for a credit split?

[13] Did the General Division make an error because the Claimant had additional evidence to submit?

ANALYSIS

[14] 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.²

The Claimant's grounds of appeal are examined in this context below.

Failure to provide a fair process

[15] The Tribunal must provide a fair process to all parties. This means that each party must be given 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 impartial decision maker based on the law and the facts.

[16] The Claimant wrote in the application to the Appeal Division that the General Division had failed to provide a fair process because she was not given an opportunity to respond to some documents that had been filed with the Tribunal. She did not specify what documents these were.

[17] I have reviewed the written record. The Claimant filed a number of documents to support her disability pension application before the General Division hearing. She also filed documents after the hearing. The General Division accepted these documents and gave the Minister the opportunity to respond to them in writing.³ This was a fair process. Although the Claimant was not given a specific opportunity to respond to the Minister's response to her documents, she had the opportunity to fully present her case. The Claimant was able to present documents before the General Division hearing. At the hearing she had the opportunity to present her case orally. Then, she was given further time to present more evidence. She could have included any explanation of this evidence she believed was necessary or beneficial to her case.

[18] At the Appeal Division hearing the Claimant said that she was not able to fully explain the documents that she had presented to the Tribunal because the General Division member did not ask her certain questions (for example what medication she was taking or how it made her

²This paraphrases the grounds of appeal set out in s. 58(1) of the Department of Employment and Social Development Act

³ See GD16-1

feel). However, it is for each party to present their case to the Tribunal. It is not for the General Division to assist any party to present their case by asking questions to ensure that all possible issues have been canvassed.

[19] There was no failure to provide a fair process. The appeal fails on this basis.

Reliance on the wrong section of the law

[20] The Claimant also says that the General Division relied on the wrong sections of the law when it made its decision. She does not specify what sections were wrong, or what sections should have been relied on instead. I have read the General Division decision. It correctly sets out that to be found disabled the Claimant must meet the contributory requirements of the *Canada Pension Plan*.⁴ It also correctly states that the Claimant must have a disability that is both severe and prolonged, and correctly sets out what these terms mean.⁵ It then examined the evidenced and applied the fact to the law to make its decision.

[21] The General Division made no error in law.

Capacity to work with mental health illness and neck injury

[22] The Appeal Division can consider whether the General Division based its decision on an important factual error. The Claimant must prove three things for the appeal to be allowed on this basis:

- 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.⁶

[23] The Claimant says that the General Division based its decision on an important factual error that she could work despite having a neck injury and mental health illness. She points to her

⁴ General Division decision at para. 3

⁵ General Division decision at para. 6

⁶ *Department of Employment and Social Development Act* s. 58(2)(c)

family doctor's report that said she could not work, and argues that the General Division failed to consider this evidence.

[24] However, the General Division decision states that the family doctor wrote that the Claimant had major depressive disorder, generalized anxiety disorder and degenerative disc disease, and that she could not perform any work.⁷ It considered this evidence.

[25] The General Division also considered the rest of the evidence, including medical reports that said that the Claimant's mental health illness became worse in 2018 and that her pain became worse in 2019. The General Division also considered evidence regarding the Claimant's activities, including that she trained and worked for X in 2016, she trained for a personal support worker position in 2018, and evidence that she was leading gym classes in 2018.⁸ Therefore, there was a factual basis for the General Division's finding of fact that the Claimant had capacity regularly to pursue a substantially gainful occupation before the end of the MQP despite her neck injury and mental health illness. The General Division made no error in this regard.

[26] The Claimant also disagrees with the weight that the General Division placed on some of the evidence, including a letter provided by a nurse practitioner and by her neurosurgeon. However, it is for the General Division to accept the evidence from the parties, weigh it, and make a decision. This appeal cannot succeed because the Claimant disagrees with how the General Division weighed the evidence.

[27] The General Division did not overlook or misconstrue any important information.

Canada Pension Plan Credit Split

[28] The Claimant argues, in addition, that the General Division made an error because it failed to consider that she was approved for a division of unadjusted pensionable earnings (credit split) under the *Canada Pension Plan*. Although it is not clearly set out in the written record when and how this credit split was performed, I am satisfied that it was done. In her application for the disability pension, the Claimant wrote that she had been in a common-law relationship

⁷ General Division decision at para. 11

⁸ General Division decision at para. 32 to 35

from 2001 to 2010.⁹ The Claimant had earnings during this time, and these earnings were considered when her MQP was calculated.¹⁰ Whether the Minister performed a credit split or not would make no difference to the outcome of the disability claim. Performing the credit split would not change the end of the MQP (which is calculated based on when contributions are made to the *Canada Pension Plan*). The General Division made no error in this regard.

Additional evidence

[29] Finally, the Claimant says that the appeal should be allowed because she has more evidence to present. However, providing new evidence is not generally permitted on an appeal to the Appeal Division.¹¹ The appeal fails on this basis.

CONCLUSION

[30] The appeal is dismissed for these reasons.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	September 24, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. M., Appellant Viola Herbert, Representative for the Respondent

⁹ GD2-36

¹⁰ See Record of Earnings GD2-62

¹¹ *Canada (Attorney General) v. O'Keefe*, 2016 FC 503