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

Citation: *HS v Minister of Employment and Social Development*, 2021 SST 28

Tribunal File Number: AD-20-792

BETWEEN:

H. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: February 1, 2021

DECISION AND REASONS

DECISION

[1] I dismiss the appeal. The General Division did not make an error. This written decision explains my reasons.

OVERVIEW

[2] H. S. (the Claimant) worked in sales at a tractor dealership from March 2013 to June 2015. In June 2015, he had a workplace accident resulting in a crush injury to his foot. He has had two surgeries to try to fix the damage to his foot.

[3] The Claimant explains that he has chronic pain syndrome (the pain is in his lower back and feet), disturbed sleep, headaches and fatigue. He has difficulty sitting or standing for prolonged periods, bending, and reaching. He has depression, low mood, sadness, difficulty remembering, and difficulty with concentration. He explains that he cannot do household chores and requires help for personal needs.

[4] He applied for the disability pension under *Canada Pension Plan* (CPP) on September 26, 2018.

[5] To qualify for a disability pension under the CPP, the Claimant needed to show that he had a severe and prolonged disability on or before the end of the minimum qualifying period (MQP).[1] The MQP is calculated based on the Claimant's contributions to the CPP. The Claimant's MQP ended December 31, 2015.

[6] The Minister refused the application initially and on reconsideration. The Claimant appealed to this Tribunal. The General Division dismissed the appeal. I must decide whether General Division made an error under the *Department of Employment and Social Development Act* (DESDA).

[7] The General Division did not make an error. I dismiss the appeal.

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[1] *Canada Pension Plan*, s 42(2).

ISSUES

[8] There are three issues:

1. Did the General Division make an error of fact by ignoring some of the medical evidence about the impact of the Claimant's psychological condition on his capacity for work?

2. Did the General Division make an error of fact by ignoring the Claimant's testimony about the impact of his medications on his capacity for work?

3. Did the General Division make an error of law by failing to consider how the Claimant's conditions and personal circumstances impacted his ability to retrain?

ANALYSIS

Reviewing General Division decisions

[9] The Appeal Division does not give parties a chance to reargue their case in full at a new hearing. Instead, the Appeal Division reviews the General Division's decision to decide whether it made an error. The DESDA sets out the errors I can consider, or "grounds of appeal."[2] These errors are that the General Division made an error of fact, law, or jurisdiction or failed to provide a fair process.

[10] 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."[3] A mistake about 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.[4]

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[2] Section 58(1) of the DESDA.
[3] DESDA, s 58(1)(c).
[4] The Federal Court described errors of fact that way in a case called *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319.

Did the General Division ignore medical evidence about the Claimant's psychological condition?

[11] The General Division did not make an error of fact by ignoring medical evidence about the Claimant's psychological condition. The General Division did not ignore the family doctor's notes or the March 2016 report.

[12] I presume the General Division considered all of the evidence even if the General Division did not discuss that evidence in the decision.[5] There is an exception to this approach. When the evidence is important enough that it needed to be discussed, it may be that the we cannot presume the General Division considered it. In that situation, it may be that the General Division ignored evidence and therefore made an important error of fact.[6]

[13] The General Division concluded that the Claimant's medical evidence did not show a severe disability as defined by the CPP. In reaching that conclusion, the General Division decision specifically relied on:

- The report dated March 2016;[7]
- the post-operative report after the surgery dated March 2017;[8]
- The family doctor's medical report from September 2018 that referenced depression as one of the Claimant's conditions;[9] and
- A consultation note from the family doctor dated August 10, 2018 that stated the Claimant generally appeared normal in both his physical and mental health.[10]

[5] The Federal Court of Appeal explained this in a case called *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[6] The Federal Court explained this in a case called *Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498.
[7] General Division decision, para 9.
[8] General Division decision, para 10.
[9] General Division decision, para 11.
[10] General Division decision, para 11.

[14] The General Division concluded:

> I found it important that the March 2016 consultation report said the Claimant could return to sedentary employment. This report was written shortly after the end of the Claimant's minimum qualifying period. If the Claimant was able to regularly do some kind of work that is substantially gainful, then his disability does not meet the definition of 'severe' in CPP law.[11]

[15] The Claimant argued that the General Division ignored both the family doctor's clinical notes which showed that the Claimant was not improving, as well as the March 2016 report, particularly the parts of that report that discuss his scores on testing consistent with significant psychological factors affecting his perception of pain and disability.[12] The report recommends that the Claimant seek a concurrent mood assessment (for possible depressive mood disorder) as well as a specialty consultation related to treatment options for pain. The report identifies "yellow flags" in this case, namely psychological barriers to recovery and return to work.[13]

[16] The Minister argues that the General Division did not ignore any of the evidence relating to the Claimant's psychological condition. The fact that the General Division decision does not recount the exact parts of the report that the Claimant relies on does not mean that the General Division ignored the report. This same report that outlined the yellow flags about the Claimant's psychological functioning also stated that he was fit for sedentary duties. The Claimant's primary caregiver for depression was his family doctor. The family doctor's notes provide guidance about how the Claimant was doing after the report noting the "yellow flags." The family doctor's notes show that the Claimant's condition was stable.

[17] In my view, the General Division has not made an error by ignoring medical evidence about the Claimant's psychological condition. The General Division considered the family doctor's notes, and put weight on a note that signalled the Claimant's condition was stable. The General Division does not have to refer to all of the doctor's notes. In any event, there are notes from the family doctor that show that the Claimant started on an antidepressant in 2017, that he felt better with that medication, and that his mental health appeared to be normal and that he was

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[11] General Division decision, para 12.
[12] GD2-133 to 141.
[13] GD2-136.

doing better.[14] The General Division must sift through and weigh the evidence. The General Division completed that task, including considering the report that identifies the psychological barriers to returning to work.

[18] It is clear that the General Division considered the totality of that report, even if it did not quote from the sections about the Claimant's psychological barriers. The General Division put weight on the conclusion in that report. The report found there were no medical restrictions, and that the Claimant was fit for seated sedentary duties.

[19] The report was the result of a comprehensive assessment process. If the psychological yellow flags presented a barrier to sedentary work, the report's conclusion would reflect that. The General Division did not ignore or misinterpret this report.

[20] Although the General Division decision is somewhat sparse in terms of recounting the evidence, in my view, the decision shows an effort to speak plainly and to the Claimant, who was not successful in his appeal. There is no error of fact.

Did the General Division ignore the Claimant's testimony about his medications?

[21] The General Division did not make an error of fact by ignoring the Claimant's testimony about his medications. Although the General Division did not discuss the Claimant's testimony about his medications in the decision, it was not important enough that it needed to be discussed. I reach that conclusion particularly in light of the medical evidence stating that the Claimant had capacity to work at a sedentary position.

[22] At the General Division hearing, the Claimant testified that for about a year after the accident, he took Morphine and Percocet. He stated that these medications had an impact on his ability to focus. Once he stopped taking those medications, he started taking Tylenol #3's, and was still taking them at the time of the hearing. The Tylenol #3's did not take the pain away, and resulted in him feeling light-headed.[15]

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[14] GD2-52, 56 and 60.
[15] General Division hearing, Claimant's testimony about medication at approximately 12:50-14:25 minutes and 28:48-30:30.

[23] The General Division decision acknowledges that the Claimant had constant pain, numbness, and poor sleep as of March 2017.[16] The decision also states that as of August 2018, the Claimant's family doctor stated that the Claimant generally appeared normal in both his physical and mental health.[17] The General Division also put a lot of weight on the consultation report from a few months after the end of the MQP (the report was dated in March 2016), that stated that the Claimant could return to sedentary employment.[18]

[24] The Claimant argues that the General Division ignored the Claimant's testimony about the impact of his medications on his capacity to work during the MQP, and that this is an error of fact. He argues that as a result of his medical conditions and the medications he was taking at the time of the MQP, he is incapable regularly of pursuing any substantially gainful occupation.

[25] The Minister argues that the General Division did not ignore evidence about the impact of the Claimant's medication on his ability to work. The Minister notes that the medical evidence (that the General Division put more weight on) supported the notion that the Claimant had stopped taking Morphine and Percocet very shortly after the end of the MQP, by March 2016. The Minister acknowledges that the first note about the Claimant using Tylenol #3's does not appear in the record until December 2018, when the Claimant's family doctor noted that the Claimant's activities of daily living were "stable" with Tylenol #3.[19]

[26] I presume that the General Division considered the Claimant's testimony about the impact of his medications. This testimony was not important enough to discuss give the weight the General Division put on the medical evidence about capacity to work.

[27] The General Division relied heavily on medical evidence both from just a few months after the MQP and then in the years following (long after the Claimant stopped taking Percocet and Morphine) that showed the Claimant had some capacity for work.

[28] The medical record does not dispute the Claimant's testimony about his pain medication in the first year after his accident. In December 2015, it had not yet been a year since the

[16] General Division decision, para 10.
[17] General Division decision, para 11.
[18] General Division decision, para 12.
[19] GD2-65.

Claimant's accident and the Claimant was using pain medication that would have made it difficult to concentrate at a job. However, by March 2016, the Claimant was not using those medications anymore and was using Tylenol #3 for pain.

[29] The Claimant must show that he was incapable regularly of pursuing any substantially gainful occupation on or before the end of the MQP. The disability also needs to be prolonged. In light of those legal requirements, I cannot infer that the General Division ignored the impact of pain medications on the Claimant. Rather, the General Division did not discuss this evidence as it put a great deal of weight on the medical evidence, which itself mentioned the use of medications, but was also clear that the Claimant had capacity for work.

Did the General Division make an error in the analysis of the Claimant's ability to retrain?

[30] The General Division did not make an error of law in its discussion of the Claimant's retraining. The General Division's decision is brief, but it did consider whether the Claimant would have been capable of retraining.

[31] Where there is evidence of a capacity to work, the claimant must show efforts to get and keep employment were unsuccessful due to the medical conditions."[20] I will call this the "employment efforts test" which is triggered when there is evidence of capacity to work. In some cases, the factors that impact the Claimant's real-world employability (like age, etc) are less important. For example, when the there is extensive medical evidence showing that the Claimant can return to light duty work and the Claimant makes no attempt to return to work or retrain.[21]

[32] The General Division found that the Claimant did not put a reasonable amount of effort into looking for suitable work or upgrading his education to help advance him into work he might be able to do.[22] The General Division asked the Claimant during the hearing what work he might be able to do, and the Claimant stated that he thought about becoming a real estate agent.

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[20] The Federal Court of Appeal explained this in a case called *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[21] *Inclima v Canada (Attorney General)*, 2003 FCA 117. Also, in a case called *Doucette v Canada (Minister of Human Resources Development)*, 2004 FCA 292, the true cause of the inability to return to work was the failure to make greater efforts between the time of the accident and the end of the MQP. Given that conclusion, the Court found that there was no need to make an in-depth analysis of the constraints posed to the applicant's capacity to return to the work force by his education level, language proficiency and past work experience.
[22] General Division decision, para 18.

The Claimant offered some reasons as to why he did not pursue that option, but those reasons were not related to his medical condition. The General Division also considered factors that impact the Claimant's real-world employability, including his age.

[33] In my view, the General Division member did not make any error of law in the assessment of the Claimant's ability to retrain. The General Division member considered the available medical evidence and the Claimant's testimony, and reached a conclusion. The Claimant argues at the Appeal Division that he cannot retrain or upgrade his skills due to his medical conditions, and that the General Division's failure to acknowledge this amounts to an error. However, the General Division simply relied on the testimony the Claimant gave at the General Division about the possibility of retraining and alternate work. That approach does not amount to an error of fact or an error of law.

[34] I reviewed the record.[23] The General Division did not ignore or misunderstand the evidence. The General Division analyzed solid evidence of capacity to work both immediately after the end of the MQP as well as consistently thereafter. It is true that the General Division decision was brief. However, there were footnotes in the decision to the relevant reports, and the analysis was clear: the General Division put great weight on the evidence that suggested that the Claimant had capacity to do sedentary work.

[35] It may be that the decision could have discussed in some more detail the Claimant's conditions and his functional limitations. However, given the clear weight the General Division put on the evidence of a capacity to work and the lack of effort the Claimant put in to employment efforts, the General Division's reasons are not lacking in any way that amounts to an error.

[23] Reviewing the record in this way is consistent with the expectation from the Federal Court in a case called *Karadeolian v Canada (Attorney General)*, 2016 FC 615.

CONCLUSION

[36] I am dismissing the appeal. The General Division did not make an error.

Kate Sellar
Member, Appeal Division

HEARD ON:	January 5, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	H. S., Appellant Rajinder Johal, Representative for the Appellant Susan Johnstone, Representative for the Respondent