Citation: *VW v Minister of Employment and Social Development*, 2022 SST 684

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	V. W.
Representative:	Vicki Doidge
Respondent:	Minister of Employment and Social Development
Representative:	Ian McRobbie

Decision under appeal:	General Division decision dated January 14, 2022 (GP-20-1480)

Tribunal member:	Neil Nawaz
Type of hearing:	Teleconference
Hearing date:	July 6, 2022
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	July 29, 2022
File number:	AD-22-218

Decision

[1] I am allowing this appeal. The General Division made factual errors when it denied the Claimant a disability pension. I am returning this matter to the General Division for another hearing.

Overview

[2] The Claimant is a 40-year-old former personal support worker. In January 2019, she was in a car accident that left her with chronic neck and back pain.

[3] In August 2019, the Claimant applied for a Canada Pension Plan (CPP) disability pension. She claimed that she could no longer work because of ongoing pain, fatigue, and depression.

[4] The Minister refused the application because, in her view, the Claimant had not shown that she had a severe and prolonged disability.[1] The Claimant appealed the Minister's refusal to the Social Security Tribunal's General Division.

[5] The General Division held a hearing by teleconference and dismissed the appeal because it found that the Claimant's disability was not severe. The General Division also found that the Claimant had failed to follow medical advice.

[6] The Claimant then asked the Tribunal's Appeal Division for permission to appeal. She alleged that, in coming to its decision, the General Division made the following errors:

- It did not make any finding about the severity of her disability, specifically her ability to carry on remunerative employment;
- It found that she had not made sufficient effort to follow her doctors' treatment recommendations; and

[1] Coverage for the CPP disability pension is established by working and contributing to the CPP. In this case, the Claimant's earnings and contributions give her disability coverage until December 31, 2025.

- It failed to consider extenuating circumstances around her decisions to refuse or delay recommended treatment.

[7] I granted the Claimant permission to proceed because I thought she had an arguable case. Earlier this month, I held a hearing by teleconference to discuss the Claimant's allegations in full.

[8] Now that I have heard submissions from both parties, I have concluded that the General Division's decision cannot stand.

What the Claimant must prove

[9] There are four grounds of appeal to the Appeal Division. A claimant must show that the General Division

- proceeded in a way that was unfair;
- acted beyond its powers or refused to use them;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.[2]

[10] My job was to determine whether the Claimant's allegations fell into one or more of the permitted grounds of appeal and, if so, whether any of them had merit.

Analysis

[11] I am satisfied that the General Division made errors in assessing the Claimant's compliance with medical advice. Because the General Division's decision falls for this reason alone, I see no need to consider the Claimant's remaining allegations.

The General Division failed to properly consider the Claimant's reasons for not taking treatment

[12] In my view, the General Division ignored or misconstrued selected medical evidence when it found that the Claimant had failed to follow her treatment providers'

[2] See *Department of Employment and Social Development Act* (DESDA), section 58(1).

advice. In doing so, the General Division failed to give due consideration to the Claimant's reasons for not taking prescription medication or attending physiotherapy.

– The law requires claimants to mitigate their disability

[13] Disability claimants must present, not only evidence about their disability, but also evidence of their efforts to find work and to seek treatment.[3] This is called the duty to mitigate. The Federal Court of Appeal has made it clear that claimants are not entitled to a CPP disability pension unless they do everything reasonably possible to overcome their impairments. The court has also stated that the burden of proof rests entirely with the claimant.[4] In other words, it is up to the claimant to provide evidence that they have attempted to find work and seek treatment.

[14] In its decision, the General Division concluded that the Claimant had failed to follow medical advice. In coming to this conclusion, the General Division followed principles set out in two Federal Court of Appeal cases, *Lalonde* and *Sharma*.[5] However, merely citing legal authorities and their principles does not necessarily mean that the General Division understood those principles or applied them correctly.

[15] In *Lalonde*, the claimant's specialists had recommended that she attend physiotherapy, but she refused to do so because a physiotherapist had once told her that the treatment might be harmful to her. The court concluded that, when claimants refuse to undergo a recommended treatment that is likely to affect their disability status, claimants must then establish that their refusal was reasonable.

[16] In *Sharma*, the claimant didn't outright refuse treatment recommendations but took them lightly. In that case, the General Division concluded that the claimant was not entitled to a disability pension because he had not used his sleep mask as instructed

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[3] This principle is outlined in a case called *Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33.
[4] See *Klabouch*, note 3.
[5] See *Lalonde v Canada (Minister of Human Resources Development*), 2002 FCA 211; and *Sharma v Canada (Attorney General)*, 2018 FCA 48.

and had left the hospital prematurely. Even though the claimant had partially complied with treatment, the court, relying on *Lalonde*, upheld the General Division's decision.

[17] In both *Lalonde* and *Sharma*, the court emphasized the need to consider whether a claimant's non-compliance is reasonable and what impact it will have on their disability status.

– The General Division misconstrued doctors' comments about prescription medications

[18] In its decision, the General Division found that that the Claimant had no reason to refuse drugs, even though she was breastfeeding a child:

> The [Claimant] has also made it clear that she is not comfortable taking any medication while breastfeeding her youngest child. The [Claimant] said no doctor would prescribe medication while breastfeeding or pregnant. While I respect the [Claimant's] choice, the medical evidence doesn't support this belief.[6]

[19] I'm not sure that the General Division did respect the Claimant's choice. Nor is it clear to me that the Claimant's treatment providers dismissed her concerns about taking prescription medications while nursing. In support of its finding, the General Division cited two medical documents:

- Dr. Harb's progress note, which mentioned that the Claimant declined an antidepressant and an anti-inflammatory because she was breastfeeding;[7] and
- Dr. Kamawi's pain clinic report, which noted that the Claimant was "not interested in pharmacotherapy because she is breastfeeding" but offered her a list of medications to try if pain relief was inadequate.[8]

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[6] See General Division decision, paragraph 58.
[7] See General Division decision, paragraph 59, referring to an undated office note by Dr. Raymond Harb, family physician, GD4-115.
[8] See General Division decision, paragraph 60, referring to Dr. Malalai Kamawi's pain management report dated March 1, 2021, GD8-2

[20] When I look at these two reports, I don't see any indication that their authors actually prescribed medications or that they even strongly urged her to take them. It appears that, as much as anything else, Dr. Harb and Dr. Kamawi were merely **suggesting** that the Claimant take medications—provided that she felt comfortable doing so while nursing her child.

[21] More to the point, neither doctor expressed any disapproval of the Claimant's decision not to take prescription medications while breastfeeding. They could have explicitly stated that the Claimant's concerns had no medical basis, but they did not.

[22] Despite this, the General Division concluded:

> I disagree with the [Claimant] when she says no doctor would prescribe medication to a breastfeeding parent. These treatments were offered to her while she was breastfeeding. They could also be tried when she stops.[9]

On that last point, I saw nothing in the General Division's decision to suggest that the Claimant has ever categorically refused to take prescription medication. Based on the record, it appears that the Claimant only wanted to delay taking drugs until she had finished breastfeeding. In fact, the Claimant does not appear to have any objection to prescription medications *per se*, having previously tried a number of them, including:

- Naproxen (for pain);[10]
- Mobicox (for pain);[11]
- Tylenol #2 (for pain);[12]
- Elavil (for chronic pain and depression);[13] and
- Phenobarbital (for epilepsy).[14]

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[9] See General Division decision, paragraph 63.
[10] See Dr. Harb's office note dated January 31, 2019, GD4-2.
[11] See Dr. Harb's office note dated February 12, 2019, GD4-4.
[12] See Dr. Harb's office note dated February 12, 2019, GD4-4 and Dr. Grigory Karmy's chronic pain assessment report dated April 14, 2020, GD4-106.
[13] See Harb's office note dated July 11, 2019, GD4-24 and Dr. Karmy's report (note 12), GD4-106.
[14] See Dr. K. Santher's psychiatric consultation note dated November 26, 2020, GD6-4.

[23] In short, there is no evidence that the Claimant refused to take prescription medications on principle or out of some misguided belief that they would do her more harm than good. She did stop taking them—by all accounts temporarily—while she was first pregnant, then breastfeeding, but none of her treating physicians appeared to find this choice unreasonable. Despite this, the General Division drew an adverse inference from what it found was the Claimant's unreasonable non-compliance with recommended medical treatment.

– The General Division ignored the Claimant's reasons for not attending physiotherapy

[24] The General Division also found that the Claimant had stopped going to physiotherapy without good reason:

> It is documented that the Appellant stopped physiotherapy in August 2019, but it is unclear from the medical evidence as to why. She became pregnant that month but there is **no medical evidence** to show that physiotherapy would have been bad for her pregnancy [emphasis added].[15]

[25] It is true that the Claimant cited her pregnancy for halting physiotherapy, but that was only one of the reasons she gave for doing so. At the General Division hearing, the Claimant testified that she had never resumed physiotherapy because (i) her private insurer had cut off coverage and she could no longer afford to pay for treatment[16] and (ii) she had been told that more physiotherapy wasn't going to harm her, but it wasn't going to produce much additional benefit either.[17]

[26] The file contained evidence corroborating the Claimant's explanation that she could no longer afford physiotherapy. Dr. Harb noted that the Claimant had been "cut off from therapy."[18] He then wrote, "No therapy since [she] was cut off insurance in August 2019."[19] Later, a chronic pain assessment report stated, "She participated in an active

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[15] See General Division decision, paragraph 52.
[16] Refer to recording of General Division hearing at 32:30.
[17] Refer to recording of General Division hearing at 30:25.
[18] See Dr. Harb's office noted dated November 26, 2019, GD 4-69.
[19] See Dr. Harb's office noted dated February 25, 2020, GD 4-84.

exercise program. The claimant reports that her rehabilitation treatment was discontinued on August 12, 2019 due to lack of insurance coverage."[20]

[27] Despite this evidence, the General Division didn't mention the Claimant's lack of coverage in its decision, even though it was among her stated reasons for stopping physiotherapy. If the General Division found the Claimant less than credible on this point, its decision was silent about that too.

[28] Instead, the General Division found no medical evidence that physiotherapy would have been bad for the Claimant's pregnancy. This finding might have been true, but it missed the Claimant's other reasons for not continuing physiotherapy, not just her lack of resources, but her feeling that more of it would do little good.

[29] The General Division addressed this latter explanation but did not accept it: "I don't find it reasonable not to pursue treatment that may provide some benefit and potentially enough benefit to be able to pursue substantially gainful employment."[21]

[30] The General Division found that the Claimant had no reason to regard further physiotherapy as pointless. But this finding ignored medical evidence that essentially said just that. The April 2020 chronic pain assessment report described the prognosis for full recovery as poor, even with an active exercise program.[22] More to the point, the Claimant's physiotherapist determined that she had little more to offer his client, since "there were no significant improvements in pain or activity tolerance with PT/OT [physiotherapist or occupational therapist] here."[23] The physiotherapist advised the Claimant to follow a home exercise program and referred her to a multidisciplinary chronic pain management program. The Claimant was agreeable to both.

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[20] See Dr. Karmy's report (note 12), GD4-106
[21] See General Division decision, paragraph 57.
[22] See Dr. Karmy's report (note 12), GD4-111.
[23] See report dated December 3, 2020 by Eric Peron, physiotherapist, GD6-7.

– The General Division can't be presumed to have considered key evidence in this case

[31] The Federal Court of Appeal does not demand perfect adherence to every treatment recommendation. However, it does require claimants to explain why they may not have followed medical advice that was likely to improve their condition. Given this requirement, decision-makers must make sure that they carefully consider all aspects of a claimant's reasons for a supposed failure to seek treatment. Unfortunately, that did not happen here.

[32] In this case, the General Division wrongly understood medical reports to mean that the Claimant's doctors had prescribed, rather than merely suggested, medications after her pregnancy. The General Division also inferred, without any basis, that they disapproved of the Claimant's refusal to take such medications while breastfeeding.

[33] The General Division also erred by ignoring one of the Claimant's major reasons—the loss of her coverage—for not pursuing physiotherapy. It chose instead to focus on the Claimant's conviction that pregnancy was incompatible with physiotherapy while ignoring evidence that further physiotherapy was unlikely to produce anything more than marginal benefit.

[34] In assessing the Claimant's reasons for not taking treatment, the General Division based its decision on erroneous findings of fact made without regard for the material before it.[24] The General Division is presumed to have considered all the evidence before it.[25] However, that presumption can be rebutted if the General Division overlooks a highly significant piece of information or gets it wrong. Here, the General Division did not properly assess the Claimant's reasons for refusing treatment, because it had ignored or misconstrued key facts underlying those reasons.

[24] This is the precise wording of section 58(1)(c) of the DESDA.
[25] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.

Remedy

[35] When the General Division makes an error, the Appeal Division can fix it by one of two ways: (i) it can send the matter back to the General Division for a new hearing or (ii) it can give the decision that the General Division should have given.[26]

[36] The Tribunal is required to proceed as quickly as fairness permits. I would ordinarily be inclined to give the decision that the General Division should have given and decide this matter on its merits myself, but I do not think that the record is complete enough to allow me to do so.

[37] I have listened to the entire recording of the General Division hearing. I heard the Claimant testify about many relevant topics, including her work history, the car accident that ended her job, her medical conditions and limitations, and the treatments that she received for them. However, I did not hear the Claimant testify about one crucial area—her efforts, if any, to seek alternative employment. This is an important topic in any CPP disability claim, and this gap in the record makes me wary about deciding the merits of this matter myself.

[38] Unlike the Appeal Division, the General Division's primary mandate is to weigh evidence and make findings of fact. As such, it is inherently better positioned than I am to hear the Claimant's testimony on this important topic and to explore whatever avenues of inquiry that may arise from it. In this particular instance, I feel my only option is to refer this matter back to the General Division for rehearing.

[26] See DESDA, section 59(1).

Conclusion

[39] For the above reasons, I find that the General Division based its decision on two erroneous findings of fact made without regard for the material before it. Because the record is not sufficiently complete to allow me to decide this matter on its merits, I am referring it back to the General Division for a fresh hearing.

[40] The appeal is allowed.

Member, Appeal Division