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

Citation: *CB v Minister of Employment and Social Development*, 2020 SST 899

Tribunal File Number: AD-20-745

BETWEEN:

C. B.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: October 19, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

[2] Although the General Division made an error in law, when this is corrected, the same decision is reached.

OVERVIEW

[3] C. B. (Claimant) completed high school. After working for some time, she returned to college and earned a certificate in consumer electronics and completed an apprenticeship in this. She then worked as an electronics technician until December 1998. The Claimant applied for a Canada Pension Plan disability pension in 2018 and claimed that she was disabled by chronic pain in her neck and back. She also has undergone surgeries in one knee and has nocturnal seizures.

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

[5] Leave to appeal the General Division decision to the Tribunal's Appeal Division was granted because the General Division may have made an error in law. I have now read the parties written submissions and heard their oral arguments. I have considered to the General Division decision, the General Division's written record and listened to the General Division hearing recording. The General Division made an error in law. However, when this error is corrected, the same decision is made. Therefore, the appeal is dismissed.

ISSUES

[6] Did the General Division base its decision on at least one of the following important factual errors

a) That market conditions precluded the Claimant from obtaining substantially gainful work;

b) That requiring good ergonomics and frequent posture changes are common features of a workplace, without considering the extent of accommodations that the Claimant required;

c) That the Claimant's attendance at an interdisciplinary rehabilitation program demonstrated capacity to regularly attend a pat-time job; or

d) That the Claimant's fatigue and need to nap in the afternoon would not prevent her from regularly and predictably pursuing a substantially gainful job.

[7] Did the General Division make an error in law by requiring that the Claimant demonstrate that efforts to obtain or maintain employment were unsuccessful because of her health before the end of the MQP?

ANALYSIS

[8] 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]

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

Important Factual Errors

[9] The Claimant says that the General Division based its decision on a number of important factual errors. To succeed on appeal on this basis, 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.[2]

Finding A Job

[10] The first finding of fact that the Claimant says was made in error is the General Division decision statement that if the Claimant could not find a job where she could be accommodated it was due to labour market conditions.[3] The Claimant argues that there was no evidentiary basis for this finding of fact. This may be true. If so, the finding of fact was made in error.

[11] However, the General Division decision is not based on whether the Claimant could find a job. The decision is based on the Claimant's capacity for sedentary work, the lack of evidence that her efforts to obtain or maintain work were unsuccessful because of her health, and that she had not tried to work in jobs recommended through the rehabilitation program.

[12] Therefore, the General Division did not base its decision on an important factual error.

Ergonomics And Posture Changes

[13] The second finding of fact that the Claimant calls into question is the General Division decision statement that requiring good ergonomics and frequent posture changes are common features of a workplace.[4] She argues that there was no evidence before the General Division upon which this finding of fact could have been made.

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[2] *Department of Employment and Social Development Act* s. 58(2)
[3] General Division decision at para. 32
[4] General Division decision at para. 32

[14] However, the General Division may take judicial notice of certain facts. Judicial notice is the acceptance of a fact without proof.[5] The legal test to be met for a decision maker to take judicial notice of a fact is that the fact (1) is either so generally accepted as not to be subject to debate among reasonable people, or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.[6] That the requirements for good ergonomics and frequent postural changes are common in the commercial marketplace is such a fact. It is generally accepted that these requirements are necessary for most employees. This is not subject to debate. Therefore, the General Division made no error in making this finding of fact.

[15] The Claimant also says that the General Division made an error in law regarding this because it failed to consider whether the Claimant requires a benevolent employer in order to rejoin the paid workforce.

[16] A benevolent employer is one who changes workplace duties or expectations such that they are less than what is expected of other employees.[7] The parties presented no evidence to the General Division about any accommodations that the Claimant received at a workplace, or how her performance expectations were different than others'. Therefore, the General Division could not have considered this issue. It cannot have erred by failing to consider something for which there was no evidence.

[17] Therefore the appeal fails on this basis.

Rehabilitation Program

[18] The next finding of fact that the Claimant says was made in error was with regard to her attendance at a rehabilitation program. The General Division concluded that the Claimant's attendance at this program for six hours a day, five days per week for nine weeks with no deterioration in her condition showed that she had capacity to work.[8] The Claimant argues that the General Division erred because failed to consider her testimony that she took extra breaks

[5] *R v. Williams*, [1998] 1 S.C.R. 1128 para. 54
[6] *R v. Find*, 2001 SCC 32
[7] *Atkinson v. Canada (Attorney General)*, 2014 FCA 187
[8] General Division decision at para. 22

during this program, and that the environment was not the same as in the competitive marketplace.

[19] While the General Division decision does not specifically refer to this testimony, this is not fatal to the decision. It is not necessary for the decision to refer to each and every piece of evidence that is presented to it. It is presumed to have considered all of the evidence.[9] The decision must only set out the most important factual findings and justifications for them.[10]

[20] The General Division engaged with the Claimant's evidence about her attendance at the rehabilitation program. It gave greater weight to the medical reports that demonstrated that the Claimant's condition did not deteriorate during this program.[11] Therefore, the General Division made no finding of fact that was in error.

[21] The appeal fails on this basis.

Fatigue

[22] Finally, the Claimant argues that the General Division failed to consider that her fatigue and need to nap in the afternoon makes her unemployable. However, the General Division decision states that the Claimant did not report any limitations with sleep, getting out of bed, concentration or having to lie down when she was assessed twice by Dr. Reynolds.[12] It considered this evidence. It is for the General Division to accept the evidence from the parties and weigh it to reach a decision. It is not for the Appeal Division to reweigh the evidence to reach a different decision. This is what the Claimant is requesting with this argument.

[23] The appeal fails on this basis.

Error In Law

[24] The Claimant also says that the General Division made an error in law. The Federal Court of Appeal decided that where there is evidence of work capacity a claimant must show that

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[9] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.
[10] *Canada v. South Yukon Forest Corporation*, 2012 FCA 165
[11] General Division decision at para. 22
[12] General Division decision at para. 19

efforts at obtaining and maintaining employment have been unsuccessful by reason of their health.[13] This is correctly set out in the General Division decision.[14]

[25] The General Division decision then states that the Claimant failed to meet this legal obligation because first, she did not make efforts to work before the MQP ended,15 and second, because her other efforts took place several years after the MQP.16 But, the Federal Court of Appeal does not specify when efforts to obtain and maintain employment must take place. Therefore, to require that work efforts occur before or near the end of the MQP adds an additional requirement to this legal obligation. This is an error in law.

[26] The Appeal Division must intervene on this basis.

REMEDY

[27] The Appeal Division can give a number of different remedies when it intervenes, including confirming the General Division decision.[17] The General Division decision is confirmed in this case. This remedy is given the following reasons:

a) The record is complete;

b) The parties made oral and written submissions on all of the legal issues;

c) There are no gaps in the submissions;

d) Both parties requested that the Appeal Division give the decision that the General Division should have given if it intervenes;

e) The Tribunal can decide questions of fact and law necessary to dispose of an appeal;[18]

[13] *Inclima v. Canada (Attorney General)*, 2003 FCA 117
[14] General Division decision at para. 29
[15] General Division decision at para. 29
[16] General Division decision at para. 30
[17] *Department of Employment and Social Development Act* s. 59(1)
[18] *Department of Employment and Social Development Act* s. 64(1)

f) Appeals must be concluded as quickly as the considerations of fairness and natural justice permit.[19]

g) This matter has been ongoing since May 2018. Further delay would be incurred if the matter were referred back to the General Division for reconsideration.

[28] There is no need to disturb the findings of fact made by the General Division. It made no error when it decided that there was evidence of work capacity before the end of the MQP. Where there is such evidence, a claimant must show that efforts to obtain and maintain employment were unsuccessful because of their health.20 The Claimant did not meet this legal obligation.

[29] The Claimant stopped working as a consumer electronics technician in 1998. She could no longer do this work because of ongoing back and neck pain. In 1999, she worked for a few hours each month completing bookkeeping tasks for her husband's consulting business. This work did not end because the Claimant could not maintain the work due to her health.

[30] The Claimant later looked for work by going to agencies and trying to find work that she could do with her disability.21 She did not find any work. The Claimant testified that all the jobs that were available required standing, lifting, etc. and she could not do this.

[31] The Claimant did not meet her legal obligation to demonstrate that she could not obtain or maintain employment because of her health condition. The Claimant's work before the end of the MQP ended for reasons other than her health.

[32] While I accept that the Claimant could not complete a physically demanding job, she has not tried any sedentary work. In addition, the Claimant was young at the end of the MQP. Her return to college as an adult demonstrates that she could retrain. However, she made no effort to do so.

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[19] *Social Security Tribunal Regulations* s. 3(1)
[20] *Inclima*, above
[21] The Claimant's work search efforts are summarized at GD3-13; General Division hearing recording at approximate minute 44:45 although the exact time may differ depending on what device is used to listen to the recording

[33] The Claimant's disability is therefore not severe under the Canada Pension Plan.

[34] In order to be disabled under the Canada Pension Plan a claimant must have a disability that is both severe and prolonged. Because the Claimant's disability is not severe, there is no need to consider whether it is prolonged.

CONCLUSION

[35] The appeal is dismissed.

[36] Although the General Division made an error in law, when this is corrected, the same decision is reached. The Claimant was not disabled before the end of the MQP.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	October 14, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Chantelle Yang, Representative for the Appellant Ian McRobbie, Counsel for the Respondent