Citation: *Minister of Employment and Social Development v HS*, 2022 SST 435

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Minister of Employment and Social Development
Representative:	Jessica Grant
Respondent (Claimant):	H. S.
Representative:	Ashwin Ramakrishnan

Decision under appeal:	General Division decision dated October 31, 2021 (GP-20-1661)

Tribunal member:	Kate Sellar
Type of hearing:	Teleconference
Hearing date:	April 27, 2022
Hearing participants:	Appellant's representative Respondent Respondent's representative
Decision date:	May 30, 2022
File number:	AD-22-67

Decision

[1] I am allowing the appeal. The General Division made an error of fact. I will return the matter to the General Division for reconsideration.

Overview

[2] H. S. (Claimant) worked in construction until June 2016. He stopped working due to osteoarthritis in his knees. He had pain, swelling, and mobility issues. He has not returned to any type of work since he left construction.

[3] The Claimant applied for a Canada Pension Plan (CPP) disability pension on November 12, 2019. The Minister of Employment and Social Development (Minister) refused his application. The Claimant appealed the Minister's decision to the Social Security Tribunal's General Division.

[4] The General Division found that the Claimant had a severe and prolonged disability as defined by the *Canada Pension Plan*, and that he was entitled to the disability pension with payments starting as of December 2018.

[5] I gave the Minister permission to appeal the General Division decision. I found that it was possible that the General Division made an error of fact by ignoring evidence about the Claimant's work capacity.

[6] I must decide whether the General Division made an error under the *Department of Employment and Social Development Act*. If the General Division made an error, I must decide what I will do to remedy (fix) it.

[7] The General Division made an error of fact. I will return the matter to the General Division for reconsideration.

Issues

[8] The issues in this appeal are:

a) Did the General Division make an error of fact by ignoring evidence about the Claimant's work capacity?

b) Did the General Division make an error of fact by ignoring evidence about whether the Claimant followed medical advice?

c) Did the General Division make an error of law by failing to apply the work efforts test?

d) If the General Division made any of these errors, what will I do to fix (remedy) them?

Analysis

[9] First, I will describe my role at the Appeal Division in terms of reviewing General Division decisions. Second, I will explain how I have reached the conclusion that the General Division made an error of fact by ignoring some evidence. Third, I will explain what I will do to remedy the error.

Reviewing General Division decisions

[10] The Appeal Division does not provide an opportunity for the parties to re-argue their case in full. Instead, I reviewed the parties' arguments and the General Division decision to decide whether the General Division made any errors.

[11] The *Department of Employment and Social Development Act* (Act), lists the only errors I can consider. They are:

- The General Division acted unfairly.
- The General Division failed to decide an issue that it should have, or decided an issue that it should not have.

- The General Division based its decision on an important error regarding the facts in the file.

- The General Division misinterpreted or misapplied the law.[1]

Error of fact: ignoring evidence about capacity for work

[12] The General Division made an error of fact by failing to consider and discuss some of the evidence about the Claimant's capacity for work. This evidence was important enough that the General Division needed to discuss it. The General Division ignored some evidence.

– Errors of fact

[13] An error of fact arises either when the General Division ignores or misunderstands a fact in an important way.[2] An error of fact needs to be important enough that it could affect the outcome of the appeal.

[14] The General Division does not have to refer to every piece of evidence in its decision.[3] The Appeal Division can presume the General Division considered all of the evidence. However, the Minister can overcome that presumption by showing that the evidence the General Division did not mention in its reasons was important enough that the General Division needed to discuss it.[4]

[15] In other words, I can infer an error of fact when the General Division fails to mention some relevant evidence in its reasons. The more important the unmentioned evidence, the more it suggests that the General Division actually ignored that evidence.[5]

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[1] See section 58(1) of the *Department of Employment and Social Development Act* (Act).
[2] See section 58(1)(c) of the Act.
[3] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[4] See *Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498.
[5] The Federal Court talked about this in at least two cases: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) at paras 16 and 17; and *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 39.

– The evidence the Minister says the General Division ignored

[16] The Minister argues that the General Division made an error of fact by ignoring medical evidence about the Claimant's regular capacity to pursue alternate work. The Minister argues that the General Division ignored:

- The family doctor's opinion and the orthopedic surgeon's opinion that the Claimant could not return to his physically demanding job, but that he would benefit from lighter duties and encouraged him to seek alternate work.[6]
- The report from the two-day Functional Abilities Evaluation the Claimant's insurer requested in October 2016.[7]
- The insurer's notes about the Claimant that state that the Claimant said he thought he could do the job of a truck driver as long as the vehicle was automatic transmission. The insurer decided that the Claimant met the requirements to be a dispatcher (I'll refer to these documents as the insurer's documents).[8]
- Ontario Limitations to Participator Form (I'll refer to this as the OLPF form) completed by the family doctor stating the Claimant's limitations. That form listed no limitations for sitting, driving, operating machinery, ability to concentrate, energy/stamina, or fine motor skills.[9]

– The Claimant argues the General Division did not ignore evidence

[17] The Claimant argued that he did not have capacity for work, and so the General Division did not make an error of law by ignoring this evidence. The Claimant argues it

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[6] The Minister relies on the evidence including the orthopedic surgeon's letter to the family doctor dated December 13, 2016 at GD1-57 to 58; the family doctor's statement for long-term disability benefits dated December 15, 2015 at GD1-141; and the family doctor's letter to the Claimant's insurer dated June 27, 2016 at GD5-202.
[7] This report, dated October 5, 2016, is at GD1-62 to 73.
[8] The Minister relies on the Insurer 12-month review dated February 14, 2017 at GD5-349, the Insurer Portfolio Assessment and Management Plan at GD5-362; the Labour market survey dated May 17, 2016 at GD5-322 to 326, and the Insurer letter of information to the Claimant dated January 5, 2017 at GD5-337.
[9] This document is dated May 16, 2018, and is at GD5-397.

was clear that he could not do even sedentary work and the General Division did not gloss over any evidence.

– The General Division ignored some evidence about work capacity

[18] In my view, the General Division ignored some of the evidence when considering the Claimant's capacity for alternate work. The General Division reviewed some of the medical evidence about the Claimant's limitations, but it also ignored some evidence on this topic.[10]

[19] The General Division decided that the Claimant is not able to do the physically demanding types of jobs he did in the past, "or even jobs with light physical duties, due to his significant mobility restrictions."[11] The General Division noted that the Claimant had never held a sedentary job. Given his age, education, and work experience, he would be unlikely to get sedentary work.

[20] The General Division did expressly discuss some of the evidence that the Minister says it ignored. For example, the General Division did consider the letter from the orthopedic surgeon to the family doctor from December 2016.[12] Similarly, the General Division did discuss the Functional Abilities Evaluation from October 2016 in its decision.[13] In both cases, the General Division explained that it put little weight on those reports because the Claimant's condition worsened after the experts wrote the reports.

[21] However, I find that the General Division did ignore some of the other documents that described the Claimant's capacity for work. Specifically, the General Division did not discuss the insurer's documents and the OLPF form. Those documents are important because they contain information about the Claimant's ability to pursue alternate work within his limitations.

[22] There are two reasons why these documents were important.

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[10] See paragraphs 25 to 31 in the General Division's decision.
[11] See paragraph 40 in the General Division's decision.
[12] See paragraph 28 in the General Division's decision.
[13] See paragraph 27 in the General Division's decision.

[23] First, some of these documents are from 2017, which makes them particularly important given that the General Division put less weight on the 2016 documents stating that the Claimant's condition worsened after 2016.

[24] Second, these documents are important because they provide professional opinions about the Claimant's ability to pursue alternate employment. The General Division concluded that the Claimant was incapable regularly of pursuing **any** substantially gainful work on or before December 31, 2017.

[25] I infer that the General Division's failure to discuss these documents means that the General Division ignored them. The General Division made an error of fact.

Minister did not prove an error of fact about following medical advice

[26] I cannot find that the General Division made an error of fact by ignoring evidence about whether the Claimant followed medical advice.

[27] The Minister argues that the General Division made an error by failing to discuss and consider whether the Claimant unreasonably refused treatment. There are several documents in the Claimant's medical file suggesting that the Claimant may have unreasonably refused treatment.

[28] The Minister points out that the General Division did not discuss and consider whether, before the end of the MQP, the Claimant unreasonably refused these surgical and non-surgical treatments that his doctors recommended:

- Right knee replacement surgery
- A brace and physiotherapy for his knee

[29] The evidence indicates that the Claimant cancelled his knee replacement surgery twice before the end of the MQP.[14] The General Division decision mentions delay in

[14] See GD5-628 and GD1-83.

scheduling the knee replacement surgery. The Claimant testified “he still does not have a date for this surgery, in part due to delays caused by the COVID-19 pandemic.”[15]

[30] The General Division’s decision does not address whether the Claimant unreasonably refused surgery during the MQP by cancelling. Similarly, the decision does not discuss whether the Claimant unreasonably refused the non-operative treatment recommendations like a brace or the physiotherapy.

[31] The Claimant argues if the Appeal Division had access to his testimony, it would be clear why the General Division did not discuss whether the Claimant unreasonably refused surgery during the MQP.

[32] In my view, the Minister did not prove that the General Division made an error of fact.

[33] The General Division decision contains a section about the Claimant’s treatment. This section describes aspects of the Claimant’s treatment in which he participated fully. That section does not talk about the recommendations about the brace or the physiotherapy. But it does mention the delay in accessing knee surgery because of COVID-19 (after the end of the MQP).

[34] I am not in a position to decide fairly, based on the information I have, whether the evidence about the rescheduled surgeries during the MQP and the recommendations about the brace and the physiotherapy were important enough that the General Division needed to discuss them.

[35] I would only infer that General Division’s the silence about these questions means it ignored the evidence if that evidence was important enough that the General Division needed to discuss it.

[36] Unfortunately, the General Division failed to produce a complete recording of the hearing. I can’t review all of the evidence that the General Division had. I can’t tell

[15] See paragraph 30 in the General Division decision.

whether the Claimant gave testimony that made it clear why he rescheduled his surgeries such that it was not important enough to discuss.

[37] Perhaps in light of all of the evidence, it was clear to the General Division that the Claimant did not **refuse** treatment at all, and only **delayed** it in which case it may be that the written evidence about cancelling surgery dates was not important enough that the General Division needed to discuss it.

[38] Similarly, I don't know what the Claimant said in his testimony about physiotherapy or the brace. In another part of the decision setting out the important medical evidence, the General Division mentions non-surgical recommendations.[16] The General Division seems to have been live to that evidence. It may not have been important enough to discuss in relation to following medical advice.

[39] The Minister did not prove that the General Division made an error of fact. I cannot find an error of fact in this set of circumstances without access to a complete record.

No finding on alleged error of law: work efforts test

[40] In light of my finding that the General Division ignored evidence about capacity for work, there is no need for me to decide whether the General Division made an error by failing to apply the work efforts test.

[41] The Federal Court of Appeal says that if a claimant has some evidence of work capacity, then General Division must consider whether the claimant made efforts to get and keep work failed because of the claimant's medical conditions.[17] I refer to this as the work efforts test.

[42] The Minister argues that the General Division made an error by failing to consider and apply the work efforts test.

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[16] See paragraph 26 of the General Division's decision: "non-operative treatment was recommended for his right knee while he continues to work…"
[17] See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

[43] The Claimant argues there was no need for the General Division to decide this question since there was no evidence of work capacity.

[44] I will not make a finding about whether the General Division made an error of law by failing to apply the work efforts test to the Claimant's appeal. The General Division found that there was no evidence of capacity for work. In that situation, the law does not require the General Division to apply the test.

[45] In this decision, I've found that the General Division made an error of fact by ignoring evidence about the Claimant's work capacity. That error will require remedy, and the work efforts test only becomes relevant once there is a finding about work capacity.

Fixing the Error

[46] Once I find that the General Division made an error, I can decide how to fix the error. The two options are as follows:

- Give the decision that the General Division should have given.
- Return the matter to the General Division for reconsideration.[18]

[47] I can decide any question of law or of fact necessary for dealing with an appeal.[19]

[48] Due to what seems to be a technical error, the General Division only recorded a portion of the hearing, and did not record the whole of the Claimant's evidence.

[49] The Minister argued that if I found that the General Division made an error of fact by ignoring evidence of work capacity, I should give the decision that the General

[18] See section 59 of the Act.
[19] See section 64 of the Act.

Division should have given. Giving the decision that the General Division should have given is an efficient way to move forward in many cases.[20]

[50] However, in this case, I do not have a complete record. If I were to give the decision that the General Division should have given, I would need to reach a conclusion about the Claimant's capacity to work. To reach a decision on the ultimate question about whether the Claimant is entitled to a disability pension, I would need to be satisfied that I had reviewed both the medical evidence and the testimony from the hearing. It is not fair to the parties for me to reach that conclusion when I have not heard all of the Claimant's testimony on the issues in his appeal.

[51] I will return the matter to the General Division for reconsideration. The Claimant is entitled to a new hearing so that there is a full record to support whatever conclusion the General Division ultimately reaches about all of the issues, including work capacity and the Claimant's treatment efforts.[21]

Conclusion

[52] I have allowed the appeal. The General Division made an error of fact. I return the matter to the General Division for reconsideration.

Kate Sellar

Member, Appeal Division

[20] See section 2 of the *Social Security Tribunal Regulations*, which says that the regulations are to be interpreted in a way that secures the just, most expeditious and least expensive determination of appeals and applications.
[21] And if the General Division finds that the Claimant has capacity for work, I have no doubt that the General Division will apply the employment efforts test as is required by the Federal Court of Appeal.