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

Citation: *SF v Minister of Employment and Social Development*, 2021 SST 26

Tribunal File Number: AD-20-771

BETWEEN:

S. F.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: January 29, 2021

Canada

DECISION AND REASONS

DECISION

[1] I am dismissing the appeal. The General Division did not make an error. These reasons explain how I reached that conclusion.

OVERVIEW

[2] S. F. (the Claimant) is 32 and has a grade 11 education. He has low back pain, leg pain, anxiety, depression, poor sleep, trouble concentrating, low energy, and headaches. He worked as a labourer since he arrived in Canada in 2008. He last worked as a cook. He stopped working due to his medical condition after a work-related accident.

[3] The Claimant applied for a disability pension under the *Canada Pension Plan* (CPP) on April 11, 2018. The Minister denied the application initially and on reconsideration. The Claimant appealed to this Tribunal. The General Division decided that the Claimant was not entitled to the disability pension.

[4] I must decide whether the General Division made an error under the *Department of Employment and Social Development Act* (DESDA). The General Division did not make an error of fact or an error of law. I dismiss the appeal.

ISSUES

[5] The issues are:

1. Did the General Division make an error of law by failing to apply the correct standard of proof?
2. Did the General Division make an error of fact by ignoring the neurosurgeon's report?
3. Did the General Division make an error of fact by failing to consider the impact that the Claimant's medication had on his capacity for work?

4. Did the General Division fail to consider whether the Claimant's somatic symptom disorder itself impacted his ability to work?

ANALYSIS

Reviewing General Division decisions

[6] 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 three possible reasons (grounds) of appeal at the Appeal Division.[1] 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.

[7] 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."[2] 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.[3]

Did the General Division fail to apply the correct standard of proof?

[8] The General Division did not make an error of law. Although the General Division used some language that was suggestive of a higher standard, when I consider the decision as a whole, the analysis shows that the General Division applied the correct standard of proof.

[9] The General Division member set out the correct standard of proof:

---

[1] DESDA, s 58(1).
[2] DESDA, s 58(1)(c).
[3] The Federal Court of Appeal explained this in a case called *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319.

> A person must prove on a balance of probabilities their disability meets both parts of the test, which means if the [Claimant] meets only one part, the [Claimant] does not qualify for disability benefits.[4]

[10] However, the General Division member also wrote: "**I am not convinced**, based on the evidence and the [Claimant]'s testimony that he does not have the ability to function in a vocational setting."[5] **(emphasis added)** And then later in the decision, the General Division stated "[d]uring his testimony, the [Claimant] **did not convince me** that he was suffering from a severe disability.[6] **(emphasis added)**

[11] The Claimant argues that General Division's decision in the case was not supported by either the medical evidence or the Claimant's testimony. One possible explanation for that dynamic could be that the General Division did not apply the correct standard of proof to the evidence. The Claimant argues that using the word "convinced" suggests needing to be certain, which is a higher standard than simply deciding on a balance of probabilities.

[12] Failing to apply the correct standard of proof would be an error of law, but the General Division did set out the standard of proof correctly. However, the decision does contain several "red flag" statements and the use of certain specific terms that could suggest that the General Division did not apply the correct standard of proof. I reviewed the Minister's submission before ruling on the existence of such an error.

[13] The Minister, on his part, argues that the General Division described the test correctly for the standard of proof, and then applied that standard without error. The Minister argues that the fact that the General Division member said that she was not "convinced" by the Claimant's testimony is not sufficient to conclude that the General Division applied the wrong standard of proof. The Minister argues that both times the General Division used the word "convinced", it was simply considering the Claimant's testimony as is required.

[14] The Minister notes that according to *The Law of Evidence In Canada*, to decide on a balance of probabilities (the correct standard) the decision maker must find that "the existence of

---

[4] General Division decision, para 5.
[5] General Division decision, para 24.
[6] General Division decision, para 28.

the contested fact is more probable than its nonexistence."[7] The Minister states that the use of the word "convince" is consistent with applying that standard.

[15] The Minister points to a decision from the Appeal Division (called *SC v Minister of Employment and Social Development*) in another case which found that the words "failed to convince" alone was not enough to show the General Division applied the wrong standard of proof.[8] The Appeal Division in that case found that the General Division had already stated applied the correct test to the evidence, and that the decision as a whole did not show that the Claimant was held to a higher standard than a balance of probabilities.

[16] The Minister points out that regardless of what words the General Division used, the General Division member's analysis shows that she:[9]

a) Considered the Appellant's documentary medical evidence and the Appellant's testimonial evidence before determining that he is not convinced that the testimony shows that he is incapable regularly of pursuing any substantially gainful occupation.[10]
b) Determined that his medical reports "do not indicate that he is incapable of returning to work."[11]
c) Acknowledged that he has limitations and suffers from back pain and depression, but that it doesn't mean that he is incapable of performing any substantially gainful work.[12]
d) Determined that the Appellant is capable of light duties with the proper pain management regime.[13]
e) The General Division's decision was based on medical reports that, after assessing his condition, determined that he is capable of light duties with an increase over time.[14]

---

[7] AD2-8.
[8] *SC v Minister of Employment and Social Development*, 2015 SSTAD 1317.
[9] The list of the Minister's arguments is at AD2-9.
[10] The Minister relies on the General Division's decision at paras 8-13, 14-22, and 24.
[11] The Minister relies on the General Division's decision at para 27.
[12] The Minister relies on the General Division's decision at para 27.
[13] The Minister relies on the General Division's decision at para 27-28.
[14] The Minister relies on the General Division's decision at para 28.

[17] It may be in some cases that the references to needing to be "convinced" by evidence and testimony suggests that the General Division applied a level of scrutiny to the evidence that is not consistent with the balance of probabilities. The Claimant needs only to show that he "more likely than not" meets the test for a severe and prolonged disability.

[18] However, in my view, the General Division has not made an error of law. The plain meaning of "convince" can suggest a higher standard than balance of probabilities. However, I do not disagree with the decision in *SC*. Sometimes there will need to be more than simply the use of the "red flag" phrases to show that the General Division did not apply the correct standard of proof.[15] In this case, the red flag statements are there, but the General Division's approach here as outlined above at (a) through (e), shows that the General Division did not ask too much of the Claimant. The General Division carefully analyzed the evidence not to decide whether it was certain that the Claimant's disability was severe, but only whether he proved his disability was severe on a balance of probabilities. There is no error of law.

Did the General Division fail to consider the neurosurgeon's report?

[19] The General Division did not fail to consider the neurosurgeon's report. There is no error of fact.

[20] The General Division is presumed to have considered all of the evidence before it, even if it does not mention that evidence in its decision.[16] The Federal Court explained that the presumption can be overcome when the evidence is probative (important) enough that it needed to be discussed.[17]

[21] The General Division decision states:

---

[15] For example, in *VN v Minister of Employment and Social Development*, 2020 SST 298, the "red flag" statements were only part of the reason it was clear that the General Division did not apply the correct standard of proof.
[16] The Federal Court of Appeal explain how this presumption works in a case called *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[17] That Federal Court case is *Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498.

> On October 15, 20188, a report from Dr. Zaitlen, neurologist, stated that the Appellant suffered from low back degenerative disc disease with nerve root lesion. The 2018 MRI showed small changes from the 2017 MRI. Dr. Zaitlen said that treatment options were discussed with the [Claimant], more precisely, […]. However, the [Claimant] had already tried most or almost all the options discussed with no improvement.[18]

[22] The Claimant acknowledges that the General Division summarized Dr. Zaitlen's opinion in the decision (as quoted above), but says the General Division failed to grapple with that evidence in its analysis. The Claimant argues that the General Division ignored Dr. Zaitlin's evidence when it came time to deciding whether the Claimant had some capacity for work.

[23] The Minister argues that the General Division did not ignore the neurosurgeon's report in its decision, and that discussing that evidence as outlined above was sufficient. The Minister notes that the General Division specifically referenced the fact that the Claimant had tried multiple treatments, despite the Claimant raising this as a topic the General Division ignored.

[24] In my view, the General Division did not make an error of fact. The General Division was clearly live to the information contained in the report. The General Division's analysis about the Claimant's capacity for work recognizes that the Claimant had both back pain and depression, but that he has some capacity for work.

[25] Dr. Zaitlin's report is not so important that the General Division needed to discuss it specifically when discussing the capacity for work. Dr. Zaitlin's report does not say one way or the other whether the Claimant has capacity for work. The report focuses on providing the diagnosis (nerve root lesion and low back degenerative disc disease), a discussion of treatment to date, and offering next steps in a treatment plan.[19] The General Division did not ignore the report or draw any conclusion from it that is perverse or capricious. There is no error of fact.

Did the General Division fail to consider the impact that medications have on the Claimant's capacity for work?

---

[18] General Division decision, para 11.
[19] GD4-55 and 56.

[26] The General Division did not fail to consider the impact that medications had on the Claimant's capacity to work. There was very little evidence about medication at all in the record about his medication, and the evidence the Claimant points to is not so important that the General Division needed to discuss it.

[27] In a letter dated January 11, 2020, the Claimant's psychiatrist noted that the Claimant informed him that "he found Mirtazapine 45mg is too heavy for him. Discontinued his medication after a month. Sleep has been disturbed. He requested a reduction to 30mg and this was agreed." The note then states that the plan was to continue on Mirtazapine at 30mgs, and Pregabalin.[20]

[28] The Claimant argues his medication dulls him and that at one point he had to discontinue it because it was too "heavy" for him. He says the General Division ignored the impact of his medications on his ability to work, particularly in terms of concentration.

[29] The Minister argues that the Claimant did not provide evidence to show that medication impacts his capacity for work. The Claimant's minimum qualifying period (MQP) ended on December 31, 2017. The note about the medication is from January 2020, so the Minister argues that the note is not particularly helpful in deciding whether medication impacted the Claimant's capacity for work during the relevant time. The Minister argues that when read along with other reports, it is clear that the Claimant had capacity to work during his MQP.[21]

[30] The Minister notes that the Claimant's own testimony did not identify medication as a barrier to his capacity for work. The Claimant talked very briefly about medication during the General Division hearing, but only really about whether the medication he took was helping with his pain and the fact that his psychiatrist is the member of the health care team that adjusts the medications.

[20] GD4-91.
[21] Other reports including, for example, the one at GD2-418.

[31] The Minister also notes that Dr. Nikkhou specifically asked the Claimant about medication and impact on his work capacity and the Claimant himself said that it was pain from his back that stopped him from working.[22]

[32] In my view, the General Division did not make an error. There was very little evidence about the impact the Claimant's medication had. The evidence that his medication was adjusted several years after the end of the MQP was not so important that it needed to be discussed when deciding whether the Claimant had capacity for work during the MQP.

[33] It may be that the medication had an impact on the Claimant's ability to work. However, he did not give testimony about that, and the medical reports that speak about his functional limitations do not make that point in any way that would require the General Division to discuss it. The General Division did not ignore important evidence about the impact of the Claimant's medications on his ability to work.

Did the General Division fail to consider whether the somatic symptom disorder itself impacted the Claimant's ability to work?

[34] The General Division did not fail to consider whether the Claimant's somatic symptom disorder impacted the Claimant's ability to work. The Claimant takes issue with the conclusion that the General Division reached about the impact of that disorder, but the General Division did not make an error of fact.

[35] The General Division decision states:

> Appellant psychometric profile was suggestive of a significantly exaggerated objective profile and that there were inconsistencies between his euthymic affect and his reported severe depressive and anxiety symptoms as well as significant tendency toward reporting the symptoms in an exaggerated and inconsistent manner. Overall, the Appellant had somatic symptom disorder with mild pain and subclinical features of adjustment disorder. His psychological symptoms were in part associated with a tendency toward catastrophizing his current pain symptoms and physical limitations. Fear, perceived disability and emotional distress were significant psychosocial barriers for the Appellant. In addition, the reports indicated self-imposed mobility restrictions and submaximal effort during

[22] AD2-11.

> testing. It was determined that the Appellant was capable of light duties with the proper pain management regime. A return to work on modified duties was offered[…][23]

[36] The Claimant argues that the General Division did not grapple with the idea that the somatic symptom disorder itself results in functional limitations that impact the Claimant's ability to work. In other words, the Claimant experiences a legitimate psychological barrier to re-employment that the General Division ignored. The Claimant argues that Dr. Ugwunze's professional opinion was that the Claimant's fear, perceived disability and emotional distress were significant psychosocial barriers, and that the General Division did not consider those barriers.

[37] The General Division decision states:

> Dr. Ugwunze, psychiatrist, stated in his reports from January 2018 to January 2020 that the Appellant suffered from a depressive disorder and chronic back pain. He further noted that the Appellant stops taking his medication at times.[24]

[38] The Minister argues that the General Division did not ignore the Claimant's somatic symptom disorder. The Minister notes that paragraphs I have quoted from above specifically consider's Dr. Nikkhou's report in some detail as well as mentioning Dr. Ugwunze's reports. The General Division considered these reports along with the physical findings that cleared the Claimant for work. The Minister concludes that not only did the General Division consider the evidence from Dr. Nikkhou, it was central to the General Division reaching the conclusion that the Claimant's disability was not severe.[25]

[39] In my view, the General Division did not make an error of fact. The General Division did consider Dr. Nikkhou's report and Dr. Ugwunze's reports quite expressly in the decision, so I cannot conclude that the General Division "ignored" them. The General Division's decision weighed the evidence and gave reasons as to why the Claimant did not have a severe disability. The General Division considered the lack of medical evidence on work capacity, the challenges

---

[23] General Division decision, para 9.
[24] General Division decision, para 12.
[25] AD2-10 paras 15 and 16.

in the Claimant’s reporting of his disability, as well as his personal circumstances (including his young age).[26]

[40] However, it could also be an error of fact if the General Division member misinterpreted the report in a way that was perverse or capricious. I do not have the ability to grant an appeal based on an error that is really just about applying settled law to the facts.[27]

[41] It seems that the Claimant’s representative is not really arguing that the General Division ignored the report, but really more that the conclusion the General Division reached about the report is not defensible. In other words, is it perverse or capricious to find that the Claimant had capacity to work when Dr. Nikkhou explained that he had psychological barriers to participating in the workforce?

[42] The General Division member understood Dr. Nikkhou’s evidence to be that the Claimant reports his symptoms in an exaggerated and inconsistent manner. How the Claimant reports the symptoms is less important to the General Division than how he experiences his symptoms. The General Division acknowledged that the Claimant has depression and that he has limitations. Ultimately the General Division did not find that the medical reports supported the idea that his barriers to work meant that he was incapable regularly of pursuing any substantially gainful occupation.

[43] The General Division did not make an error. The fact that the Claimant reports his symptoms in an unreliable way, particularly in a way that results in exaggerating, makes the medical reports about his functional limitations all the more important. It weighed the evidence and came to a conclusion. I cannot say that it is perverse or capricious to refuse to find that the Claimant’s psychological barriers resulted in a severe disability within the meaning of the CPP.

[44] I have reviewed the record in this case.[28] The General Division did not ignore or misconstrue the evidence. The General Division considered the Claimant’s testimony and medical evidence and decided that the Claimant did not show that his disability was severe on or

---

[26] General Division decision, paras 24 to 28.
[27] The Federal Court of Appeal explained this in a case called *Garvey v Canada (Attorney General)*, 2018 FCA 118.
[28] This review is consistent with some of the discussion from the Federal Court in a case called *Karadeolian v Canada (Attorney General)*, 2016 FC 615.

before the end of the MQP. There is no doubt that the Claimant has functional limitations that impact on his ability to work, but considering all of the evidence together, including the Claimant's personal circumstances, he is not incapable regularly of pursuing any substantially gainful occupation. That is the test for a severe disability under the CPP. The General Division did not misunderstand or ignore the evidence in its analysis.

CONCLUSION

[45] I dismiss the appeal.

Kate Sellar
Member, Appeal Division

HEARD ON:	January 14, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Rajinder Johal, Representative for the Appellant Hilary Perry, Representative for the Respondent