



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *WH v Minister of Employment and Social Development*, 2021 SST 91

Tribunal File Number: AD-20-872

BETWEEN:

W. H.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: March 11, 2021

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

[2] The decision that the General Division should have given is made. The Claimant became disabled in April 2018.

OVERVIEW

[3] W. H. (Claimant) earned a Grade 12 GED diploma, a basic welding diploma, and certification as a journeyman painter. He worked in physically demanding jobs until March 2018. The Claimant applied for a Canada Pension Plan disability pension and says that he is disabled by a number of conditions including numbness, weakness and pain in his right arm and hand, a pinched nerve in his neck, and mental health illnesses including depression, anxiety and panic attacks.

[4] The Minister of Employment and Social Development refused the application. The Claimant appealed this decision to the Tribunal. The Tribunal's General Division dismissed the appeal. It decided that the Claimant's disability was not severe under the *Canada Pension Plan* on or before the date of the hearing.

[5] The Claimant was granted leave to appeal this decision to the Tribunal's Appeal Division. The appeal had a reasonable chance of success because the General Division may have made an error with respect to its consideration of the Claimant's mental health illnesses.

[6] I have now read all of the documents filed with the Tribunal and the General Division decision. I have also listened to the recording of the General Division hearing and the parties' oral submissions. The General Division made an error in law when it failed to consider the Claimant's mental health illnesses. When all of the Claimant's physical and mental health conditions are considered together with his personal circumstances, he is disabled. The Claimant was disabled in April 2018.

ISSUES

[7] Did the General Division make an error in law when it failed to consider the Claimant's mental health illnesses?

[8] Did the General Division base its decision on an important factual error regarding the Claimant's mental health illnesses?

ANALYSIS

[9] 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

Error in Law

[10] For a claimant to be disabled under the *Canada Pension Plan*, they must have a disability that is both severe and prolonged. A disability is severe if, as a result, the person is incapable regularly of pursuing any substantially gainful occupation.² This is correctly stated in the General Division decision.³ To decide this, a decision maker must consider all of the claimant's conditions and their personal circumstances.⁴

[11] The leading case on the legal test for "severe" is called *Villani*.⁵ In that decision, the Federal Court of Appeal states that a claimant's medical conditions and their personal circumstances must be considered. It also states that medical evidence will be required.⁶ It does

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

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

³ General Division decision at para 5.

⁴ *Villani v Canada (Attorney General)*, 2001 FCA 248.

⁵ *Villani v Canada (Attorney General)*, 2001 FCA 248.

⁶ *Villani v Canada (Attorney General)*, 2001 FCA 248 at para 50.

not say that medical evidence about the impact of a particular condition on the claimant's work capacity is required.

[12] This same Court considered another disability case, *Bungay*.⁷ The Minister's counsel argues that, in *Bungay*, the Court refined the test for medical evidence. He argues that the medical evidence must also say something about the Claimant's work capacity for the condition to be considered. I disagree for the following reasons.

[13] *Bungay* says:

Employability is not to be assessed in the abstract, but rather in light of "all of the circumstances." The circumstances fall into two categories:

(a) *The claimant's "background."* Matters such as "age, education level, language proficiency and past work and life experience" are relevant here (*Villani, supra* at paragraph 38).

(b) *The claimant's "medical condition."* This is a broad inquiry, requiring that the claimant's condition be assessed in its totality. **All of the possible impairments of the claimant that affect employability are to be considered, not just the biggest impairments or the main impairment.** The approach of assessing the claimant's condition in its totality is consistent with section 68(1) of the regulations, which requires claimants to submit highly particular information concerning "any physical or mental disability," not just what the claimant might believe is the dominant impairment. (emphasis added)

[14] The entire *Bungay* decision must be read as a whole and in context.⁸ The decision follows *Villani*. It states that whether a disability is severe must be decided based on whether the claimant, in the circumstances of their background and medical conditions, is capable regularly of pursuing any substantially gainful occupation.⁹ It also states that the Board made an error because it focussed on only one of Ms. Bungay's medical conditions, even though she had a

⁷ *Bungay v Canada (Attorney General)*, 2011 FCA 47.

⁸ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65; and *Irving Pulp & Paper Ltd. v CEP, Local 30*, 2013 SCC 34.

⁹ *Bungay v Canada (Attorney General)*, 2011 FCA 47 at para 8.

number of other conditions as well.¹⁰ It does not differentiate between conditions that a medical professional says affected the claimant's employability and those that did not.

[15] Therefore, when *Bungay* is read as a whole and in context, it does not say that the decision maker need only consider a claimant's medical conditions where there is medical evidence that they affect employability. All of a claimant's medical conditions that affect employability must be considered.

[16] The Federal Court also considered this issue in *St-Louis*. The facts of this case are similar to the one before me. Mr. St-Louis had a heart condition and anxiety. The Tribunal decided that he was not disabled because he had not followed reasonable treatment recommendation to have heart surgery. When the Federal Court reviewed the decision, it decided that this was unreasonable. The Tribunal had not considered his anxiety. The Court wrote:

It would not be far fetched to think his anxiety could have had an impact on his initial refusal to have heart surgery. Again, this was not mentioned by the Tribunal. In this way, it cannot be said that the Tribunal conducted a broad inquiry into the respondent's background and medical condition so as to properly consider the totality of both.¹¹

[17] Again, the Court did not require medical evidence about the impact of the claimant's mental health illnesses on his employability. It required that the decision maker make a broad inquiry into the claimant's background and the totality of his medical conditions that affect employability, both physical and mental, to decide whether the claimant was disabled.

[18] This is also consistent with the requirement to provide certain information with an application for a disability pension.¹² A claimant is to provide information that includes diagnosis, nature, extent and prognosis regarding their condition, as well as the findings on which the diagnosis and prognosis were made. A claimant is not required to provide a medical opinion about the impact of their condition(s) on their capacity to work.

¹⁰ *Bungay v Canada (Attorney General)*, 2011 FCA 47 at para 9.

¹¹ *Canada (Attorney General) v St-Louis*, 2011 FC 492.

¹² See section 68(1) of the *Canada Pension Plan Regulations*, which lists what information is to be provided with a disability pension application.

[19] Additionally, it is for the Tribunal to decide whether a claimant retains some capacity to work in spite of their medical conditions. This is not for a medical professional to do. Therefore, whether there is medical evidence that a particular condition affects a claimant's employability is not necessary.

[20] Finally, in this regard, counsel for the Minister relies on an Appeal Division decision to support its argument. In *TH*,¹³ the Appeal Division states that the decision maker must assess a claimant's condition in its totality, not just the biggest impairments. The Appeal Division then considered whether the General Division had made an error when it failed to consider one mental health condition. The Appeal Division concludes that the General Division made no error in this regard because there was not enough evidence to analyze whether the condition in question had an impact on the claimant's ability to work.¹⁴

[21] Unlike Court decisions, decisions of the Appeal Division are not binding on me. Therefore, I do not have to follow them. I am not persuaded that I should follow the Appeal Division's reasoning in *TH*. Although the decision says that the General Division did not make an error when it failed to consider one medical condition, it also stated that it would have been ideal if it had done so¹⁵ and that it could have grappled more squarely with the claimant's mental health issues, including this diagnosis.¹⁶ These statements acknowledge that the General Division really should have dealt with the mental health condition.

[22] The Appeal Division also assessed the evidence when it decided that the General Division did not make an error in law. For example, the decision states that it seems that the General Division failed to focus on this mental health condition because there was not enough evidence about its impact on work capacity.¹⁷

[23] The Appeal Division should not weigh evidence at this stage of its analysis. The Appeal Division is to conduct a two-step process when deciding an appeal. First, it must decide whether the General Division made an error on which it can intervene—in this case, an error in law.

¹³ *TH v Minister of Employment and Social Development*, 2020 SST 569.

¹⁴ *TH v Minister of Employment and Social Development*, 2020 SST 569 at para 23.

¹⁵ *TH v Minister of Employment and Social Development*, 2020 SST 569 at para 21.

¹⁶ *TH v Minister of Employment and Social Development*, 2020 SST 569 at para 24.

¹⁷ *TH v Minister of Employment and Social Development*, 2020 SST 569 at para 21.

Second, if such an error is made, the Appeal Division can give a remedy. Only at this stage can the Appeal Division weigh evidence to reach a decision on the merits of a case. The decision in *TH* is not persuasive because the Appeal Division confused these steps and weighed evidence when it should not have.

[24] In this case, there were a number of medical reports about the Claimant's physical conditions and limitations. They are summarized in the General Division decision.

[25] There was also evidence about the Claimant's mental health, both in medical reports and testimony. The General Division failed to consider this. This is an error in law. Therefore, the Appeal Division must intervene.

Important Factual Error

[26] The Claimant also argues that the General Division based its decision on an important factual error when it found as fact that he did not have a severe disability because it did not consider evidence about mental illness. However, since I have decided that the Appeal Division must intervene because the General Division made an error in law, I do not need to consider this.

REMEDY

[27] When the Appeal Division intervenes in a case, it can give different remedies. It is appropriate to give the decision that the General Division should have given in this case. This is because:

- a) the written record is complete;
- b) there are no gaps in the evidence;
- c) both parties requested that the Appeal Division give the decision that the General Division should have given;

- d) the Tribunal has legal authority to decide questions of law or fact necessary to dispose of appeals;¹⁸ and
- e) the Tribunal must conclude matters as quickly as the circumstances and considerations of fairness and natural justice permit.¹⁹

[28] The General Division made no error when it considered the evidence about the Claimant's physical conditions and limitations. I accept and adopt its findings of fact on this. The Claimant would not be able to return to any physically demanding job due to his physical limitations on or before the date of the General Division hearing (September 2020).²⁰

[29] In addition, there was evidence that the Claimant also had mental health illnesses at the relevant time. This evidence is summarized below:

- a) When the Claimant attended at the hospital emergency in April 2018, the attending doctor wrote that the Claimant takes clonazepam and something else for anxiety.²¹
- b) Dr. Maharaj reported that the Claimant has a history of depression and that he began drinking heavily one year before due to a psychosocial issue.²²
- c) Dr. Malik reported that the Claimant had recently been drinking more and recommended that he reduce his alcohol intake. In addition, the Claimant reported being abused as a child and other stressors. Dr. Malik recommended a referral to a psychiatrist.²³
- d) Dr. Smith diagnosed depression and alcoholism.²⁴

¹⁸ Section 64 of the *Department of Employment and Social Development Act*.

¹⁹ Section 3 of the *Social Security Tribunal Regulations*.

²⁰ General Division decision at para 25.

²¹ GD2-96.

²² GD2-100.

²³ DG2-107.

²⁴ GD2-166.

- e) Both the Claimant and his wife testified at the General Division hearing that the Claimant has had depression for many years, and he also has sudden mood swings.²⁵
- f) The Claimant and his wife also testified that the Claimant was referred to a psychiatrist a long time ago but remains on a long waiting list. He cannot access any other mental health treatment at this time.²⁶
- g) The Claimant also testified that he was sexually abused as a child and was bullied in the workplace. This made his mental health illnesses worse. He was off work for stress leave four different times and was sent to counselling.²⁷ His mental health has deteriorated since he stopped working.
- h) The Claimant continues to have nightmares about the work situation, he drinks more, and he uses marijuana.²⁸
- i) The Claimant testified that, at the time of the hearing, he would have panic attacks about four times each day.
- j) The Claimant takes three different anti-depressants.

[30] The Claimant's mental health illnesses remain largely untreated. The Claimant has followed treatment recommendations. He has been prescribed medications for depression and anxiety, but since he has no family doctor and has not been able to see a mental health professional, the appropriateness of the medication and its dosage has not been monitored. He has been referred to a psychiatrist but remains on a waiting list. This inability to consult with a psychiatrist has also likely impacted his treatment.

[31] The Claimant was able to work despite his mental health illnesses for a number of years (he testified that he has been taking antidepressant medication for about 20 years). However, he also testified that he was bullied at work and that this worsened his condition. Then, when he

²⁵ General Division hearing recording at approximate time 10:30, 12:25, and 59:00, although the exact time may differ depending on the device used to listen to the recording.

²⁶ General Division hearing recording at approximate time 16:30 and 33:45.

²⁷ General Division hearing recording at approximate time 31:31, 29:57, and 32:50.

²⁸ General Division hearing recording at approximate time 34:00.

stopped working, his condition worsened further. He continues to have nightmares and panic attacks four times each day. This continues despite treatment with medication.

[32] The Tribunal must consider all of a claimant's conditions in their totality, along with their personal characteristics. At the time of the General Division hearing, the Claimant was 54 years of age, with high school equivalent education and trades certificates. The Claimant has worked hard, always in physically demanding jobs. He cannot return to this kind of work. He has no skills that would transfer to sedentary work. His age and work experience impair his capacity to find alternate work. In addition, it would be difficult for the Claimant to retrain given his standing and sitting restrictions and frequent panic attacks. He lacks capacity regularly to pursue any substantially gainful occupation.

[33] When all of the evidence is considered in its totality, it is more likely than not that the Claimant has a severe disability.

[34] Under the *Canada Pension Plan*, a disability must be both severe and prolonged. A disability is prolonged if it is likely to be long continued and of indefinite duration.²⁹ The Claimant's disability is also prolonged. Although some doctors wrote that the Claimant's physical condition would improve in 6 to 12 months, this has not happened. No further treatment has been recommended that is expected to improve the Claimant's physical conditions.

[35] The Claimant became disabled in April 2018 when he stopped working, and he said that he could no longer work because of his medical conditions.

CONCLUSION

[36] The appeal is allowed.

[37] The decision that the General Division should have given is made. The Claimant became disabled in April 2018.

²⁹ Section 42(2) of the *Canada Pension Plan*.

[38] Payment of a disability pension begins four months after a claimant is disabled. Payment of the disability pension will begin as of August 2018.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	March 3, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	W. H., Appellant Jordan Fine, Counsel for the Respondent