Citation: *GD v Minister of Employment and Social Development*, 2022 SST 806

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	G. D.
Respondent:	Minister of Employment and Social Development
Representative:	Viola Herbert

Decision under appeal:	General Division decision dated February 21, 2022 (GP-21-1147)

Tribunal member:	Neil Nawaz
Type of hearing:	Videoconference
Hearing date:	August 9, 2022
Hearing participants:	Appellant Respondent's representative
Decision date:	August 15, 2022
File number:	AD-22-150

Decision

[1] The appeal is dismissed. The General Division did not make any errors.

Overview

[2] The Claimant, G. D., has held a variety of jobs, all of them temporary or part-time. He has a university degree and is now 43 years old. For many years, he has lived with numerous medical conditions, including Marfan syndrome, diabetes, and morbid obesity. He last worked in 2015, when he quit a job as a produce clerk.

[3] In April 2020, the Claimant applied for a Canada Pension Plan (CPP) disability pension. He said that he could no longer work because of extreme fatigue. Service Canada refused the Claimant's application because, in its view, the Claimant had not shown that he had a severe and prolonged disability as of his minimum qualifying period (MQP), which ended on December 31, 2009.[1]

[4] The Claimant appealed the Minister's refusal to the Social Security Tribunal's General Division. The General Division held a hearing by teleconference and dismissed the appeal because it did not find enough medical evidence to show that the Claimant was disabled. The General Division acknowledged that the Claimant had functional limitations now but saw no indication that they prevented him from substantially gainful employment as of his MQP. The General Division also found that the Claimant had refused to seriously consider bariatric surgery, which was recommended by his cardiologist.

[5] The Claimant then asked the Tribunal's Appeal Division for permission to appeal. He insisted that he was disabled. He alleged that the General Division made the following errors:

[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 required him to show that he became disabled before December 31, 2009 and had remained so ever since.

- It ignored evidence that he weighed the costs and benefits of bariatric surgery before deciding it was not the right treatment for him at the time;
- It ignored evidence that he had unsuccessfully pursued an alternative career in audio engineering that would have been better suited to his functional limitations; and
- It ignored evidence that his post-MQP job at X never brought him "substantially gainful" earnings and that he quit largely because of his disability.

[6] I gave the Claimant permission to appeal because I thought he had an arguable case. Earlier this month, I held a hearing by videoconference to discuss his allegations in full.

Issues

[7] In this appeal, I had to answer the following questions:

- Did the General Division ignore the Claimant's reasons for not pursuing bariatric surgery?
- Did the General Division disregard the Claimant's attempts to seek an alternative occupation?
- Did the General Division mischaracterize evidence about the Claimant's last job?

Analysis

[8] 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]

[9] To succeed, the Claimant had to show that the General Division made an error that fell into one or more of the above grounds of appeal. I have reviewed the General Division's decision, as well as the law and the evidence it used to reach that decision. I have concluded that none of the Claimant's reasons for appealing has merit.

The General Division considered the Claimant's reasons for declining bariatric surgery

[10] The Claimant alleges that the General Division ignored his explanation for not following a medical recommendation. He maintains that he had good reasons for not pursuing bariatric surgery. He says that he looked into the potential risks and benefits of the procedure and decided that it wasn't for him. He notes that death is always a possibility when you submit to such an invasive operation.

[11] I fail to see merit in this argument. The General Division didn't ignore the Claimant's explanation for not pursuing surgery. It simply decided that his explanation wasn't reasonable.

– The law requires claimants to mitigate their disability

[12] Disability claimants must show that they mitigated their disability. That means they have to provide evidence about, not just their disability, but also their efforts to seek treatment for that disability.[3] 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.

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[2] *Department of Employment and Social Development Act* (DESDA), section 58(1).
[3] This principle is outlined in a case called *Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33.
[4] See *Klabouch, supra* note 3.

[13] 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]

[14] 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.

[15] The claimant in *Sharma* 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 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.

[16] More recently, in a case called *Brown*, the Federal Court of Appeal affirmed the obligation on claimants to "make efforts to treat their disability, where this is possible, and to seek employment that accommodates their limitations."[6] The Court found that the General Division was entitled to find that Mr. Brown had no good excuse not to follow his doctors' recommendations to exercise and lose weight.

[17] None of these cases require perfect adherence to every treatment recommendation. But they all emphasize the need to consider whether a claimant's non-compliance is reasonable and what impact such non-compliance will have on their disability status.

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[5] See *Lalonde v Canada (Minister of Human Resources Development*), 2002 FCA 211 and *Sharma v Canada (Attorney General)*, 2018 FCA 48.
[6] See *Brown v Canada (Attorney General)*, 2022 FCA 104, paragraph 11.

– The General Division considered the Claimant's explanation for not pursuing surgery

[18] In this case, the General Division based much of its decision on what it found was the Claimant's unreasonable refusal to consider a weight reduction procedure:

> The [Claimant] was advised to consider bariatric surgery. Dr. Jack Colman explained that losing weight was important because he was very overweight (peaking at about 400 pounds) and he might need heart surgery again if he has complications from Marfan syndrome. Being overweight would make a positive surgical outcome less likely.[7]

[19] The evidence clearly shows that the Claimant was advised to consider bariatric surgery. In 2016, Dr. Colman noted that the Claimant had gained weight since his last consultation. The cardiologist initiated a "detailed discussion of [the Claimant's] need of involvement in a formal bariatric medical surgical program," adding "he might be a gold star candidate" if he first lost a bit of weight.[8] According to Dr. Colman, the Claimant agreed to be referred to the program.

[20] The Claimant testified that he didn't follow through with the referral. The General Division asked for an explanation and found it wanting:

> The [Claimant] never went to a consultation to discuss the possibility of bariatric surgery, even though he told his doctor at one point that he would go. At the hearing, he said that he had read pamphlets about the surgery and concluded that it was likely to shorten his life rather than extend it. I find that this was unreasonable. The [Claimant] should have at least attended the consultation before deciding whether bariatric surgery was right for him.[9]

[21] The above passage accurately reflects what the Claimant told the General Division.[10] The Claimant argues that his refusal to submit to an invasive surgical procedure was reasonable and should not have been held against him. I can't agree.

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[7] See General Division decision, paragraph 33.
[8] See consultation report dated November 7, 2016 by Dr. Jack Colman, cardiologist, GD2-99.
[9] See General Division decision, paragraph 34.
[10] Refer to recording of General Division hearing at 38:20.

One of the General Division's jobs is to make findings of fact. It has considerable leeway to make such findings as long as it does not base its decision on errors that are "perverse or capricious" or "made without regard for the material before it."[11] Based on my review of the material, I don't see how the General Division got the facts around the Claimant's non-compliance wrong. What's more, the General Division was entitled to find that personally researching the risks of proposed surgery is no substitute for discussing them with a qualified medical professional.

– **The General Division took the Claimant's efforts to lose weight into account**

[22] The Claimant also alleges that the General Division failed to recognize that he had attempted—with some success—to lose weight by means other than surgery.

[23] Again, I don't find this argument persuasive. The General Division was well aware that the Claimant had attempted to reduce by diet and exercise. However, it concluded that the Claimant's attempts to address his obesity were not particularly successful and not nearly as effective as undergoing bariatric surgery would have been. In its decision, the General Division summarized the evidence on this topic:

> [The Claimant] admitted that he had a gym membership at one point, but not anymore. He tried walking on a treadmill but stopped. Dr. Dina Reiss wrote in January 2019 that he wasn't exercising much. Dr. Lorna Swann wrote in December 2019 that the [Claimant] had stopped exercising and gone back to his regular diet. **The [Claimant] is still 350 pounds, down from 394 pounds in 2016** [emphasis added].[12]

[24] The Claimant didn't dispute any of the above findings except to protest that losing nearly 50 pounds "wasn't that bad." However, the General Division didn't see it that way: "[C]onsidering all the evidence, I conclude that he hasn't made genuine efforts to lose weight."[13]

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[11] These quotes reflect the precise wording of section 58(1)(c) of the DESDA. See also See *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[12] See General Division decision, paragraph 36.
[13] See General Division decision, paragraph 37.

[25] In its role as finder of fact, the General Division is entitled to draw reasonable inferences from the evidence. The Claimant may not agree with those inferences but, in the absence of a significant factual error, that is no reason to overturn the General Division's decision.

– **It makes no difference when the Claimant refused treatment**

[26] In my decision granting the Claimant permission to appeal, I noted that Dr. Colman recommended bariatric surgery in November 2016—seven years after the end of the Claimant's MQP. At the time, I wondered whether the Claimant's refusal to seek treatment might harm his disability claim because it occurred long after the end of his coverage.

[27] In the end, I decided that it didn't matter when a failure to mitigate occurs.

[28] The relevant case law requires disability claimants to take reasonable steps to seek treatment but it says nothing about when that treatment should be sought. *Lalonde*, *Sharma*, and *Brown* all involved claimants who either refused to accept medical advice or complied with it haphazardly. The logic of these cases is that there is no way to assess a claimant's inability to work unless all reasonable therapeutic options have been exhausted. If effective, treatment can lessen the severity of a disability or stop it from becoming severe in the first place. If ineffective, treatment can confirm the severity of a disability or indicate that recovery has plateaued. In both scenarios, treatment reveals something about whether a disability is severe and prolonged, and it makes no difference whether that treatment—or a claimant's refusal to take it—comes during the coverage period or later.

The General Division considered the Claimant's attempts to pursue an alternative occupation

[29] The Claimant argues that the General Division ignored evidence that he had unsuccessfully pursued an alternative career in audio engineering that would have been better suited to his functional limitations.

[30] I don't find this argument compelling. The General Division was aware that the Claimant had enrolled in a retraining program. However, it decided that the Claimant's enrollment in the program indicated capacity rather than lack of it. The Claimant testified that he attended about 25 hours of in-person classes per week in 2011. Between this program and the Claimant's X job, the General Division concluded, "The fact that the [Claimant] was able to study and work after December 31, 2009, despite reporting that his symptoms got worse **after** 2009, further shows that he could work by December 31, 2009 [emphasis in original]."[14]

[31] The Claimant may not agree with the General Division's analysis, but I fail to see to see any errors in it.

[32] It is true that disability claimants, if they have some remaining capacity, must make an effort to return to work or pursue an alternative occupation. But that is not all. They must also show that such efforts have been unsuccessful **because** of their impairments.[15]

[33] In this case, the Claimant failed to show that his effort to become an audio engineer was unsuccessful because of his health problems. The evidence shows that the Claimant managed to complete a fairly intensive one-year program at the Y, a private career training college. While the Claimant never got a job as an audio engineer, it was not because of his Marfan syndrome, his diabetes, or his weight, but for other reasons, including the relative scarcity of jobs in the field.

[34] Claimants are eligible for the CPP disability pension only if they are unable regularly to pursue any substantially gainful occupation.[16] However, labour market conditions are irrelevant in determining whether an individual is disabled.

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[14] See General Division decision, paragraph 43.
[15] This principle comes from a case called *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[16] See *Canada Pension Plan*, section 42(2)(a)(i).

The General Division properly assessed evidence about Claimant's last job

[35] The Claimant alleges that the General Division ignored evidence that his post-MQP job at X never brought him "substantially gainful" earnings and that he quit largely because of his disability.

[36] Now that I have fully reviewed the record, I must disagree.

[37] There is nothing to indicate that the General Division ignored what the Claimant made at his last job. In its decision, the General Division noted that the Claimant worked part-time at X from April to December 2015. The General Division seems to have regarded the job as "substantially gainful," even though it earned the Claimant only $9,527 in total. Although the General Division did not cite this figure in its decision, I am satisfied that it was nonetheless aware of it.

[38] That is because the General Division is presumed to have considered all the evidence on the record.[17] The General Division presumably knew that the Claimant's 2015 earnings were less than the year's substantially gainful threshold.[18] However, it found other factors suggesting that the Claimant was capable regularly of performing a substantial occupation, such as:

- The Claimant's job at X lasted for only eight months, or two-thirds, of the year;
- The Claimant's former supervisor at X described his attendance as "fair" and his work as "satisfactory";
- The Claimant worked part-time hours at X because that was all that was available to him, not because that was all he could handle; and

[17] See *Simpson, supra* note 11.
[18] Section 68.1 of the *Canada Pension Plan Regulations* defines "substantially gainful" as salary or wages equal to or greater than the maximum annual amount that a person can receive as a disability pension. In 2015 that amount was $15,175.

- The Claimant quit because he found another job, not because of his health problems.

[39] Much of this information came from a questionnaire completed by X's human resources department at the request of the Minister.[19] The Claimant insists that he lied to X about his reasons for quitting because he didn't think it was their business. He says that he had kept his impairments to himself when he was hired, and he didn't think it necessary to disclose them on his way out.

[40] However, the Claimant said much the same thing to the General Division,[20] which chose instead to believe the questionnaire. That was its right as finder of fact. As noted, the General Division is entitled to weigh the evidence as it sees fit so long as it does not stray into error.[21] The General Division found the Claimant less than credible on this question, and I can't second-guess that finding unless it was based on a perverse or capricious error made without regard for the material before it. I see nothing that rises to that standard, especially since the Claimant himself admitted that he was willing to bend the truth in his communications with his former employer.

Conclusion

[41] The General Division did not commit any errors that fall within the permitted grounds of appeal. From what I can see, the General Division made a full and genuine effort to weigh the evidence and apply the law. For that reason, its decision stands.

[42] The appeal is therefore dismissed.

Member, Appeal Division

[19] See employer questionnaire completed on July 12, 2020 by A. A., X personnel manager, GD2-9.
[20] Refer to recording of General Division hearing at 34:20.
[21] See *Simpson, supra* note 11.