



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *CP v Minister of Employment and Social Development*, 2021 SST 318

Tribunal File Number: AD-20-623

BETWEEN:

C. P.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: June 28, 2021

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

[2] The decision that the General Division should have given is made. The Claimant is disabled. Pension payments will begin as of January 2018.

OVERVIEW

[3] C. P. (Claimant) earned a high school diploma and some job-related certifications. He worked for many years as a forklift operator. He has physical limitations including neck and shoulder pain, and mental health illnesses from being harassed and threatened at work.

[4] The Claimant applied for a Canada Pension Plan disability pension and says that he is disabled by his conditions. 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 did not have a disabling condition that precluded all types of work at the relevant time.

[5] Leave to appeal this decision to the Tribunal's Appeal Division was granted. The appeal had a reasonable chance of success because the General Division may have based its decision on an important factual error about following treatment recommendations.

[6] I have now read all of the documents filed with the Appeal Division and the General Division, and the General Division decision. I have listened to the parties' oral arguments and the recording of the General Division hearing. The General Division based its decision on important factual errors about the Claimant following treatment recommendations and his doctor's opinions. Therefore, the appeal is allowed.

[7] The decision that the General Division should have given is made. The Claimant is disabled. Disability pension payments will begin as of January 2018.

PRELIMINARY ISSUE

[8] The Claimant also made an application to have the General Division decision rescinded or amended (cancelled or changed) based on a new material fact—a new medical report.¹ The General Division dismissed this application. The Claimant appealed this decision to the Tribunal's Appeal Division. The Appeal Division allowed that appeal and referred the matter back to the General Division for reconsideration.² This matter is waiting to be heard by the General Division. I did not consider this new medical report in making my decision. It was not before the General Division when it made its decision. New evidence is not ordinarily considered by the Appeal Division,³ and it did not fall within any of the exceptions to this rule.⁴

ISSUES

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

- a) that the Claimant unreasonably refused treatment;
- b) that Dr. Cobrin and Dr. Kumar said that the Claimant could return to alternate employment;
- c) that Dr. Cobrin stated that the Claimant was alright because he has good coping skills;
- d) that the psychotherapist and psychologist reports were inconsistent;
- e) that the Claimant's request for an alternate position in a grievance showed capacity to work; or

¹ Section 66 of the *Department of Employment and Social Development Act* allows the Tribunal to rescind or amend decisions based on new material facts.

² See the Tribunal's Appeal Division decisions AD-20-760 and GP-20-1732.

³ See *Canada (Attorney General) v O'Keefe*, 2016 FC 503.

⁴ New evidence can be accepted when it is necessary as general background information, to establish procedural defects, or to highlight that there was no evidence before the decision maker: *Marcia v Canada (Attorney General)*, 2016 FC 1367.

- f) that it criticized the Claimant's memory problems at the hearing, without considering that this is a symptom of his mental health illness?

[10] Did the General Division make an error in law:

- a) when it failed to consider the totality of the Claimant's physical and mental health conditions; or
- b) when it failed to consider medical reports that supported the Claimant's legal position that he could not return to alternate employment?

[11] Did the General Division make an error when it relied on its own observations of the Claimant at the hearing?

ANALYSIS

[12] The Claimant says that the General Division based its decision on a number of important factual errors. To succeed on this, the Claimant must prove three things:

- a) that a finding of fact was erroneous (wrong);
- 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.⁵

The General Division made an error when it found as fact that the Claimant had refused treatment

[13] The Claimant argues that the General Division based its decision on an important factual error that the Claimant unreasonably refused treatment. The decision states: "Treatment recommendations and situational stressor removal have been recommended but there is no evidence that either has been acted upon."⁶ However, there was evidence that the Claimant followed treatment recommendations. For example, he attended at least four sessions with

⁵ See section 58(1)(c) of the *Department of Employment and Social Development Act*.

⁶ See General Division decision at para 22.

Dr. Cobrin between November 2017 and February 2018.⁷ He testified that he stopped seeing Dr. Cobrin because he could not afford to continue. The Claimant also took medication for mental health illnesses as prescribed by his family doctor.⁸

[14] Regarding stressor removal, the Claimant's mental health illness was caused by workplace harassment and abuse. However, he stopped working in September 2017.⁹ Logically, this would have removed all situational stressors. But the Claimant's mental health illness has persisted even without these stressors.

[15] This demonstrates that the Claimant followed treatment recommendations. Therefore, the General Division's finding of fact was wrong. It was made without regard for the evidence that was before the General Division. The decision was based, at least in part, on this factual error.

[16] The appeal is allowed on this basis.

The General Division made an error when it found as fact that the Claimant's doctors said that he could return to alternate work

[17] The Claimant also argues that the General Division made an important factual error that his doctors said that he could return to work other than his last job. The family doctor completed the medical form that accompanied the application for the disability pension¹⁰ and provided notes to excuse him from work.¹¹ He also completed documents for workers' compensation. None of these documents say that the Claimant could work in a different job.

[18] Dr. Cobrin, psychologist, wrote that, if it were not for the workplace bullying, the Claimant would not require treatment.¹² This statement does not mean that the Claimant could return to a different job. It is silent on this issue.

[19] In addition, the Claimant was assessed by two practitioners at Psychology Health Solutions (PsychHealth).¹³ They diagnosed the Claimant with post-traumatic stress disorder (PTSD) and major depressive disorder. They wrote that he is unemployable.

⁷ See GD2-265.

⁸ See GD2-57.

⁹ See GD2-276.

¹⁰ See GD2-57.

¹¹ See GD2-235 to GD2-238.

¹² See GD2-265.

[20] The General Division can make reasonable inferences based on the evidence. However, the inference that the Claimant could work at another job is not reasonable for the following reasons:

- a) The General Division decision states that Dr. Kumar's report and that of PsychHealth are inconsistent. This is not so. Dr. Kumar wrote that the Claimant could not return to his prior job. PsychHealth wrote that the Claimant could not work at any job. The PsychHealth report simply expands on Dr. Kumar's opinion by considering all jobs and not merely the last one the Claimant held.
- b) The General Division decision states that PsychHealth was of the opinion that the Claimant required psychological intervention to stabilize his condition. This is an accurate statement. However, the General Division then speculates that seeking employment in a different environment would provide some stabilization.¹⁴ There is no indication in the PsychHealth report that the Claimant could stabilize his condition by working.
- c) The General Division decision states that there had not been any treating mental health professional involved with the Claimant. However, the Claimant was treated by Dr. Cobrin and his family doctor (who prescribed medication).

[21] Therefore, the General Division's finding of fact is wrong. It was made without regard for the evidence that was before it. The appeal must also be allowed on this basis.

Other Issues

[22] The Claimant says that the appeal should be allowed because the General Division made a number of other errors as well. However, since I have decided that the appeal is allowed for the reasons set out above, I do not need to consider the remaining issues.

¹³ See GD9-2.

¹⁴ See General Division decision at para 19.

REMEDY

[23] When an appeal is allowed, the Appeal Division can give different remedies. It is appropriate for the Appeal Division to give the decision that the General Division should have given in this case because:

- a) the facts are not in dispute;
- b) there are no gaps in the evidence such that another hearing is required;
- c) both parties requested that the Appeal Division give the decision that the General Division should have given if the appeal was allowed;
- d) the Tribunal has legal authority to decide questions of law and fact that are necessary to dispose of an appeal;¹⁵ and
- e) the Tribunal must conclude appeals as quickly as the considerations of fairness and natural justice permit.¹⁶

The Claimant has a severe disability

[24] The facts are set out clearly in the documents filed with the Tribunal. They are summarized as follows:

- a) The Claimant completed a high school equivalent program. He also earned some job specific certifications.
- b) The Claimant last worked as a forklift operator, a job he held for almost 20 years.
- c) The Claimant has some physical limitations. He injured his shoulder at work and has ongoing neck and shoulder pain as a result.
- d) The Claimant returned to work after this injury.¹⁷ He took medication to manage his pain.

¹⁵ See section 64 of the *Department of Employment and Social Development Act*.

¹⁶ See section 3 of the *Social Security Tribunal Regulations*.

- e) The Claimant was harassed, bullied, and assaulted at work over a long period.¹⁸ He says that the employer did not investigate his concerns adequately.
- f) The Claimant developed mental health illnesses as a result of the work situation.
- g) The Claimant has been diagnosed with PTSD and depression.
- h) The Claimant's minimum qualifying period (MQP—the date by which a claimant must be disabled to receive the disability pension) is December 31, 2020. The General Division hearing was held on June 4, 2019. So, I must decide whether the Claimant was disabled on or before the date of the General Division hearing.

[25] It is clear that the Claimant has mental health illnesses. His family doctor prescribed medication to treat this.¹⁹ In 2018, the dosage was increased.²⁰ The Claimant was also assessed and treated by mental health specialists. Dr. Cobrin reported in February 2018 that he had seen the Claimant for four sessions. He wrote that the Claimant has good coping skills and that, if it were not for the workplace bullying, he would not need mental health intervention.²¹ The Claimant did not continue with this treatment because he could not afford it, and his work benefit plan's coverage was exhausted.²²

[26] The Claimant was assessed later by PsychHealth. These assessors performed a number of psychological tests. Based on this and their interview with the Claimant, PsychHealth diagnosed the Claimant with PTSD and major depressive disorder. The report concludes that the Claimant is unemployable.²³ I place great weight on this report. It is evidence of the Claimant's mental health condition closest to the end of the MQP. The diagnoses and opinion were based on objective testing in addition to the Claimant's reporting of his situation. This evidence is uncontradicted.

¹⁷ See General Division hearing recording at approximate time 33:00, although the exact time may differ depending on what device is used to listen to the recording.

¹⁸ See General Division hearing recording at approximate time 38:00.

¹⁹ See GD2-76.

²⁰ See GD5.

²¹ See GD2-265.

²² See General Division hearing recording.

²³ See GD9-2.

[27] There was little evidence about the Claimant's capacity to perform day-to-day activities. The best evidence is the Claimant's questionnaire completed as part of the disability pension application. In this document, the Claimant wrote that he has bouts of depression and is unable to perform necessary daily routines. This evidence is uncontradicted. In addition, he wrote that he has trouble with memory and concentration. This would impact his capacity to work.

[28] I must consider the Claimant's medical conditions and his personal characteristics, including his age, education, language skills, and work and life experience.²⁴ The Claimant was 46 years old on the date of the General Division hearing and is fluent in English. This would not negatively impact his capacity to work. He earned a high school education, with some work specific certifications. This somewhat limited formal education would limit the Claimant's capacity for some work. His only work experience is in physically demanding positions. With his physical limitations, his options for physically demanding jobs are limited. His skills are not transferrable to sedentary work.

[29] When the Claimant's physical and mental health illnesses are considered together with his personal characteristics, on balance, he is incapable regularly of pursuing any substantially gainful occupation. His disability is severe.

The Claimant's disability is prolonged

[30] The Claimant's disability is also prolonged. He continues to have pain in his neck and shoulder. No further treatment has been recommended. The Claimant's mental health illnesses also continue despite treatment. There is no suggestion that this condition will resolve despite the Claimant's compliance with treatment recommendations.

CONCLUSION

[31] The appeal is allowed.

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

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

[33] The Claimant was disabled when he left work in September 2017. Disability pension payments begin four months after a claimant becomes disabled.²⁵ Therefore, payments will begin as of January 2018.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	June 15, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	C. P., Appellant Steven Yormak, Counsel for the Appellant Marcus Dirnberger, Counsel for the Respondent

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