Citation: *KO v Minister of Employment and Social Development*, 2022 SST 1188

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	K. O.
Representative:	Gavin Cosgrove
Respondent:	Minister of Employment and Social Development
Representative:	Viola Herbert

Decision under appeal:	General Division decision dated August 23, 2021 (GP-20-563)

Tribunal member:	Kate Sellar
Decision date:	February 4, 2022
File number:	AD-21-392

Decision

[1] I am allowing the appeal. I am returning the appeal to the General Division for reconsideration by a different member. These reasons explain why.

Background

[2] K. O. (Claimant) was a carpenter. He stopped working after he had a motorcycle accident in May 2018. He had soft issue damage and five surgeries on his wrist. He had a concussion. He has adjustment disorder with mixed anxiety and depressed mood.

[3] The Claimant applied for a disability pension under the Canada Pension Plan (CPP). The Minister refused his application initially and on reconsideration. The Claimant appealed to this Tribunal. The General Division decided that the Claimant was not eligible for the disability pension. The Appeal Division granted the Claimant permission to appeal the General Division's decision.

The parties agree on the outcome of the appeal

[4] The parties have asked for a decision based on a written agreement dated January 27, 2022. The parties asked me to allow the Claimant's appeal and refer the case back to the General Division for reconsideration. The parties agreed that the General Division may have made an error of law under the *Department of Employment and Social Development Act* (Act) when it considered:

- the reasonableness of the Claimants non-compliance with treatment recommendations; and
- the impact of the non-compliance on his disability.

[5] The agreement says (in part):

> The [Claimant] stated in his Request for Leave to Appeal that he suffers from profound depression and post traumatic stress disorder. Complicating his ability to treat his impairments was the delay in treatment funding available to the (sic) him, which he

> stated that the Review Tribunal held against him, suggesting he did not file medical evidence.
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> The [Claimant] stated that he explained why he did not take certain steps due to funding hurdles. The [Claimant] also stated that he was and continues to be treated for these conditions and that evidence was before the Tribunal in writing and in the form of viva voce evidence. Unfortunately, the Tribunal did not record his hearing due to "technical failure."
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> The parties agree that there is a significant gap in the evidence due to technical failure and the General Division was unable to develop the evidentiary foundation so that the Appeal Division would have the necessary facts to render a decision. Because of this significant gap in the evidence the parties agree that this matter should be returned to the General Division for a hearing based on the current record with an opportunity to clarify/add to the evidence.[1]

[6] I accept the parties' agreement.

Error of Law

[7] In my view, the General Division made an error of law in its analysis of the Claimant's compliance with treatment.

[8] The General Division concluded that the Claimant:

- did not follow medical advice and
- failed to give a reasonable explanation for not following the advice.

[9] The General Division reviewed several medical reports that identified psychological barriers to working for the Claimant. The medical documents showed that at least one doctor recommended that the Claimant see a psychologist.[2]

[10] The General Division acknowledged that the Claimant had "exhausted his funding from the insurance company quickly and therefore did not have the money for

[1] See AD2 for the agreement the parties signed.
[2] The General Division explained that the Claimant saw a psychologist once for an assessment and a second time for driver anxiety. He recommended the Claimant see a psychologist. See paragraph 27 of the General Division decision.

treatment."[3] The General Division decided that the Claimant refused treatment unreasonably. The reasons state that it would have been

> …reasonable for the [the Claimant] to consult with is (*sic*) family physician for help. He did not. As well, there are concussion treatment facilities and mental health treatments which are available at no cost. It is reasonable his family physician could have helped with securing some treatment at no cost to the Claimant.
>
> I accept the Claimant was focussing on his physical health However, he is arguing that this mental health is equally as important to his determination of a severe disability. As such, he had an obligation to treat his mental health with the same effort as he put into his physical health.[4]

[11] The Claimant has no obligation to exhaust all treatment efforts.[5] When it comes to treatment compliance, the case law requires the General Division to:

- Identify the treatment recommendation.
- Decide whether the Claimant refused the recommendation.
- Decide whether the Claimant's refusal was reasonable.
- Consider what the impact of the treatment would have been on the Claimant's disability.

[12] The treatment recommendation was for a psychologist. The Claimant's evidence was that he ran out of access to funds for that treatment. The parties agree that the Claimant stated that he was and continues to receive treatment.

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[3] This is in the General Division decision at paragraph 38.
[4] See paragraphs 39 and 40 of the General Division decision.
[5] The Federal Court of Appeal explained that Claimants need to make reasonable efforts to manage medical conditions in *Klabouch v Canada (Social Development)*, 2008 FCA 33 and *Sharma v Canada (Attorney General)*, 2018 FCA 48. There is no reference to exhausting all treatment options in these cases. The requirement set out in *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211, is that claimants are not to unreasonably refuse treatment, which is different from exhausting all treatment options.

[13] It seems to me that the General Division must assess the Claimant's explanation on its own terms to determine if it is reasonable or not. Instead, the General Division considered whether the Claimant had other reasonable alternatives to seek other no-cost treatment through his family physician, perhaps by other types of professionals or other services that might be free. The recommendation was for a psychologist, not to speak further with his family doctor or to locate and use some other unnamed free mental health service of some kind.

[14] It is not clear what the evidentiary basis was for the findings about the availability of no-cost treatments for mental health, or whether the General Division was taking official notice of this fact. Making a finding of fact without evidence can also be an error of law.[6]

No analysis of other possible errors

[15] The Appeal Division's decision granting the Claimant permission to appeal listed several other possible errors in the General Division decision. My decision focusses only on the issue on which the parties agree. The error I've discussed alone (along with the fact that there is no proper record of the Claimant's testimony) warrants the remedy.

Remedy

Returning the matter to the General Division

[16] The parties agree that the Appeal Division should send the matter back to the General Division for reconsideration.

[17] I agree.

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[6] The Supreme Court of Canada explained this in a case called *R v JMH*, 2011 SCC 45, at paragraph 25; see also *Murphy v Canada (Attorney General)*, 2016 FC 128 at paragraph 26.

[18] I cannot give the decision that the General Division should have given because I have no access to the Claimant's testimony.[7] There is no recording of the General Division hearing.

[19] The lack of recording is especially important in relation to the error of law in analyzing treatment compliance. It seems that the Claimant gave testimony about his treatment efforts that could suggest that he merely delayed but did not refuse treatment.

Conclusion

[20] I allow the appeal. The appeal will return to the General Division for reconsideration by a different member.

Kate Sellar
Member, Appeal Division

[7] Section 59(1) of the Act explains that once the Appeal Division has found an error, the Appeal Division can either give the decision that the General Division should have given, or return the matter to the General Division for reconsideration (with instructions if applicable).