



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *PD v Minister of Employment and Social Development*, 2021 SST 266

Tribunal File Number: AD-21-79

BETWEEN:

P. D.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: June 9, 2021

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] P. D. (Claimant) completed high school and college in India before moving to Canada. The Claimant worked in Canada in a physically demanding warehouse job. She stopped working in December 2017 when she could no longer manage the physical requirements of the job.

[3] The Claimant applied for a Canada Pension Plan disability pension. She says that she is disabled by a number of conditions, including a shoulder injury; ongoing pain in her neck, shoulders and arms; depression and anxiety. The Minister of Employment and Social Development refused the application. The Claimant appealed to the Tribunal. The Tribunal's General Division dismissed the appeal. It decided that the Claimant's disability was not severe because she could have worked or retrained for a less demanding job, and she had not shown that she could not obtain and maintain work because of her health condition.

[4] I granted leave (permission) to appeal to the Tribunal's Appeal Division. The appeal had a reasonable chance of success because the General Division may have made an error by not considering the impact of the Claimant's poor English skills on her capacity regularly to pursue any substantially gainful work. I have now read the documents filed with the Appeal Division and the General Division decision. I have listened to the parties' oral submissions and the General Division hearing recording. The General Division did not make any error in law. It did not base its decision on any important factual error. Therefore, the appeal is dismissed.

PRELIMINARY MATTER

[5] The Tribunal arranged for an interpreter to attend at the hearing and provide interpretation between English and Punjabi for the Claimant. Before the hearing, counsel for both parties wrote to the Tribunal and said that an interpreter was not needed, and asked that this be cancelled for the hearing. At the beginning of the hearing the parties again confirmed that

there was no need for an interpreter. The hearing proceeded completely in English with no interpretation.

ISSUES

[6] Did the General Division make an error in law when it failed to consider the impact of the Claimant's mental health illnesses and her poor English skills on her capacity to retrain or perform alternate work?

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

- a) That the Claimant had an ability to communicate in English;
- b) That the Claimant had capacity for sedentary work or retraining;
- c) That the Claimant could have continued to work with accommodations;
- d) That the Claimant had not received counselling;
- e) That the Claimant's fear of surgery was unreasonable in light of her mental health condition; or
- f) That there was other mental health treatment available to the Claimant

ANALYSIS

[8] 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

Capacity to Retrain

[9] 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 it makes a claimant incapable regularly of pursuing any substantially gainful occupation.² Further, when deciding whether a claimant has capacity to work, the Tribunal must consider their medical conditions and their personal circumstances.³ These circumstances include age, education, language skills and work and life experience. This is correctly set out in the General Division decision.⁴

[10] The Claimant says that the General Division made an error of law. She says that the General Division failed to fully consider her personal circumstances because it failed to consider the impact that her limited English skills had on her capacity to work.

[11] However, the General Division examined her English skills. The decision states that the Claimant participated in a telephone conversation in English with the Tribunal and that she testified that English courses were a core part of her college program.⁵ There was no evidence about how much English was used in the Claimant's workplace. The General Division did not speculate about this.

[12] The Claimant also argues that the General Division erred because it failed to consider the impact of her mental health illnesses on her work capacity. There was little evidence about this condition. In July 2019, Dr. Mistry reported that the Claimant had anxiety, but was feeling better after she started to take medication.⁶ The decision also states that the Claimant had not had individual counselling or treatment with a mental health specialist.⁷ She attended a few group therapy telephone calls.⁸

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

² See section 42(2) of the Canada Pension Plan

³Villani v. Canada (Attorney General), 2001 FCA 248

⁴ See General Division decision at para. 12

⁵ See General Division decision at para. 14

⁶ See GD2-8; GD3-2

⁷ See General Division decision at para. 19

⁸ See General Division decision at para. 19

[13] The Claimant also testified that she does not want to go outside⁹ and is dependent on others for day-to-day chores. This is not referred to in the decision. However, it is not necessary for the General Division to note every piece of evidence in its decision. It is presumed to have considered all of the evidence.¹⁰ The decision demonstrates that the General Division was alive to the Claimant's mental health status and grappled with in making its decision.

[14] The decision also states that the Claimant declined shoulder surgery because she was scared, but is again considering it.¹¹ The Claimant argues that her fear was part of her mental health illness. This is not clear from her testimony. So, the General Division did not err when it failed to address this argument specifically in the decision.

[15] The General Division made no error in law.

Important Factual Errors.

[16] The Claimant also argues that the appeal should be allowed because the General Division based its decision on a number of important factual errors. In order to succeed on this basis, the Claimant has to prove three things:

- a) that a finding of fact was erroneous (in error);
- b) that the finding was made perversely, capriciously, or without regard for the material that was before the General Division; and
- c) that the decision was based on this finding of fact.¹²

[17] First, the Claimant says that the General Division's finding of fact that she had an ability to communicate in English¹³ is an error. However, there is an evidentiary basis for this. The decision sets out that the Claimant was able to carry on a telephone conversation in English, and

⁹ See General Division hearing recording at approximate time 1:07:00 although the exact time may differ depending on what device is used to listen to the recording.

¹⁰ *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

¹¹ See General Division decision at para. 21

¹² See section 58(1)(c) of the Department of Employment and Social Development Act

¹³ See General Division decision at para. 14

that she took English courses in college as a core part of her program.¹⁴ Therefore, this finding of fact is not wrong.

[18] Second, the Claimant says that the General Division's finding of fact that she had capacity for sedentary work or retraining was an important factual error. The decision states that although she has physical limitations she is a good candidate for academic upgrading, retraining or less physical work.¹⁵ This is not a finding of fact. It is a conclusion of law, based on a consideration of all of the evidence. This includes her work history in Canada as a labourer, her English skills, her age, and her educational background. There is evidence to support this conclusion.

[19] Again, it is not for the Appeal Division to reweigh the evidence to reach a different conclusion.¹⁶ The appeal cannot succeed on this basis.

[20] Third, the Claimant argues that the General Division's statement that she could have worked with accommodations is an important factual error. However, the General Division does not make this finding of fact. Rather, the General Division states that the Claimant's employer did not accommodate her in any way.¹⁷

[21] Fourth, the Claimant says that the General Division decision statement that the Claimant had not received counselling is an important factual error. However, the General Division did not make this finding of fact. The decision states that the Claimant had tried one mental health medication and participated in group therapy calls. She had not had one-on-one counselling or treatment with a psychiatrist or psychologist.¹⁸ This is consistent with the evidence that was before the General Division. It is not wrong.

[22] Fifth, the Claimant says that the General Division decision's statement that her fear of surgery was unreasonable¹⁹ in light of her mental health condition is an important factual error. However, this is not a finding of fact, but a conclusion in law. It is based on the evidence that

¹⁴ See General Division decision at para. 14

¹⁵ General Division decision at para. 15

¹⁶ *Gaudet v. Attorney General of Canada* 2013 FCA 254

¹⁷ See General Division decision at para. 17

¹⁸ See General Division decision at para. 19

¹⁹ See General Division decision at para. 21

was before the General Division. The Claimant said that she was scared to have shoulder surgery, but that she is again considering this.²⁰ There was no evidence that this fear was caused by the Claimant's mental health illness, although it may have been. Nevertheless, the General Division examined this evidence. It also considered that the surgeon provided an 80% chance of success for the surgery, and the Claimant's testimony that she was again considering this treatment.

[23] The General Division made no error in this regard.

[24] Finally, the Claimant argues that the General Division's statement that there were more mental health treatments available is an important factual error. The decision states that further medication trials, psychiatric/psychological treatment and surgery on both shoulders all had the potential to decrease her pain and improve her level of function.²¹

[25] There was no evidence that the Claimant had been referred to any mental health illness treatments that she had not tried. So, this part of the finding of fact is wrong. However, the decision was not based on the Claimant's failure to follow mental health treatment recommendations. The decision was based on the Claimant not having a severe disability when her condition is examined in totality – including mental health illness that is treated conservatively, shoulder conditions for which treatment remains untried, and the Claimant's personal circumstances that are not a barrier for her regularly to pursue any substantially gainful occupation.

[26] For all these reasons, the General Division made no important factual errors.

[27] The General Division did not overlook or misconstrue any important information.

CONCLUSION

[28] The appeal is therefore dismissed.

Valerie Hazlett Parker

²⁰ See General Division hearing recording at approximate time 15:51

²¹ See General Division decision at para. 22

Member, Appeal Division

HEARD ON:	June 3, 2021
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	P. D., Appellant Leo Dillon, Counsel for the Appellant Zachery Hennessy, Representative for the Respondent