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

Citation: *KD v Minister of Employment and Social Development*, 2020 SST 963

Tribunal File Number: AD-20-700

BETWEEN:

K. D.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: November 5, 2020

Canada

DECISION AND REASONS

DECISION

[1] I dismiss the appeal. The General Division made an error and I will give the decision that the General Division should have given. The outcome remains the same: the Claimant is not entitled to a disability pension. These reasons explain why.

OVERVIEW

[2] K. D. (Claimant) was a truck driver. In January 2015, he had a car accident that resulted in injuries to his shoulder, back, tailbone, and foot. He also bumped his head and had scratches on his chest and stomach. He explained that he has been unable to work since the accident. His tailbone and back improved by 2016 but his shoulder pain worsened. He will need a shoulder replacement in 20 years.

[3] The Claimant applied for a disability pension under the *Canada Pension Plan* (CPP) in July 2018. He had to prove that he had a severe and prolonged disability within the meaning of the CPP by December 31, 2016. The Minister denied the application initially and on reconsideration.

[4] The Claimant appealed to this Tribunal. The General Division decided that the Claimant was not entitled to a disability pension. 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 decide what I will do fix (remedy) that error.

[5] In my view, the General Division did make an error. I will give the decision that the General Division should have given. The outcome remains the same for the Claimant; he is not entitled to a disability pension.

PRELIMINARY MATTERS

[6] At the Appeal Division, the Claimant provided some new evidence that was not available to the General Division member at that stage of the process.[1]

[7] At the Appeal Division hearing, I explained that parties may request the opportunity to raise new evidence as part of an application to the General Division to rescind or amend its decision (a "new facts application"). I noted that in some of these cases, parties ask the Appeal Division to put their appeal on hold pending the outcome of a new facts application at the General Division. The Claimant's lawyer stated that he wanted to proceed directly with the hearing at the Appeal Division.

[8] Since the Appeal Division focuses on deciding whether there are any errors in the General Division decision, in most cases the Appeal Division does not consider new evidence that was not available to the General Division member when she made her decision.[2]

[9] This case is no exception to that approach. I will not consider the new evidence the Claimant provided.

ISSUE

[10] The issues in this appeal are:

1. Did the General Division make an error of fact by deciding that the Claimant's physiotherapist stated that he was capable of sedentary work?

2. Did the General Division make an error of fact or an error of law in the way that it discussed and decided the issue of the Claimant's compliance with treatment?

3. Did the General Division make an error of fact or an error of law by deciding that the Claimant failed to show that efforts to get and keep employment failed because of his health condition?

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[1] AD2-10 and 11.
[2] The Federal Court outlined this approach in a case called *Parchment v Canada (Attorney General)*, 2017 FC 354.

4. Did the General Division make an error of law by failing to evaluate the Claimant's employment prospects in a "real world" context?

ANALYSIS

Reviewing General Division decisions

[11] The Appeal Division does not give people a chance to re-argue their case in full at a new hearing. Instead, the Appeal Division reviews the General Division's decision to decide whether it committed an error calling for a review. That review is based on the wording of the DESDA, which sets out the grounds of appeal.[3] The three reasons for an appeal arise when the General Division fails to provide a fair process, makes an error of law, or makes an error of fact.

[12] The DESDA says that it is an error when the General Division "bases its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."[4] A mistake involving the facts has to be important enough that it could affect the outcome of the decision (that is called a "material" fact). The error needs to result from ignoring evidence, willfully going against the evidence, or from reasoning that is not guided by steady judgement.[5]

No error of fact about the physiotherapist's opinion

[13] The General Division did not make an error of fact. The General Division did not misinterpret the physiotherapist's opinion about the Claimant's ability to do sedentary work.

[14] The General Division stated:

> Both Dr. Pickle and [the physiotherapist] have made opinions that [the Claimant] is unable to work as a truck driver, but he would be capable of working in a sedentary position.[6]

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[3] DESDA, s 58(1).
[4] DESDA, s 58(1)(c).
[5] The Federal Court considered these ideas about perverse and capricious findings of fact in a case called *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319.
[6] General Division decision, para 24.

[15] More specifically, the General Division stated:

> [The physiotherapist] noted at the time of his MQP that he may be able to return to work if he were driving only. In July 2017, six months post-MQP [the physiotherapist] indicated he would not be able to return to his usual work but if he did return to an occupation it would have to be sedentary. The Claimant's representative argued this opinion is speculative and not evidence of his ability to return to work. I disagree. [The physiotherapist] had been treating the Claimant since 2015. As such, he was providing an educated opinion based on his first-hand knowledge of the Claimant's ability and treatment.[7]

[16] The Claimant argues that the physiotherapist did not ever give a medical opinion that the Claimant is capable of working in a sedentary position. The physiotherapist's note from December 2016 states:

> [The Claimant] may return to work if his job only encompasses driving. He will have major difficulties with any overhead work as well as any work involving lifting. I foresee these restrictions for at least another 12 weeks.[8]

[17] And then in the note from July 2017, the physiotherapist states:

> No change to prior note regarding returning to work and duties. If [the Claimant] returns to an occupation it would have to be sedentary.[9]

[18] The Claimant argues that the physiotherapist's notes do not mean that the Claimant can or should return to sedentary work. The Claimant argues that the physiotherapist simply stated that the Claimant "may" return to driving-only work, and "if" he is able to return to a job, it would have to be sedentary. If the physiotherapist thought that the Claimant could return to work, he could have stated that the Claimant "can" return to work or that he could try to go back.

[19] The Minister argues that the medical opinions can be interpreted differently and that it was up to the General Division to interpret them. I should only intervene in the General Division's interpretation of the medical note if that interpretation is perverse or capricious. The

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[7] General Division decision, para 25.
[8] GD2-114.
[9] GD2-124.

Minister argues that the General Division's interpretation was neither perverse nor capricious and therefore I should not find an error with it in order to substitute it for the interpretation the Claimant prefers.

[20] When I granted permission to appeal, I found that there was an argument to be made that the General Division made an error of fact about what the physiotherapist's opinion actually was. However, in that decision I noted that the standard for an error of fact is that the finding needs to be perverse or capricious.

[21] In light of all the arguments I heard, I am not satisfied that the General Division made an error of fact here.

[22] The wording of the physiotherapist's note leaves room for interpretation. The General Division's interpretation does not wilfully contradict the wording of the note, and it seems to be guided by steady judgement. The General Division concluded that the physiotherapist was actually of the opinion that the Claimant was capable of sedentary work. The General Division member considered the words in the note, and it acknowledged the argument from the Claimant about what the note actually meant.

[23] However, the General Division ultimately concluded that the note meant that the physiotherapist was not simply describing what the Claimant might do, but was saying what the Claimant was able to do. The General Division pointed out that this approach to interpreting the note is consistent with the role of the physiotherapist as a person who treated the Claimant regularly and had first hand knowledge to assess his capacity.

[24] I understand that this is not the way that the Claimant wanted the General Division to interpret the physiotherapist's note, but it is not a perverse or capricious approach to interpreting the physiotherapist's opinion in this case. The note lists other limitations (like overhead work) which again focusses on the functional abilities of the Claimant, not simply speculating about what those limitations might be if he were able to return to work.

No error of fact and no error of law about the Claimant's treatment

[25] The General Division did not make an error of fact or an error of law in the way that it discussed and assessed the Claimant's treatment.

[26] The General Division stated:

> While it is the decision of the Claimant whether to accept recommended treatment or not, it is important to realize that refusing treatment may have some impact on his disability status.
>
> There was a treatment offered before the MQP, and treatments offered recently which may be of benefit to the Claimant. By refusing the treatments the Claimant may be prolonging his pain and level of functioning.
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> Nonetheless, his refusal to accept these treatments has not directly impacted his disability status. I am more persuaded by the evidence of a capacity to work even with his prolonged pain and functional limitations.[10]

[27] The Claimant argues that the General Division member:

- made an error of fact by finding that the Claimant refused reasonable treatment options that were recommended by his doctors; and
- made an error of law by failing to give reasons why she concluded that the Claimant's alleged failure to seek surgery was unreasonable in light of the recommendations from his treatment team.

[28] The Minister argues that the General Division did not make an error of fact by stating that the Claimant declined Dr. Bicknell's offer to perform an arthroscopy and debridement of his left shoulder. It was the Claimant's choice to have these procedures and prior to the end of the MQP, he decided not to have them. The General Division noted that the Claimant sought out and tried other treatments, but he declined the surgical options. This is consistent with the information in the record and the Claimant's testimony. The Minister argues that when the General Division member asked the Claimant during the hearing about the surgeries, the Claimant testified that he

[10] General Division decision, paras 20-22.

discussed the surgeries with Dr. Bicknell and decided that the risks outweighed the benefits. The General Division relied on the Claimant's testimony.

[29] The Minister argues that the General Division did not make an error of law here either. The General Division did not rely on the treatment issue to decide the Claimant's case, so there is no error if the decision lacks a full analysis about whether the refusal was unreasonable. The General Division found that the Claimant's decision not to have surgery did not directly impact the Claimant's disability status. The General Division denied the Claimant's application because it found he had capacity for some type of work (sedentary). The Claimant did not show that efforts to get and keep employment were unsuccessful because of his health condition.

[30] The question of a Claimant's treatment can be relevant either because:

- it speaks to whether the Claimant took steps to manage their disability[11];or because
- it speaks to whether the Claimant unreasonably refused treatment that would have had an impact on the ability to work, which can result in a finding that the Claimant is not eligible for the disability pension.[12]

[31] In my view, the General Division did not actually make the factual finding that the Claimant says was an error of fact. Also, I find that the General Division did not make an error of law by failing to complete the analysis about the Claimant's treatment. The General Division did not rely on the Claimant's treatment as a reason for denying the appeal.

[32] I am not satisfied that the General Division made the factual finding the Claimant alleges, namely that he unreasonably refused treatment options recommended by his doctors. The General Division found that Dr. Bicknell offered surgeries that the Claimant refused. This is different from the General Division deciding that Claimant's treatment team recommended the surgeries, that the Claimant refused them, that the refusal was unreasonable, and that the refusal had an impact on the Claimant's disability status.

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[11] The Federal Court of Appeal explains this in a case called *Sharma v Canada (Attorney General)*, 2018 FCA 48.
[12] The Federal Court of Appeal explains this in a case called *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

[33] It seems to me that the General Division merely made note of the Claimant's testimony in this regard – he refused a treatment option. The decision could be more clear about whether it was truly "recommended" but it was a moot point since the General Division:

- did not make a finding that the refusal was unreasonable; and
- did not make a finding that the refusal had an impact on the disability.

[34] Both of those findings would be necessary to deny a disability pension based on a failure to comply with treatment. The General Division expressly stated that it was deciding the case on another issue – namely, that the Claimant had a capacity to work but did not show that efforts to get and keep employment were unsuccessful because of his disability.

[35] The General Division decision does discuss treatment compliance, but comes short of providing a full analysis on the issue. The General Division did not rely on treatment compliance as a reason to deny the Claimant a disability pension, so to the extent that the analysis there is incomplete, finding a legal error about this analysis does nothing to advance the Claimant's claim for a disability pension.

Errors relating to the Claimant's efforts to get and keep work

[36] The General Division made errors relating to the Claimant's efforts to get and keep work.

[37] If there is a capacity for work, the Claimant has to show that efforts to get and keep work failed because of the medical condition.[13]

[38] The General Division discussed the Claimant's testimony about his attempts to get and keep work. The General Division found that he was trying to work for his friend fixing remote controlled cars:

> This was not a job. He was not paid. He did it one or two hours a few times a week sporadically. He had only done it a few times. He answered the phones if his friend was busy. He stated the establishment is a hobby shop and he tried it because he thought he had a handle on his pain. The

[13] The Federal Court of Appeal explained this requirement in a case called *Inclima v Canada (Attorney General)*, 2003 FCA 117.

> Claimant stated that he could not do the job well as he was not there mentally to work due to the pain.
>
> There is no corroborating evidence regarding his attempt at fixing radio-controlled cars. He was clear this was not a job. It was a hobby shop and radio-controlled cars were a hobby for the Claimant. I therefore do not view this as a valid attempt to work at anything. Nor do I consider his friend a benevolent employer as it was not a job and he was not paid. As well, this required a degree of physical input would presumably require him to use his arms and therefore his shoulder. It was established at the MQP and a few months post-MQP that he should not pursue physical labour. It was not an attempt at a suitable position for his limitations.[14]
>
> Therefore, there is evidence of a capacity to work, both before and well after his MQP and the Claimant has failed to show an attempt at obtaining or maintaining employment, and that he was unsuccessful because of his shoulder pain.

[39] The Claimant argues that the General Division ignored or did not really consider the Claimant's evidence about trying to return to work. The Claimant testified that he tried to return to work in a volunteer position in 2018 as a way of figuring out whether he had the ability to perform some basic tasks and because he wanted to see what his workplace limitations were. The Claimant explained that he had significant difficulties with the work. He could not complete even tasks involving fixing remote control cars for more than one or two hours as a time. He had trouble with general strength and grip. He had numbness in two of his fingers, significantly increased pain and difficulty concentrating; all of which caused him to make mistakes.

[40] The Claimant also points to his testimony about his attempts to try to help with customer service at the same shop, but that he was not comfortable operating the cash or computer systems, is not computer savvy and was worried about making mistakes. He says his evidence was that he worked about 20-30 hours by the time of the hearing over a period of 2 years.

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[14] General Division decision, paras 33 and 34.

[41] The Claimant argues that the General Division simply concluded this was not work, it was not an attempt at work within his limitations, and that these factual findings are errors given what the Claimant actually said about his work efforts.

[42] The Minister argues that the General Division did not make a perverse or capricious finding of fact about the Claimant's attempt to return to work. The General Division did not mischaracterize the Claimant's testimony in the decision. The General Division did not view this as a valid attempt to work because the Claimant made it clear that it was not a job. He was not paid. The General Division noted that the work required the Claimant to use his arms and therefore his left shoulder, and that this was physical labour and therefore outside his limitations.

[43] In my view, the General Division made an error of law and an error of fact in the consideration of the Claimant's attempt at work.

[44] First, I will discuss the error of law. When the General Division finds that the Claimant has a residual capacity to work, the Claimant has an additional hurdle in the appeal. The Claimant must show (on a balance of probabilities) that efforts to get and keep employment were unsuccessful because of the disability. This additional hurdle comes from a federal court case – it is not part of the test for a severe disability as it is set out in the legislation. This requirement has been understood to mean that the Claimant's employment efforts need to be reasonable.[15]

[45] In my view, there are a variety of ways that a Claimant might meet this additional hurdle. For example, a Claimant could show that efforts to get and keep a job were unsuccessful because of the disability by explaining, for example:

- that they applied widely for work but were not ultimately hired by any employer because of the Claimant's functional limitations; or

- that they tried a job for a few months and had to quit because of increasing pain or disability.

[15] Appeal Division cases like *D.T. v Minister of Employment and Social Development*, 2019 SST 676 are consistent with this idea. So are Federal Court of Appeal cases like *Hillier v Canada (Attorney General)*, 2020 FCA 11.

[46] There is no specific requirement in law for the Claimant to have succeeded in securing paid work in order to meet this hurdle. There is no specific requirement in law for corroborating evidence about the efforts to get and keep work. In fact, there is no blanket requirement for Claimants to have applied for paid work or full time work as a first step.

[47] In my view, in some circumstances (depending on the nature of the Claimant's functional limitations and their personal circumstances), a reasonable effort to get employment might start with trying an unpaid trial or a benevolent or volunteer type of opportunity to test strength, pain levels, range of motion, cognitive abilities, mental health, or endurance, etc.. This approach might be particularly reasonable if medical experts are telling you that you have capacity but you do not feel subjectively that you do.

[48] In this case, the Claimant had only done physical work throughout his career. He was experiencing a great deal of pain in his shoulder that was not well managed, although he tried both medication and cortisone shots. Surgical shoulder replacement was a long way off. The Claimant weighed the risks and benefits of other surgery that he was offered in the meantime and decided against it. In this context, what would count as a reasonable effort to get and keep employment?

[49] The General Division appears to have dismissed the Claimant's appeal because his efforts in the shop were not paid and were not a job. In this context, that may be a legal error. In my view, the decision leaves the reader with the impression that the Claimant needed to apply for or try paid employment in order to show the efforts were reasonable. Without any specific requirement to take that specific step in law, the decision does not explain why the effort the Claimant did make (starting with unpaid tasks through a friend's shop) was not reasonable.

[50] I also find that the reasons the General Division gave about the work the Claimant did contain an error of fact. The General Division found that the task the Claimant tried fixing the radio-controlled cars in the shop required a "degree of physical input would presumably require him to use his arms and therefore his shoulder. It was established at the MQP and a few months

post-MQP that he should not pursue physical labour. It was not an attempt at a suitable position for his limitations."[16]

[51] I have listened to the Claimant's testimony at the General Division about the tasks he did in the shop. The finding that the work required "physical input" above his restrictions is an error of fact. The Claimant was precluded from the kind of physical labour he did when he was a truck driver. The General Division's conclusion that working on tiny radio or remote controlled cars for an hour or two at a time exceeded his physical restrictions and was not suitable because of the pain in his shoulder is an error of fact and is perverse or capricious in light of the evidence. The tiny movements involved in fixing a toy car are simply not comparable to physically demanding labour like the lifting and other physical tasks involved with driving a truck.[17]

No error of law: the General Division considered the real world context

[52] The General Division did not make an error of law: the General Division did consider the real-world context as is required by the law.

[53] The Claimant argues that the General Division did not consider the Claimant's real world situation when considering his efforts to get and keep employment, deciding only that his efforts to get and keep employment were not successful simply because of his shoulder injury. The Claimant argues that his testimony showed that he was not able to work more than two hours at a sedentary volunteer opportunity, that he has a complete lack of experience with computers, he has limited education and a history of employment that only included physical labour jobs. The Claimant argues that is seems like the General Division:

a) required him to provide that he was unable to do a sedentary job, instead of

b) proving that he is incapable regularly of pursuing any substantially gainful occupation.

[16] General Division decision, para 34.
[17] The General Division also noted that the Claimant did not provide any corroborating evidence about that work in the hobby shop. Corroborating evidence is not required, particularly here where the General Division member expressly thanked the Claimant at the close of the hearing for being "open and honest" with his answers during the hearing.

Making a decision under (b) above requires analyzing the Claimant's personal circumstances like his work history and his life experience.

[54] The Minister argues that the General Division made no error of law, and that the General Division analyzed (as is required) how factors like age, education, language proficiency and work and life experience might further limit the Claimant's employability.

[55] The Minister argues that the General Division acknowledged the need to consider the real world factors, and then applied them to the Claimant's circumstances. The General Division found that these factors did not, in combination with his physical limitations, mean that he was incapable of work. The Claimant was able to retrain in a sedentary position, and the General Division noted the report that showed there were a number of sedentary jobs that the Claimant could do.

[56] In my view, the General Division did not make an error of law. The General Division completed an analysis of the Claimant's real world circumstances by discussing his age, education, language proficiency and work and life experience.[18]

[57] In some cases, the true cause of a Claimant's inability to return to work is that the Claimant failed to make greater efforts to find work within their documented limitations during the MQP. In that context, there is no need to make an in-depth analysis of the real world factors that also might present barriers to work.[19] That was the case here. The General Division found that the Claimant had a capacity for sedentary work, based on the available medical evidence. The Claimant's evidence was that he did not look for work at all in or around the MQP because he did not have any capacity. However, the General Division found, based on the physiotherapist's report and the doctor's letter that he did have some capacity for work at the time of the MQP. The General Division did discuss the Claimant's personal circumstances, and in this situation did not make an error of law.

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[18] General Division decision, paras 38-39.

[19] This was the situation in a case called *Doucette v Canada (Minister of Human Resources Development)*, 2004 FCA 292. In that case, the Claimant stated that he was unable to perform sedentary work but there was no objective medical evidence about that. There was also a psycho-vocational assessment that concluded the Claimant had the capacity for various jobs, like gas station attendant, dispatcher or telemarketer. The Federal Court of Appeal found in this circumstance that an in depth analysis of the real world factors was less important in this context.

REMEDY

[58] Once I have found an error by the General Division, I can return the case to the General Division for reconsideration, or I can give the decision that the General Division should have given.[20]

[59] The record is complete. I will give the decision that the General Division should have given. That is the most fair and efficient[21] way forward. The parties did not object to this approach.

[60] The General Division concluded that the medical evidence showed that the Claimant had a residual capacity to work. The General Division relied primarily on the medical evidence from the physiotherapist and from Dr. Pickle in that regard, but also considered post-MQP documents that suggested the Claimant had a capacity to work.[22] There is no error with respect to this finding, and I adopt those reasons.

[61] The part of the decision I need to give is about whether the Claimant proved (on a balance of probabilities) efforts to get and keep employment that were unsuccessful because of his health condition.[23]

[62] I find that the Claimant has not met that requirement, but my reason for reaching that conclusion is different from the reasons the General Division provided. The Claimant did not show any efforts to get or keep work at all from the time of his accident until mid-2018. As a result, he is not eligible for the disability pension.

Claimant has not shown efforts to get and keep employment during the relevant time

[63] I accept the Claimant's testimony about his efforts to get and keep work. He testified that during most of the first year after the accident (which was in January 2015), he was not able to work and did not make any efforts to get or keep employment during that time. His arm was in a

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[20] DESDA, s 59.
[21] *Social Security Tribunal Regulations*, s. 2.
[22] General Division decision, para 29 lists the reports from 2017 that suggested the Claimant had a capacity for work.
[23] *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

sling for much of the first year after his accident. Initially, he had pain that was not well controlled not only in his shoulder, but also in his tailbone, on a foot, his abdomen, his chest, and his wrist. He experienced neck pain. He was not sleeping well. He was unable to attend to his personal needs independently in terms of dressing, showering, and toileting.

[64] I accept the evidence the Claimant gave about his attempts to return to work, which he started by testing his abilities helping out a friend in a hobby shop starting in 2018.

[65] The Claimant's testimony was clear: he made no efforts at all to get or keep employment from the time of the accident until his attempt to work at the shop in 2018. The Claimant's condition had started to improve one year after the accident – which would be roughly in January 2016. The Claimant did not make any efforts to get or keep employment until 2018. The efforts in 2018 were not unreasonable in and of themselves. The issue is that in this case, the Claimant needed to show some efforts during the time of the MQP which ended on December 31, 2016. He has not met that requirement.[24]

[66] I find that in light of the Claimant's medical condition and his personal circumstances, he had a capacity to work in or train for a sedentary position at the time of his MQP. He did not make any efforts to get or keep employment until he tried helping out in the hobby shop in 2018. The timing of those efforts is not reasonable given the circumstances.

[67] The Claimant is not entitled to a disability pension under the CPP.

CONCLUSION

[68] I dismiss the appeal.

Kate Sellar
Member, Appeal Division

HEARD ON:	September 9, 2020
METHOD OF PROCEEDING:	Teleconference

[24] *D.W. v Minister of Employment and Social Development*, 2020 SST 307 (CanLII), para 29.

APPEARANCES:	Ryan Alkenbrack, Representative for the Appellant Ian McRobbie, Representative for the Respondent