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

Citation: *Minister of Employment and Social Development v IO*, 2020 SST 1034

Tribunal File Number: AD-20-782

BETWEEN:

Minister of Employment and Social Development

Appellant

and

I. O.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: December 10, 2020

Canada

DECISION AND REASONS

DECISION

[1] The Minister's appeal is allowed.

[2] The General Division based its decision on important errors of fact.

[3] The Appeal Division gives the decision that the General Division should have given. The Claimant did not have a severe disability before the end of the minimum qualifying period.

OVERVIEW

[4] I. O. (Claimant) completed a Bachelor of Arts degree before she moved to Canada. She last worked in an export forwarding company. She was laid off due to a shortage of work. The Claimant has a congenital heart defect and mental health illnesses. She applied for a Canada Pension Plan disability pension and claimed that she was disabled by her conditions when they worsened in 2017.

[5] The Minister of Employment and Social Development refused the application. The Claimant appealed this decision to the Tribunal. The Tribunal's General Division allowed the appeal. It decided that the Claimant was disabled in June 2016, when she stopped working.

[6] Leave to appeal this decision to the Tribunal's Appeal Division was granted because the appeal had a reasonable chance of success. The General Division may have based its decision on an important factual error when it concluded that the Claimant was disabled by bilateral epicondylitis, as there was no evidence that she has this condition.

[7] The General Division based its decision on this and other important factual errors. The Appeal Division must intervene. The decision that the General Division should have given is that the Claimant was not disabled before the end of the minimum qualifying period (MQP – the date by which a claimant must be disabled to receive the disability pension).

ISSUES

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

a) That the Claimant was disabled by bilateral epicondylitis;

b) That the Claimant was disabled when she stopped working;

c) That the evidence supported that the Claimant had a severe disability when she stopped working;

d) That the Claimant had a severe disability before the end of the MQP;

e) That there was evidence of depression before the end of the MQP?

ANALYSIS

[9] An appeal to the Tribunal's Appeal Division is not a rehearing of the original claim. Instead, the Appeal Division can decide only 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 of law; or

d) based its decision on an important factual error.[1]

[10] The Minister says that the General Division based its decision on a number of important factual errors. To succeed on this basis, it must prove three things regarding each factual error:

a) That the finding of fact was erroneous (wrong);

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

b) That the finding of fact 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]

Bilateral Epicondylitis

[11] The Claimant wrote in her application for the disability pension that the condition that prevented her from working was a congenital heart defect.[3] The General Division considered the medical evidence presented to it about this condition.[4] The Claimant also presented evidence about the following conditions:

- Sleep apnea and insomnia[5]
- Anxiety disorder[6]
- depression[7]

[12] There was no evidence before the General Division about epicondylitis. Despite this, the General Division decision states:

> I find that the Appellant does suffer from a severe disability, as she is incapable regularly of pursuing any gainful occupation due to her ongoing limitations caused by bilateral epicondylitis.[8]

[13] The finding of fact that the Claimant was disabled by bilateral epicondylitis is an error.

[14] This finding of fact is perverse (goes contrary to the evidence). There is no evidentiary basis for this finding of fact.

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[2] See section 58(1)(c) of the *Department of Employment and Social Development Act*.
[3] GD2-106.
[4] General Division decision at paras 8-10.
[5] General Division decision at para 11.
[6] General Division decision at para 14.
[7] General Division decision at para 18.
[8] General Division decision at para 21.

[15] The General Division decision was based, at least in part, on this finding of fact. A plain reading of this sentence in the decision demonstrates that the General Division decided that the Claimant was disabled by this condition alone, not by this condition in combination with her other conditions.

[16] The Claimant argues that this error is minor, similar to a "typo," and that, when the entire decision is read it is clear that this paragraph does not impact the conclusion that the Claimant is disabled.

[17] I acknowledge that the General Division considered the evidence regarding the Claimant's medical conditions, including her heart condition, depression, and sleep issues. However, the General Division decision does not reach any conclusions regarding these conditions. It summarizes the evidence and states that its conclusion that the Claimant is disabled by bilateral epicondylitis is based on three medical reports and her personal circumstances.[9]

[18] Therefore, the General Division based its decision on this important factual error. The Appeal Division must intervene on this basis.

Date of Disability Onset

[19] Both parties say that the General Division based its decision on an important factual error that the Claimant had a severe and prolonged disability in June 2016, when she stopped working. The Claimant did not stop working because of her health; she was laid off for another reason. The Claimant testified that, although she had a heart condition for many years, her symptoms began in March 2017,[10] and her mental health also deteriorated at that time. Her legal position before the General Division was that she became disabled in June 2017.

[20] The Minister also says that the Claimant was not disabled in 2016 because she did not leave work due to her health.

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[9] General Division decision at paras 24–26.
[10] General Division decision at para 16; General Division hearing recording at approximate time 9:04, although the exact time may differ depending on the device that is used to listen to the recording.

[21] Therefore, the General Division's finding of fact that the Claimant was disabled in June 2016 when she stopped working is an error. It was made perversely. It is contrary to the uncontradicted oral and written evidence that was presented to the General Division. The decision was based on this finding of fact. The date of disability onset determines when disability pension payments begin.

[22] Therefore, the Appeal Division also must intervene on this basis.

Other Issues

[23] The Minister has presented other grounds of appeal. However, since I have decided that the Appeal Division must intervene for the reasons set out above, it is not necessary to deal with them.

REMEDY

[24] The Appeal Division has the legal authority to grant the following remedies when it intervenes:

a) Dismiss the appeal;

b) Give the decision that the General Division should have given;

c) Refer the matter back to the General Division for reconsideration;

d) Confirm the General Division decision;

e) Rescind the General Division decision; or

f) Vary the General Division decision.[11]

[25] The Claimant argues that it is appropriate for the Appeal Division to vary the decision, confirming that the Claimant is disabled and changing the date of disability onset to June 2017. She argues that any errors in the General Division decision are minor and do not affect the outcome of the appeal. In addition, she says that the Appeal Division has a complete record and

[11] See section 59(1) of the *Department of Employment and Social Development Act*.

does not need to reweigh the evidence. Further, she says that varying the decision would be the most efficient and cost-effective way to resolve the appeal and would prevent any prejudice to the parties that would be incurred if the matter were referred back to the General Division.

[26] In contrast, the Minister argues that the Appeal Division should give the decision that the General Division should have given, being that the Claimant is not disabled under the *Canada Pension Plan.*

[27] The Appeal Division must intervene in this case because the General Division based its decision on two important factual errors. That the decision was **based on** these errors means that the foundation of the decision is flawed. These errors are not minor, or akin to "typos." Therefore, it would be inappropriate to simply vary the General Division decision and uphold its conclusion.

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

a) The record is complete;

b) The facts are not in dispute;

c) The parties presented their full legal arguments at the General Division hearing, and the recording is available;

d) This matter has been ongoing for a long time. Further delay would be incurred if it were referred back to the General Division for reconsideration;

e) This is the most efficient and cost-effective way to conclude the appeal considering the circumstances, fairness, and natural justice;[12]

f) The Tribunal has the legal authority to decide questions of fact and law necessary to conclude an appeal;[13] and

[12] See section 3(1) of the *Social Security Tribunal Regulations*.
[13] See section 64 of the *Department of Employment and Social Development Act*.

g) The Minister requested this remedy. The Claimant requested this remedy if the Appeal Division did not vary the General Division decision.

The Claimant's disability was not severe before the end of the MQP.

[29] For a claimant to be disabled under the *Canada Pension Plan*, they must have a disability that is both severe and prolonged. A person has 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 continued and of indefinite duration or is likely to result in death.[14]

[30] The evidence is summarized below:

- The Claimant came to Canada after completing a Bachelor of Arts degree in Poland.
- In Canada, the Claimant completed two post-secondary programs.
- The Claimant testified that she can read and write to communicate in English with no problems.[15]
- The Claimant last worked as a document specialist. She left this job in 2016 because she was laid off.[16]
- The Claimant began to have chest pain and tightness in her chest in March or April 2017.[17]
- In June 2017, the Claimant had an incident of chest pain and tightness, shortness of breath, and pain spreading to her jaw.[18]

[14] See section 42(2)(a) of the *Canada Pension Plan*.
[15] General Division hearing recording approximate time 4:00.
[16] General Division hearing recording approximate time 4:25.
[17] General Division hearing recording approximate time 8:02.
[18] General Division hearing recording approximate time 9:04.

- The Claimant went to the hospital by ambulance.
- The Claimant was diagnosed with several cardiac conditions, including bicuspid valve stenosis, heart murmurs, and arrhythmia.
- This is treated with medication and regular diagnostic tests.
- The Claimant also has depression and anxiety. She has had these conditions for a number of years, but they became worse after this heart incident.[19]
- The Claimant takes medication for mental health illness and sees a psychiatrist.
- The Claimant first saw her psychiatrist monthly, and she now sees him once every three months.
- In addition, the Claimant has sleep apnea and insomnia. These conditions are treated with a CPAP machine and medication.
- The Claimant has fatigue and problems with concentration. She also worries and is sad.
- The Claimant's family doctor wrote that her prognosis is fair.[20]
- The MQP is December 31, 2017.

[31] The medical evidence confirms the Claimant's symptoms. However, when all of the evidence is considered, I am not persuaded that the Claimant had a severe disability before the end of the MQP. In the disability pension questionnaire,[21] the Claimant wrote that, despite her medical conditions, she has no difficulties sitting or standing, she can walk 15 minutes to one hour (slowly), and she can lift or carry several pounds for a short distance. She looks after her own eating and grooming and can manage household chores with some help.

[19] General Division hearing recording approximate time 30:00.
[20] GD2-81.
[21] AD2-106.

[32] The Claimant did not describe any other physical limitations. In addition, although she has trouble with concentration, there was no evidence that she could not manage her finances or make and implement decisions.

[33] I place significant weight on the family doctor's report filed with the disability pension application.[22] This doctor had treated the Claimant for 19 years. The report is dated December 15, 2017, which is at the end of the MQP and speaks to her overall condition at that time. It makes no reference to any mental health illness or limitations. It states that the Claimant needs close supervision of her heart conditions and that her prognosis is fair in spite of her symptoms. This evidence does not support the Claimant's position that she was disabled at that time.

[34] In addition, the Claimant underwent cardiac tests in November 2017. The exercise stress test showed no symptoms at a good workload.[23] Her cardiac conditions are diagnosed as mild to moderate (moderate stenosis and mild regurgitation).[24] This diagnosis has remained consistent since 2017. The Claimant's treatment also has not changed, which indicates that her condition is adequately controlled.

[35] Dr. Kilany stated that the Claimant could not go to work because of her multiple issues.[25] However, I do not place much weight on this statement, which is in the middle of his report. The balance of the report discusses the Claimant's cardiac status only. It does not provide any basis for this general conclusion.

[36] Regarding the Claimant's other conditions, there is no evidence that they are severe. The Claimant's treatment for sleep apnea or insomnia has not changed. The reports from the sleep clinic continue to stress the importance of sleep hygiene and use of the CPAP.

[22] GD2-81.
[23] GD2-64.
[24] GD2-67.
[25] GD2-43.

[37] The Claimant testified that she is coping better with her depression with her current antidepressant. In addition, she sees her psychiatrist less frequently than she did originally, and she has not been to any other ongoing counselling.

[38] The Claimant argues that, while her conditions may not meet the definition of severe individually, they do when considered together. However, the Claimant's evidence about her limitations does not demonstrate that she could not regularly pursue any substantially gainful occupation. She can sit or stand without limitations. There is no evidence of any cognitive problems. She looks after her household.

[39] The Claimant was 57 years old at the end of the MQP, which is younger than the age of retirement. While this could impact her ability to work, it is offset by the Claimant's other circumstances. The Claimant has two post-secondary diplomas in Canada. She is able to read, write, and work in English. She has work experience in Canada as a document expert and at financial institutions. She has transferrable skills. Therefore, her personal circumstances would not negatively impact her capacity to work.

[40] For these reasons, I find that the Claimant had capacity regularly to pursue a substantially gainful occupation at the end of the MQP.

[41] When there is evidence of work capacity, a claimant must show that they could not obtain or maintain employment because of their health.[26] The Claimant made no effort to obtain or maintain work after her heart incident in 2017. Consequently, she has not met this legal obligation.

[42] Therefore, the Claimant did not have a severe disability before the end of the MQP.

[43] In order to be disabled under the *Canada Pension Plan*, a claimant must have a disability that is both severe and prolonged. Because I have found that the Claimant's disability was not severe, it is not necessary for me to consider whether it was prolonged.

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[26] *Inclima v Canada (Attorney General)*, 2003 FCA 117.

CONCLUSION

[44] The appeal is allowed.

[45] The General Division based its decision on two important factual errors. The Appeal Division intervenes and gives the decision that the General Division should have given: The Claimant was not disabled before the end of the MQP. Therefore, her claim is dismissed.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	November 26, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	I. O., Appellant Judith Hemming, Counsel for the Appellant Viola Herbert, Representative for the Respondent