



Citation: *TB v Minister of Employment and Social Development*, 2022 SST 6

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: T. B.
Representative: Therese Menard (paralegal)

Respondent: Minister of Employment and Social Development
Representative: Joshua Toews (counsel)

Decision under appeal: General Division decision dated May 31, 2021
(GP-19-1091)

Tribunal member: Janet Lew

Type of hearing: Teleconference
Hearing date: November 2, 2021
Hearing participants: Appellant
Appellant's representative
Respondent's representative

Decision date: January 6, 2022
File number: AD-21-268

Decision

[1] The appeal is allowed. The matter will go back to the General Division for reconsideration.

Overview

[2] The Appellant, T. B. (Claimant), is appealing the General Division decision. The General Division found that the Claimant unreasonably failed to follow treatment recommendations that might have significantly improved his disability status. Because it found that he had unreasonably failed to follow treatment options, the General Division concluded that the Claimant failed to establish that he had a severe disability.

[3] The Claimant argues that the General Division made several legal and factual errors throughout its decision. The Claimant asked the Appeal Division to return the matter to the General Division for a reconsideration, given some of the gaps in the medical evidence and the need to clarify some of the existing evidence.

[4] The Respondent, the Minister of Employment and Social Development (Minister), denies that the General Division made any reviewable errors. The Minister asks the Appeal Division to dismiss the appeal. Alternatively, In the event that the Appeal Division finds that the General Division made a reviewable error, the Minister asks the Appeal Division to substitute its own decision. But, the Minister argues that, even if it substitutes its own decision, the Appeal Division should still dismiss the appeal, as the evidence does not support a finding of a severe disability.

Issue

[5] The issue is whether the General Division failed to consider some of the evidence when it found that the Claimant failed to follow reasonable treatment recommendations, that his refusal was unreasonable, and that the treatment could have improved the Claimant's condition and work capacity

Analysis

[6] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.¹

Did the General Division fail to consider some of the evidence about the Claimant's compliance with treatment recommendations?

– Brief background history – overview of medical records

[7] The Claimant has a longstanding history of generalized anxiety disorder and social anxiety disorder. The Claimant has also had bilateral inguinal pain since 2016, for which he has had extensive investigations, including an exploratory laparoscopy.

[8] The Claimant's former family doctor prepared a Canada Pension Plan medical report dated September 18, 2018. She was of the opinion that the Claimant had numerous functional limitations. He avoided others, was anxious to leave his home, and had limited sitting and standing tolerance due to pain. The Claimant had just started medication and a psychiatric consultation was pending.

[9] The family doctor was of the opinion that the Claimant's prognosis was unknown, noting that his longstanding generalized anxiety disorder and social anxiety could be difficult to treat. She noted that he had also had chronic pain for more than two years, despite physiotherapy. The prognosis was guarded for any improvement of his chronic pain.²

[10] The Claimant saw a psychiatrist on several occasions between October 2018 and April 2019. The psychiatrist diagnosed the Claimant with a generalized anxiety disorder, social anxiety disorder, and delusional disorder somatic type.

[11] Initially, the Claimant indicated that he was receptive to taking medications. The psychiatrist started him on Ciprallex and Seroquel, both psychiatric medications.³ In a consultation visit on November 9, 2018, the psychiatrist noted that the Claimant was not

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

² See Canada Pension Plan medical report dated September 18, 2018, at GD2-181 to GD2-184.

³ See Psychiatric Assessment dated October 10, 2018 at GD2-105 to GD2-108.

adherent to taking these medications. The Claimant held off on taking them because he wanted to review them with his family doctor. The psychiatrist advised the Claimant to take Cipralex for his anxiety and Risperidone for his delusional disorder.⁴

[12] By December 2018, the Claimant started taking the Cipralex and Risperidone. The psychiatrist noted there been some improvement on the medications. He advised the Claimant to continue with the same current medication, though increased the dosage of Risperidone.⁵

[13] However, by early January 2019, the Claimant stopped taking Risperidone. He also felt that the Cipralex was not doing anything.⁶ The Claimant felt that the psychiatrist was too focused on pharmacological treatment. The Claimant wanted a second opinion, though his family doctor tried to encourage him to start the Risperidone. The family doctor did not refer him to another psychiatrist.

[14] On February 22, 2019, the Claimant returned to see the psychiatrist. He reported that Risperidone made him sleepy, different, argumentative, and aggressive.⁷ The psychiatrist advised him to discontinue Cipralex gradually and to start a series of other medications.⁸

[15] In a final visit with the psychiatrist on April 5, 2019, the Claimant reported that he had been feeling better and calmer, now that he was using CBD oil. He had not taken any of the medication that the psychiatrist had prescribed at the last visit. The psychiatrist wrote that the Claimant said he would never take any psychiatric medication because of a fear of side effects. He refused any offer to try any psychiatric medications. According to the psychiatrist's notes, "[The Claimant] doesn't even want to

⁴ See Follow-up note of psychiatrist, dated November 9, 2018, at GD2-111 to GD2-112.

⁵ See Follow-up note of psychiatrist, dated December 12, 2018, at GD2-115 to GD2-116.

⁶ See clinical notes dated January 4, 2019, of family doctor, at GD2-117.

⁷ See Follow-up note of psychiatrist, dated February 22, 2019, at GD2-119 to GD2-120. See also clinical notes dated March 11, 2019, of family doctor, at GD2-121.

⁸ See Follow-up note of psychiatrist, dated February 22, 2019, at GD2-120.

try taking it for a few days.”⁹ He would only take marijuana, which someone had prescribed for him.

[16] The psychiatrist was of the opinion that the Claimant was still struggling with generalized anxiety and social anxiety symptoms. The psychiatrist noted that the Claimant was completely against taking any psychiatric medications. The psychiatrist discharged the Claimant from his care.

[17] The Claimant moved across the province. This left him without a regular family doctor. As a result, there is a gap in the medical records between May 2019 and May 2020.

[18] In about mid-2020, the Claimant accessed emergency care at the local hospital for inguinal pain. He was referred to a surgeon who noted that the Claimant’s generalized anxiety disorder was a “significant component of [his] presenting issue.”¹⁰

[19] The Claimant saw a registered psychotherapist for 15 sessions between October 21, 2020 and April 26, 2021. He presented with significant functioning disturbance and with significant symptoms of anxiety.¹¹

[20] Since August 2020, the Claimant has also been actively participating in a Case Management Program at the Canadian Mental Health Association. His participation involves support for coping with anxiety, depressive symptoms and other health-related issues such as chronic pain. There have been several referrals, including for a psychiatric assessment, a primary care program, family counselling and support for the purposes of employability.¹²

– **The Claimant’s arguments**

[21] The Claimant argues that the General Division made legal and factual errors when it concluded that he was not taking recommended medications, and that this

⁹ See Follow-up note of psychiatrist, dated April 5, 2019, at GD2-123.

¹⁰ See consultation report dated January 27, 2021, of Dr. Labelle, at GD8-4.

¹¹

¹² See undated letter of Canadian Mental Health Association, at GD8-3.

refusal was unreasonable. The Claimant argues that the General Division mischaracterized or ignored some of the evidence.

[22] At paragraphs 24 to 26 of its decision, the General Division member wrote:

[24] [The psychiatrist's] notes consistently record that the Claimant was not taking the recommended medications. Finally, in April 2019, the Claimant had told [the psychiatrist] that he would never take any psychiatric medications, even for a few days. This was because he was afraid of the side effects. The Claimant started to use CBD oil obtained from a cousin of his. He refused to take anything else, even though he still had symptoms of anxiety. [The psychiatrist] continued: "I spent some time and tried to convince the patient to try some of the psychiatric medication. He insisted not to." As the Claimant refused to take medication, [the psychiatrist] discharged him from his care.

[25] The Claimant's own family doctor evidently did not think this refusal of medication was reasonable. In January 2019, [the family doctor] reported that the Claimant wanted a referral to a different psychiatrist because [the psychiatrist] just wanted him to take medication. [The family doctor] explained that medication was a really important part of the treatment. If the Claimant was not getting any better, maybe he needed to try the medications. Not taking medication was not getting him anywhere. She encouraged him to start the Risperidone (an anti-psychotic) as [the psychiatrist] had recommended.

[26] Both [the psychiatrist and the family doctor] evidently believed that psychiatric medication might improve the Claimant's mental health—that it would significantly affect his disability status.

[23] The Claimant argues that the General Division failed to consider the following:

- He had in fact tried some of the psychiatric medications that the psychiatrist prescribed. In particular, he had taken Cipralex 15 mg and Risperidone 1 mg,
- Some of the medications were not doing anything for him. He reported to his family doctor that he felt that "Cipralex isn't doing anything,"¹³

¹³ See family doctor's clinical records dated January 4, 2019, at GD2-117.

- Though there had been initial benefits, the Claimant experienced adverse side effects from taking the psychiatric medications.¹⁴ He found that the Risperidone made him feel sleepy, argumentative, and aggressive.¹⁵
- He sought alternatives by asking his family doctor for a referral to another psychiatrist.¹⁶ The Claimant says that this showed that he was making reasonable efforts to undertake treatment

[24] The Claimant argues that, given his personal experience, it was reasonable for him to refuse to take medication. He argues that, in the “real world” context, if a medication causes a person to act aggressively, it would be reasonable they would develop a fear to taking any other form of medication. The Claimant argues that the General Division failed to consider the fact that he experienced these particular side effects when he took Risperidone.

[25] The Claimant also argues that the General Division misapplied the legal principles set out in *Lalonde*¹⁷ and *Sharma*.¹⁸ In the case of *Lalonde*, the Federal Court of Appeal held that claimants have to submit to reasonable treatment recommendations. And, in the absence of undergoing treatment, the decision-maker would have to consider the reasonableness of a claimant’s refusal and what impact that refusal might have on their disability status if the refusal was considered unreasonable.

¹⁴ See psychiatrist’s follow-up note dated December 12, 2018, at GD2-115 to GD2-116. The Claimant reported that he slept more than normal, which he considered a good thing. He also reported that he felt calmer.

¹⁵ See psychiatrist’s follow-up note dated February 22, 2019, at GD2-119. The Claimant reported that he stopped taking the Risperidone because it was making him feel sleepy. He said it also made him feel different with a tendency to argue and be nervous with others. See also family doctor’s clinical records dated March 11, 2019, at GD2-121. The Claimant reported that he slept all day and his son would wake him up when home from school. The Claimant also described a road rage incident.

¹⁶ See family doctor’s clinical records dated January 4, 2019, at GD2-117. The Claimant questions whether the psychiatrist was listening to him. He wondered about seeking a second opinion.

¹⁷ See *Lalonde v Canada (Minister of Human Resources Development)*, 2020 FCA 211.

¹⁸ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

[26] In *Sharma*, the Federal Court of Appeal confirmed that an applicant has a duty to mitigate. If an applicant fails to mitigate, they do not establish a severe disability.¹⁹ The Court referred to the Appeal Division's approach. The Appeal Division wrote:

[16] The Appeal Division should not be conducting its own assessment of whether an appellant's non-compliance is reasonable, provided that the General Division is aware of and considers whether an appellant's non-compliance with treatment recommendations is reasonable, and what impact that refusal has on an appellant's disability status.

[27] In this case, the Claimant argues that he did fulfil his duty to mitigate. He notes that he had been compliant with taking medications and that he had a reasonable excuse against taking any further medications: one medication was not working and the other made him angry. He also noted that he attended physiotherapy as recommended, for his chronic inguinal pain. He also sought other treatment by asking for a second opinion from someone who he felt would be more attentive.

[28] In this regard, the Claimant argues that the General Division made factual errors when it found that he failed to follow reasonable treatment options and that he had failed to provide a reasonable explanation for his failure to do so.

– **The Minister's arguments**

[29] The Minister argues that the General Division did not make any reviewable errors when it considered whether the Claimant had followed reasonable treatment recommendations and whether his refusal was reasonable under the circumstances.

[30] The Minister argues that the General Division considered that the Claimant briefly took Risperidone and stopped because of the side effects. The Minister argues that the General Division found that the Claimant did not follow reasonable treatment recommendations because of his overall pattern of resisting prescribed medications, which crystallized into total refusal to take psychiatric medication by April 2019. The

¹⁹ See *Sharma*, at para 13.

Minister argues that this is not a case about refusing Risperidone due to specific side effects, but is a case about refusing all psychiatric medication due to side effects.

– **Analysis and summary on the issue of the Claimant’s compliance with treatment recommendations**

[31] The General Division made an overreaching statement when it said that the Claimant failed to take medication for his anxiety. This left the impression that the Claimant had not tried any psychiatric medications. The General Division added to this impression when it wrote that the Claimant “may have feared the possible side effects of (non-opioid) medications that he was unwilling even to try.”²⁰

[32] The Claimant argues that, if the General Division had been alive to the fact that he had taken psychiatric medications but had experienced side effects, it would likely have concluded that he had a reasonable explanation for refusing to take any further psychiatric medications.

[33] The General Division failed to mention that the Claimant had in fact tried two psychiatric medications. The Claimant reported that he did not see any benefit from taking CipraleX. He explained that, as he experienced side effects from taking Risperidone, he feared possible side effects from any other psychotic medications. The Claimant’s experience with Risperidone could have reasonably explained his refusal to take other psychiatric medications.

[34] The Minister argues that it is unnecessary for a decision-maker to have to refer to all of the evidence before it, as there is a general presumption in law that it has considered everything.²¹ So, the Minister argues that, although the General Division may not have specifically mentioned that the Claimant had tried CipraleX and Risperidone, or that he experienced side effects from Risperidone, it was aware of this evidence.

²⁰ General Division decision, at para 27.

²¹ See *Simpson v Canada (Attorney General)*, 2012 FCA 82.

[35] Furthermore, the Minister argues that the General Division’s finding that the Claimant had not tried any psychiatric medications was not, in any way based on whether he had stopped using Risperidone. After all, both the psychiatrist and family doctor had recommended other medications to the Claimant, which he refused to try. For instance, during one of the Claimant’s final visits, the psychiatrist recommended three other medications. During the last visit to the psychiatrist, the Claimant confirmed that he had not tried these medications because he feared side effects.

[36] As far as Risperidone was concerned, the Minister argues that, indeed, the General Division acknowledged that it was reasonable that the Claimant had discontinued using it because of the side effects it caused.

[37] At the hearing, the General Division member prefaced one of her questions to the Claimant, as follows:

And then [the psychiatrist] suggested that you take Cipralex and Risperidone, that was in December 2018, and you noticed a difference, but you stopped taking Risperidone after Christmas, in 2019, because it made you feel sleepy. And you were taking physiotherapy. And then shortly after that he recommended Paroxetine instead of Cipralex, but also Abilify and you didn’t take either of those. **So the Risperidone, making you sleepy, that makes sense not to continue with that.** But suggesting that you try Abilify, Seroquel, Trazodone, for your sleep, Risperidone—and some of them you didn’t start, most of them you didn’t start.²²

(my emphasis)

[38] The member asked the Claimant why he was not taking “these medications.”²³ The Claimant responded that he took medications that the psychiatrist gave to him at the start, that he got sleepy, and he put up with it for quite a while, but with his son waking him up after he returned from school, the Claimant found it “just too much, it was everyday ... and [he] tried “different concoctions.”²⁴

²² At approximately 32:26 to 33:30 of the audio recording of the General Division hearing.

²³ At approximately 33:34 to 33:39 of the audio recording of the General Division hearing

²⁴ At approximately 33:40 to 34:26 of the audio recording of the General Division hearing

[39] The Minister relies on this exchange to show that the General Division was aware of and had considered the fact that the Claimant had side effects from taking Risperidone. More importantly, the Minister argues that this exchange shows that the General Division found it was reasonable for the Claimant to stop taking Risperidone. In other words, having already considered that it was reasonable for the Claimant to stop taking Risperidone, the Minister says that the General Division decision was about whether the Claimant refused to take other medications.

[40] While the member's question does not form part of her decision *per se*, it does provide some context. It suggests that the member considered this vital evidence regarding the extent of the Claimant's compliance with treatment recommendations. Viewed strictly from this perspective, it would seem that the member did not make a factual error when she wrote that the Claimant had failed to take medication for his anxiety. After all, the member's remarks suggest that, at the time of the hearing, she focused on the Claimant's refusal to take medications other than Cipralelex and Risperidone.

[41] Given this backdrop, it appears that the General Division member's focus in the decision was on the Claimant's refusal to take other medications, as documented by the psychiatrist.

[42] However, I am unaware of any authority that supports the Minister's argument that the member's comments at the hearing form part of the evidence.

[43] The Minister also argues that a decision-maker does not have to cite all of the evidence before it. But, if the evidence is of such significance that it could have some impact on the outcome, a decision-maker should directly address that evidence in their analysis.

[44] Without directly referring to the exchange between the member and the Claimant at the General Division hearing, it is unclear from the decision alone whether the member was indeed mindful that the Claimant had tried Cipralelex and Risperidone.

[45] The member indicated that she considered the Claimant's evidence when she wrote, "He may have feared the possible side effects of (non-opioid) medications"²⁵ but she also added that "he was unwilling even to try" these types of medications.

[46] Without acknowledging that the Claimant had tried the Cipralex and Risperidone, there is much uncertainty over whether the member considered the reasonableness of the Claimant's fears. This was important because when the member assessed the reasonableness of the Claimant's non-compliance with treatment recommendations, she determined that the reasonableness of the Claimant's fears had to be weighed against the possible improvement in his well-being.

[47] So, if the fears were seen to be ungrounded without any actual experiences, then the member might have concluded that those fears were unreasonable. But, if the member was mindful that the Claimant had adverse side effects from taking certain medications, then the member might or could have concluded that there was a real and legitimate explanation for his fears. The member could have then concluded that his fears were reasonable. And, if his fears were reasonable, then his non-compliance might have been seen as reasonable too.

[48] This is not to suggest that the General Division would have necessarily concluded that, had the member directly addressed the Claimant's use of Cipralex and Risperidone, that it would have necessarily concluded that his non-compliance with treatment recommendations was reasonable.

[49] But, the General Division should have explicitly addressed the Claimant's explanation for his non-compliance with treatment recommendations when it assessed the reasonableness of his non-compliance with taking other psychiatric medications.

Remedy

[50] How can I fix the General Division's error? I have two basic choices.²⁶ I can substitute my own decision or I can refer the matter back to the General Division for

²⁵ See General Division decision, at para 27.

²⁶ See section 59 of the *Department of Employment and Social Development Act*.

reconsideration. If I substitute my own decision, this means I may make findings of fact.²⁷

[51] The Claimant asked the Appeal Division to return the matter to the General Division for a reconsideration. He seeks a reconsideration because he says there are gaps in the evidence. He also says there is a need to clarify some of the existing evidence.

[52] The Minister, on the other hand, says that there is enough evidence to allow me to make a final decision. The Minister argues that the evidence supports a finding that the Claimant's non-compliance was unreasonable, and that, had he been compliant, he would have seen improvement in his condition and overall functionality.

[53] I agree that there may be gaps in the evidence. For instance, I do not see any evidence that says what the potential side effects could have been for the additional medications that the psychiatrist prescribed for the Claimant. This evidence could have supported (or not) the reasonableness of the Claimant's refusal to take these medications. For this reason, I am returning the matter to the General Division for reconsideration.

Conclusion

[54] The appeal is allowed. The matter will go back to the General Division for reconsideration.

Janet Lew
Member, Appeal Division

²⁷ See *Weatherley v Canada (Attorney General)*, 2021 FCA 58 at paras 49 and 51, and *Nelson v Canada (Attorney General)*, 2019 FCA 222 at para 17.