



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *KS v Minister of Employment and Social Development*, 2021 SST 230

Tribunal File Number: AD-21-84

BETWEEN:

K. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: June 2, 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 August 2019.

OVERVIEW

[3] K. S. (Claimant) completed high school before she joined the paid workforce. She last worked in collections and accounts receivable from 2013 to 2017 when she took maternity leave. After leaving work, the Claimant developed a number of medical conditions, including post-traumatic stress disorder (PTSD), depression, anxiety, chronic fatigue, and fibromyalgia.

[4] The Claimant applied for a Canada Pension Plan disability pension and says that she is disabled by her conditions. The Minister of Employment and Social Development refused the application. The Claimant appealed to the Tribunal's General Division, which dismissed the appeal. It decided that the Claimant did not have a severe disability and that she had not shown that she could not obtain and maintain work because of her health.

[5] I granted leave (permission) to appeal this decision to the Tribunal's Appeal Division because the appeal had a reasonable chance of success. The General Division may have based its decision on an important factual error that the Claimant's anxiety should be manageable.

[6] I have now read the parties' written arguments, reviewed the General Division's written record, and heard the parties' oral arguments. The appeal is allowed. The General Division based its decision on important factual errors about the Claimant's anxiety and her cognitive impairment, and that Dr. Gerber's report should be given no weight. It also made an error in law by failing to consider how the Claimant's cognitive issues affected her capacity to work.

[7] I have given the decision that the General Division should have given: The Claimant became disabled in August 2019. Disability pension payments will begin as of December 2019.

PRELIMINARY MATTER

[8] Partway through the oral hearing, the Claimant requested a break because she was not feeling well. The hearing was paused for this reason. At the end of the break time, the Claimant said that she was still unwell. She said that she did not wish to remain on the phone for the rest of the hearing but that she would listen to the recording later. Claimant's counsel confirmed that the Claimant was not legally required to attend the hearing and did not object to her leaving the teleconference at that time. The hearing finished without the Claimant.

[9] The Tribunal sent a copy of the Appeal Division hearing recording to all parties immediately after the hearing.

ISSUE

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

- a) The Claimant's anxiety should be manageable.
- b) There was no medical evidence to support that the Claimant has a severe cognitive impairment.
- c) Little or no weight should be given to Dr. Gerber's written evidence.

ANALYSIS

[11] 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

[12] To succeed on appeal on the basis of an important factual error, the Claimant must prove three things:

- a) A finding of fact was erroneous (wrong);
- b) The finding was made perversely, capriciously, or without regard for the material that was before the General Division; and
- c) The decision was based on this finding of fact.²

The Claimant's Anxiety

[13] The first finding of fact that the Claimant says is wrong involves her anxiety. The General Division decision states that the Claimant's anxiety, PTSD, and depression symptoms started when her older child began to have seizures (he was diagnosed with epilepsy). Fortunately, by June 2020, he no longer needed medication or medical monitoring for this condition.³

[14] The General Division decision goes on to say that, since the child's epilepsy is now well controlled, it is reasonable that the Claimant's anxiety would also be manageable, because the child's seizures are what contributed to her anxiety and possible PTSD.⁴

[15] This is an important factual error made without regard for the evidence that was before the General Division. There is no medical or oral evidence that supports this finding of fact. None of the Claimant's treatment providers stated that there was any expectation that her anxiety would resolve once the child's epilepsy was controlled. In fact, in 2020, after the epilepsy was controlled, Dr. Gerber diagnosed depression, PTSD, and other mental health conditions, and

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

² See section 58(1)(c) of the *Department of Employment and Social Development Act*.

³ See General Division decision at para 15.

⁴ See General Division decision at para 16.

gave a somewhat guarded prognosis.⁵ The Claimant also testified that she is hypervigilant about her children.⁶

[16] The General Division based its decision, at least in part, on this finding of fact. Therefore, it made an error, and the Appeal Division must intervene.

The Claimant's Cognitive Impairment

[17] The second finding of fact that the Claimant says is wrong involves her cognitive ability. The General Division decision states that, according to the Claimant, her cognition impairs her ability to work, but that there is no medical evidence that supports a cognitive impairment of such severity to prevent her from working.⁷

[18] The Claimant has not been diagnosed with a cognitive impairment. She did not claim to have a separate diagnosed condition related to her cognition. However, a condition does not need to have a specific diagnosis to affect a claimant's capacity to work. The written record contains evidence of cognitive impairment. For example, Dr. Gerber reports that the Claimant has a diminished ability to think or concentrate as a symptom of a number of mental health illnesses, including depression, generalized anxiety disorder, and PTSD.⁸ Problems with concentration and her mind going blank are also noted in a testing report.⁹ In addition, the Claimant consistently reported problems concentrating and focusing to her treatment providers.

[19] The General Division's finding of fact that the Claimant did not have a severe cognitive impairment is not wrong.

[20] However, the General Division failed to consider that the Claimant's cognitive situation could impair her capacity to work without a severe cognitive impairment. It dismissed this entirely because there was no diagnosis. The General Division must consider all of a claimant's

⁵ See GD4-130.

⁶ See General Division decision at para 16.

⁷ See General Division decision at para 45.

⁸ See GD4-149, GD4-153, and GD4-155.

⁹ See Testmetrix report at GD4-83.

conditions and their impact on capacity regularly to work.¹⁰ Its failure to do so is an error in law. The Appeal Division must intervene on this basis also.

Dr. Gerber's Report

[21] The last set of important factual errors that the Claimant points to is the General Division's reasons for giving no weight to Dr. Gerber's report.¹¹ The decision says the following:

- a) Dr. Gerber was not the Claimant's treating physician and only saw her once.¹²
- b) Dr. Gerber did not know the Claimant before she went on disability.¹³
- c) The documents that Dr. Gerber reviewed are dated after the Claimant stopped working.¹⁴

The Claimant says that these findings of fact are important factual errors that justify the Appeal Division's intervention.

[22] The finding of fact that Dr. Gerber was not treating the Claimant and only saw her once is correct. However, the Claimant argues that it is common for a specialist (psychiatrist) to meet a patient only once when they are providing an assessment, as was done here. Therefore, she says that this is an improper reason not to give weight to this evidence.

[23] However, it is up to the General Division to receive the evidence from the parties and weigh it. It is not up to the Appeal Division to intervene because one party disagrees with how that evidence was weighed. Therefore, the Appeal Division cannot intervene on this basis.

[24] The finding of fact that Dr. Gerber did not know the Claimant before she went on disability is also correct. However, the General Division misapprehended this evidence. The General Division reasoned that because the psychiatrist did not know the Claimant for a period of time, he could not assess her condition. But Dr. Gerber was supposed to meet with the

¹⁰ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

¹¹ See GD4-130.

¹² See General Division decision at paras 20 and 21.

¹³ See General Division decision at para 21.

¹⁴ See General Division decision at para 21.

Claimant, examine the documents sent to him, and assess her condition at that time. That is what he did. His opinion should not be dismissed simply because Dr. Gerber did not know the Claimant before he assessed her conditions.

[25] Finally, in this regard, the finding of fact that Dr. Gerber examined documents only related to the time after the Claimant stopped working is wrong. At the beginning of the report, Dr. Gerber wrote that he had reviewed the documents that had been sent to him (Appendix A).¹⁵

[26] In Appendix A of his report, Dr. Gerber lists the documents that he reviewed.¹⁶ This includes records from the Claimant's chiropractor, naturopathic doctor, and family doctor. These records began before the Claimant left work in 2017. The fact that Dr. Gerber did not quote from these documents or summarize them in his report does not mean that he did not review them to make his diagnoses and treatment recommendations. In fact, because the Claimant did not have the conditions she says are disabling before she stopped working, there would be no reason for Dr. Gerber to refer to these medical records.

[27] The General Division made this finding of fact without regard to all of the evidence that was before it. This includes the statement in Dr. Gerber's report that he had reviewed all of the records sent to him, and the medical evidence that is listed in Dr. Gerber's report (and also filed with the Tribunal).¹⁷

[28] The General Division based its decision, at least in part, on this finding of fact. It may have come to a different conclusion about what weight to give to Dr. Gerber's report if it had found as fact that he had reviewed medical evidence from before and after the Claimant's conditions began.

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

[30] In addition, I note a logical inconsistency within the General Division decision. The decision states that it placed no weight on Dr. Gerber's report. However, it also states that the evidence suggests that the Claimant's condition began to improve once she began to take

¹⁵ See GD4-130.

¹⁶ See GD4-159.

medication Dr. Gerber recommended, and that she had not yet reached the maximum dose he suggested.¹⁸ It therefore put weight on Dr. Gerber's recommendations and whether the Claimant followed them. If no weight was to be given to this report, the General Division should also not have relied on the Claimant's compliance with Dr. Gerber's recommendations when it made its decision.

REMEDY

[31] The General Division based its decision on important factual errors. It also made an error in law. To remedy (fix) these errors, it is appropriate for the Appeal Division to give the decision that the General Division should have given, for the following reasons:

- a) The General Division's record is complete.
- b) The facts are not in dispute.
- c) The Claimant requests 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 an appeal.¹⁹
- e) The Tribunal must conclude appeals as quickly as the circumstances and the considerations of fairness and natural justice permit.²⁰ The Claimant applied for the disability pension in December 2019; referring the matter back to the General Division would cause further delay.

[32] The General Division decision summarizes all of the evidence, so I do not need to repeat it here. The Claimant completed high school before she joined the paid workforce. She has worked in different jobs, most recently in an administrative position. She did not leave work because of her medical conditions; rather, they arose or worsened while the Claimant was on maternity leave.

¹⁸ See General Division decision at para 33.

¹⁹ See section 64 of the *Department of Employment and Social Development Act*.

²⁰ See section 3 of the *Social Security Tribunal Regulations*.

[33] The Claimant has physical and mental health illnesses that affect her capacity to work. Her ongoing pain began in 2018. It was first diagnosed and treated as carpal tunnel syndrome. Her back and neck pain were not constant at that time.

[34] In August 2019, Dr. Zhang reported that the Claimant had fibromyalgia. At that time, the Claimant had ongoing pain throughout her body. She cannot lift or sit for long periods. She also has brain fog and difficulty focusing and concentrating. This was consistently reported by the Claimant's treating professionals and those who assessed her for different conditions.²¹

[35] The Claimant also has mental health illnesses. The Claimant told the General Division that she has had some mental health illness for many years (depression), but she was able to work in spite of it. Unfortunately, her depression worsened in 2018 after her son began to have seizures. The Claimant also developed additional mental health conditions at that time.

[36] Dr. Gerber assessed the Claimant in July 2020 and diagnosed a number of conditions, including:

- a) major depressive disorder;
- b) PTSD;
- c) somatic symptom disorder with predominant pain; and
- d) general anxiety disorder.

[37] The Claimant's symptoms include excessive worry, depressed mood, sleep problems, flashbacks and nightmares, hypervigilance regarding her children, and ongoing difficulties with concentration. For example, the Claimant reported to Dr. Gerber that she has to reread a recipe and still has trouble understanding it. When Dr. Gerber assessed the Claimant, he concluded that she was disabled from all work.²²

[38] I place weight on Dr. Gerber's assessment. Although he had not treated the Claimant, he was consulted to assess her condition, not to treat her. His conclusions are consistent with that of

²¹ For example, see Dr. Ghavanini's October 2018 report at GD4-64; Dr. Airia's notes at GD4-52; and Dr. Zhang's August 6, 2019, report at GD4-98.

²² See GD4-130.

the family doctor and the naturopathic doctor, who also report that the Claimant has depression and anxiety. In addition, Dr. Gerber reviewed the Claimant's medical records from treatment providers from before and after her mental health conditions worsened. His treatment recommendations, for medication and counselling, are also consistent with those of the Claimant's treatment providers.

[39] The Claimant also went to Testmetrix, where a number of mental health tests were done. Their report states that the Claimant's depression is very severe.²³

[40] The Claimant has been compliant with treatment. She has attended group and individual counselling as recommended (including cognitive behaviour therapy). She continues to attend with a social worker. The fact that the Claimant does not see a psychiatrist does not mean that her mental health illnesses are not significant.

[41] The Claimant tried to attend a pain management clinic, but stopped because it was outside of her city and hard for her to get there. She told her family doctor that she would attend a similar clinic that was closer to home.

[42] The Claimant has also taken medication as prescribed. She did not start to take Cymbalta sooner because she was breastfeeding. The Claimant cannot be faulted for this. This medication has had some effect on both pain and depression. No other medications have been recommended.

[43] The Claimant's personal circumstances must also be considered.²⁴ The Claimant is young. She has varied work experience, most recently in an administrative job. She completed high school. These circumstances would not impair the Claimant's ability to work.

[44] The Claimant is able to care for her children. However, this is different from working at a job and meeting expectations in the commercial marketplace.

[45] When all of the Claimant's conditions are examined together, she has a severe disability. She has ongoing pain that prevents her from doing any manual work. She cannot sit for long periods. She is depressed and anxious. She is unable to effectively focus or concentrate. She can

²³ See GD2-86.

²⁴ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

function for only a few hours each day. As a result of all of her conditions, the Claimant is incapable regularly of pursuing any substantially gainful occupation.

[46] The Claimant's disability is also prolonged. The Claimant has had some mental health illness for many years, but she was able to work in spite of it. However, after her eldest child began to have seizures, her mental health illness worsened significantly. In 2019, she was also diagnosed with fibromyalgia and chronic fatigue syndrome. These conditions have persisted without significant improvement despite treatment. At this time, there is no prognosis that they will resolve.

[47] Based on all of the evidence, I find that the Claimant became disabled in August 2019. This is when her pain condition was diagnosed as fibromyalgia and her pain was constant. Also, at that time, her mental health conditions had not improved significantly despite treatment.

CONCLUSION

[48] The appeal is allowed.

[49] The decision that the General Division should have given is made. The Claimant became disabled in August 2019.

[50] Under the *Canada Pension Plan*, disability payments begin four months after a claimant becomes disabled.²⁵ Therefore, pension payments will begin as of December 2019.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	May 20, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	K. S., Appellant Katie Conrad, Counsel for the

²⁵ See section 69 of the *Canada Pension Plan*.

	<p>Appellant</p> <p>Attila Hadjirezaie, Counsel for the Respondent</p>
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