



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *MB v Minister of Employment and Social Development*, 2021 SST 41

Tribunal File Number: AD-20-841

BETWEEN:

M. B.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: February 8, 2021

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

[2] The decision that the General Division should have given. The Claimant is disabled.

OVERVIEW

[3] M. B. (Claimant) last worked as a care aide in a hospital. She applied for a Canada Pension Plan disability pension and says that she is disabled by a number of conditions, including back pain, leg pain, varicose veins, and knee and ankle problems.

[4] The Minister of Employment and Social Development (Minister) refused the application. The Claimant appealed to the Tribunal's General Division, which dismissed her appeal. The Claimant then appealed to the Tribunal's Appeal Division. The Appeal Division decided that the General Division had made an error about the Claimant's minimum qualifying period (MQP – the date by which a claimant must prove that they are disabled to receive the disability pension). It returned the matter to the General Division for reconsideration.

[5] The General Division again dismissed the Claimant's appeal. It decided that the Claimant did not have a severe disability because she retained some capacity regularly to pursue a substantially gainful occupation.

[6] The Appeal Division granted leave (permission) to appeal because the General Division may have based its decision on an important factual error. I have now read the documents filed with the Appeal Division for this appeal and the evidence filed with the General Division, and listened to the recordings of the General Division hearings and the parties' oral submissions. The appeal is allowed because the General Division made an error in law. It failed to fully consider the Claimant's personal characteristics when it made its decision.

[7] I give the decision that the General Division should have given. The Claimant is disabled. Disability pension payments will begin as of July 2016.

ISSUES

[8] Did the General Division make an error in law when it failed to consider the Claimant's personal characteristics?

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

- a) The Claimant failed to prove that she had more than a Grade 9 education.
- b) The Claimant pressured her doctor about what to say.
- c) The Claimant's doctor "dropped her" as a patient because she was pressured.
- d) The General Division placed little or no weight on medical evidence that supported the Claimant's legal position.

ANALYSIS

[10] An appeal to the Tribunal's Appeal Division is not a rehearing 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 section 58(1) of the *Department of Employment and Social Development Act*.

The General Division made an error in law

[11] The parties argued about whether the General Division's alleged failure to consider the Claimant's personal characteristics (including learning and reading limitations) was an important factual error. It is better framed as an alleged error in law.

[12] To decide whether a claimant is disabled, the Tribunal must consider their physical conditions and their personal characteristics, including age, education, and work and life experience.² This is correctly set out in the General Division decision.³ The decision then examines the Claimant's strong work ethic and work history.

[13] The General Division also summarizes the evidence about the Claimant's formal education. It states that the Claimant wrote in her pension application that she completed Grade 12, testified that she completed Grade 10, and produced a letter from the high school that says that she did not complete Grade 10 and that she earned low marks in Grade 9.⁴

[14] However, the General Division decision fails to refer to the following oral evidence:

- a) The Claimant has no experience working at a "desk job."⁵
- b) She has no computer experience and "failed computers" at school.⁶
- c) She got a job as a telemarketer but was fired after two weeks because she could not read names in the phone book to make calls to sell products.⁷

[15] It is not necessary for the General Division to refer to each and every piece of evidence that is presented to it.⁸ However, when a decision maker fails to mention important evidence that

² *Villani v Canada (Attorney General)*, 2001 FCA 248.

³ General Division decision at para 43.

⁴ General Division decision at para 44.

⁵ May 2019 General Division hearing recording at approximate time 48:42, although the exact time may differ depending on the device used to listen to the recording.

⁶ May 2019 General Division hearing recording at approximate time 50:00.

⁷ May 2019 General Division hearing recording at approximate time 49:30.

⁸ *Simpson v Canada (Attorney General)*, 2012 FCA 82.

points to a conclusion opposite to their decision, it is possible to infer that the General Division overlooked this contradictory evidence.⁹

[16] The Claimant's lack of computer training, failing a high school computer course, and lack of work experience at a "desk job" are part of her personal characteristics. This would limit her capacity regularly to pursue occupations that are not physically demanding. The General Division's failure to consider this evidence is a failure to fully assess the Claimant's personal characteristics. This changes the legal test from what is required, since the General Division must consider a claimant's medical conditions and their personal characteristics. This is an error in law. The appeal is allowed on this basis.

Other Issues

[17] The Claimant also argues that the appeal should be allowed because the General Division based its decision on important factual errors. However, since I have decided to allow the appeal for the reasons above, I need not consider these arguments.

REMEDY

[18] The Appeal Division can give different remedies when an appeal is allowed.¹⁰ For the following reasons, I give the decision that the General Division should have given:

- a) The written record is complete.
- b) The Claimant testified at an oral hearing in May 2019 and clarified her evidence at a second oral hearing in August 2020.
- c) The Minister attended the hearing in August 2020 and had the opportunity to test the Claimant's evidence by cross-examination.
- d) Both parties requested that the Appeal Division give the decision that the General Division should have given if the appeal was allowed.

⁹ *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667.

¹⁰ See section 59(1) of the *Department of Employment and Social Development Act*.

- e) The Tribunal may decide questions of law and fact necessary to dispose of an appeal.¹¹
- f) The Tribunal must conduct proceedings as informally and quickly as the considerations of fairness and natural justice permit.¹²
- g) The Claimant applied for the disability pension over three years ago; referring the matter back to the General Division for reconsideration would cause further delay.

[19] For a claimant to be disabled under the *Canada Pension Plan*, they must have a disability that is both severe and prolonged before the end of the MQP. A disability is severe if, as a result, the claimant is incapable regularly of pursuing any substantially gainful occupation. It is prolonged if it is long continued and of indefinite duration.¹³

[20] The Claimant's MQP is in the future. Therefore, I must decide whether she is disabled as of the date of the hearing.

[21] The Claimant worked for a number of years. She testified that she began working at the hospital as a cleaner, and later worked as a care aide. Her care aide duties included stocking supplies; feeding, dressing, and bathing patients; and getting patients into and out of bed.¹⁴ This was a physical job that required her to use her entire body.

[22] The Claimant testified about her physical limitations. These include swelling in her right leg, sharp back pain that radiates to the sole of her foot, and leg numbness if she sits or stands too long.¹⁵ The Claimant consistently reported pain symptoms to her family doctor. This doctor's examinations were mostly normal, revealing no definitive diagnosis. In fact, this doctor wrote that the Claimant had mechanical back pain and right leg pain of unknown origin.¹⁶

[23] At the hearing before me, the parties disagreed about whether the Claimant pressured her family doctor about what to write about her condition, and whether this doctor "dropped" the

¹¹ See section 64(1) of the *Department of Employment and Social Development Act*.

¹² See section 3(1)(a) of the *Social Security Tribunal Regulations*.

¹³ See section 42(2) of the *Canada Pension Plan*.

¹⁴ May 2019 General Division hearing recording at approximate time 42:00.

¹⁵ August 2020 General Division hearing recording, Part 1.

¹⁶ GD4-35.

Claimant as a patient.¹⁷ However, I do not need to resolve this issue. I place more weight on the statements made by the medical specialists.

[24] The specialists reported as follows:

- a) The orthopedic surgeon wrote that the Claimant's pain was in her back, that she was unable to heel walk or toe walk on the right side, and that she had weakness.¹⁸
- b) The vascular surgeon reported that the Claimant was disabled by lumbar pain and nerve root irritation.¹⁹
- c) A pain specialist reported that the Claimant was disabled by back, right knee, and ankle pain, and speculated that it may have been caused by a car accident in 1999.²⁰
- d) A different pain specialist provided a comprehensive report based on a thorough examination of the Claimant's medical history and his own examination of the Claimant.²¹ This doctor concluded that the Claimant had myofascial pain in the right lower back region and right leg varicose veins. He concluded that the Claimant had a severe and prolonged disability.

[25] This proves that the Claimant cannot work in a physically demanding job, like that of a care aide.

[26] The family doctor also wrote that the Claimant might be able to do a "desk job" or other sedentary (non-physical) work.²² However, when this report is read as a whole, and along with her other letters and notes, it is clear that the doctor made this statement based only on the Claimant's physical limitations and without any consideration of the Claimant's educational or learning limitations.

¹⁷ See GD8-34, where the doctor wrote: "Please find enclosed a hand written note from M. B., to assess her pain." The Claimant says that this statement means that the Claimant can better explain her pain. The Minister says this statement means that the doctor does not believe the Claimant's report about pain and so directs the reader to her own statements.

¹⁸ GD4-56.

¹⁹ GD4-81.

²⁰ IS6-5.

²¹ IS6.

²² GD5.

[27] I must decide whether the Claimant is capable regularly of pursuing any substantially gainful occupation, not whether she could do the job she last had. Therefore, I must examine whether she could perform other job duties or retrain for work. I must also consider the Claimant's personal characteristics, including her age, education, language skills, and work and life experience.²³

[28] The Claimant is now 45 years old. This is many years from retirement. She is fluent in English. The Claimant's age and language skills would not affect her capacity regularly to work. However, the Claimant's only work experience is in physically demanding jobs—as a cleaner and care aide. She cannot perform these duties. This affects her capacity regularly to pursue substantially gainful occupations.

[29] The Claimant's evidence about her education is inconsistent. In the questionnaire that accompanied the disability pension application, she wrote that she completed Grade 12.²⁴ She testified that she has difficulty filling out forms and that her statement on the questionnaire was a mistake.²⁵ She told the pain specialist that she completed Grade 9.²⁶

[30] The Claimant also testified that she returned to high school a few years after she left but that she did not complete a program; she failed everything.²⁷ In addition, she testified that she started a Personal Care Worker program but failed it because she could not do the paperwork.²⁸

[31] The Claimant provided a letter from her high school.²⁹ It states that the Claimant completed Grade 9 and did not complete Grade 10. I prefer this evidence to the Claimant's testimony. It is based on the marks that the Claimant earned, and the author has no interest in this appeal.

[32] Having only a Grade 9 education limits the Claimant's capacity to work in the commercial marketplace.

²³ *Villani v Canada (Attorney General)*, 2001 FCA 248.

²⁴ GD2-53.

²⁵ May 2019 General Division hearing recording at approximate time 54:45.

²⁶ IS6-7.

²⁷ May 2019 General Division hearing recording at approximate time 57:27.

²⁸ August 2020 General Division hearing recording, Part 2 at approximate time 4:55.

²⁹ GD9.

[33] In addition, the Claimant has no computer experience and cannot type.³⁰ She says that she failed computers at school. This lack of experience and knowledge would also limit her capacity to get and hold down a sedentary job. If the Claimant has a learning impediment (she testified at the August 2020 hearing that she was in special education classes³¹), this would be exacerbated further.

[34] The Claimant also testified that she cannot focus because of her pain.³² She cannot sit or stand for more than 20 minutes. This would affect her ability to complete a training program.

[35] Therefore, I find that the Claimant has a severe disability. She is unable regularly to pursue any substantially gainful occupation because of her physical limitations and her lack of education and training. Her physical and learning limitations would also prevent her from retraining for sedentary work.

[36] The Claimant's disability is also prolonged. She has consistently reported back and right leg pain since 2014. Despite consultations with specialists and treatment, this has not resolved. It is unlikely to resolve in the future.

[37] I find that the Claimant became disabled in June 2015. This is when the Claimant stopped working because of her conditions.

³⁰ May 2019 General Division hearing recording at approximate time 50:00.

³¹ August 2020 General Division hearing recording, Part 2 at approximate time 32:30.

³² May 2019 General Division hearing recording at approximate time 1:03:45.

CONCLUSION

[38] The appeal is allowed.

[39] The decision that the General Division should have given is made.

[40] The Claimant was disabled in June 2015.

[41] However, under the *Canada Pension Plan*, a claimant cannot be considered disabled more than 15 months before they applied for the disability pension.³³ The Claimant applied for the pension in June 2017. Therefore, the Claimant is considered to have become disabled in March 2016. Disability pension payments start four months after a claimant is disabled.³⁴ Payments will start as of July 2016.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	January 27, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. B., Appellant Glenn Jones, Counsel for the Appellant Viola Herbert, Representative for the Respondent

³³ Section 42(2)(b) of the *Canada Pension Plan*.

³⁴ Section 69 of the *Canada Pension Plan*.