Citation: *Minister of Employment and Social Development v CY*, 2023 SST 260

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Minister of Employment and Social Development
Representative:	Jared Porter
Respondent:	C. Y.
Representative:	Z. Z.

Decision under appeal:	General Division decision dated August 15, 2022 (GP-22-253)

Tribunal member:	Neil Nawaz
Type of hearing:	Teleconference
Hearing date:	February 7, 2023
Hearing participants:	Appellant's representative Respondent Respondent's representative
Decision date:	March 8, 2023
File number:	AD-22-823

Decision

[1] I am allowing this appeal. The General Division made legal and factual errors when it allowed the Respondent to keep her Canada Pension Plan (CPP) disability pension. To address those errors, I have decided to give the decision that the General Division should have given and find that the Respondent stopped being disabled as of January 2021.

Overview

[2] The Respondent is a 53-year-old former factory worker who was diagnosed with breast cancer in June 2011. She underwent surgery, followed by chemotherapy and radiation. The treatments were successful, and the cancer went into remission. The Respondent never returned to her old job, nor has she done any other work.

[3] The Respondent applied for a CPP disability pension in October 2011. The Minister approved the application, having found that the Respondent had a severe and prolonged disability.

[4] In May 2021, the Minister commenced an investigation to determine whether the Respondent was still eligible to receive the CPP disability pension. In August 2021, the Minister found that the Respondent stopped being disabled as of January 2021. The Minister demanded that the Respondent return the more than $5,600 in disability pension payments that she had received between February 2021 and August 2021.

[5] The Respondent appealed the Minister's decision to the Social Security Tribunal's General Division. The General Division held a hearing by teleconference and allowed the appeal. The General Division found that, even though the Respondent's cancer had not recurred, her condition continued to be severe and prolonged. It accepted that she could not work in the real world because she was at heightened risk of contracting COVID-19. It took official notice of the fact that COVID-19 has rendered workplaces less safe, particularly for cancer survivors.

The Minister's reasons for appealing

[6] The Minister is now asking for permission to appeal the General Division's decision. She alleges that the General Division made the following errors:

- It erred in law by concluding, in the absence of objective medical evidence, that the Respondent's future risk of contracting COVID-19 amounted to a severe and prolonged disability; and
- It erred in law by using the doctrine of official notice in a manner inconsistent with the case law.

[7] I granted the Minister permission to proceed because I thought she had raised at least an arguable case. Last month, I held a hearing to discuss the Minister's allegations in full.

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

Preliminary Matter

[9] On January 15 and 16, 2023, the Respondent emailed to the Tribunal two separate packages of documents, which included

- a personal narrative of her recent investigations and treatments for cancer;
- her proof of vaccination for COVID-19; and
- a mammogram report dated December 10, 2022.[1]

[10] For reasons that I explained at the outset of the hearing, I declined to admit these documents, none of which had been previously submitted to the General Division. The Appeal Division does not have the authority to consider new evidence or to entertain

[1] These document packages are labelled AD4 and AD5 in the record.

arguments on the merits of a disability claim.[2] Rather, the Appeal Division's mandate is to determine whether the General Division made errors in coming to its decision.

Issues

[11] There are four grounds of appeal to the Appeal Division. An applicant 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.[3]

My job is to determine whether either of the Minister's allegations fall into one or more of the permitted grounds of appeal and, if so, whether either of them have merit.

Analysis

[12] I have concluded that the General Division erred in law by basing its decision on facts that should not have been recognized through official notice. Because the General Division's decision falls for this reason alone, I see no need to consider the Minister's other allegation.

The General Division misapplied the doctrine of official notice

– Official notice can only be applied to obvious facts

[13] The Minister alleges that the General Division committed an error of law when it applied the doctrine of official notice in a manner inconsistent with case law. According to the Minister, the General Division accepted two propositions as fact, even though they remain the subject of debate among reasonable people.

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[2] See *Belo-Alves* v *Canada (Attorney General)*, [2015] 4 FCR 108, 2014 FC 1100.
[3] See *Department of Employment and Social Development Act* (DESDA), section 58(1).

[14] I agree with the Minister on this point. I am satisfied that the General Division went beyond the permitted limits of the doctrine of official notice.

[15] Courts and tribunals must generally back up their findings with evidence. However, sometimes a decision maker can take "judicial" or "official" notice of facts that are notorious or widely known.

[16] Official notice is assuming something is true because it is a fact that is so generally accepted that:

- It's not the subject of debate among reasonable people; or
- It's capable of an immediate check using a readily accessible and indisputably accurate source.[4]

[17] When a tribunal takes official notice of a fact, there is no longer a need for either party to prove that fact. As well, tribunals have extra latitude to take notice of facts when those facts relate to the specialized knowledge or expertise of the tribunal.[5]

– The facts officially noted by the General Division were debatable

[18] In finding that the Respondent continued to be disabled, the General Division followed a difficult path. At the outset of its analysis, it conceded that the Respondent's cancer had improved by December 2020:

> That was when Dr. Xing reported there was no evidence of breast cancer recurrence. The [Respondent] had been "doing quite well over the past year." She had finished active treatment at the X, and she no longer needed follow-up there. She was to have an annual breast exam and mammogram, and was to continue on tamoxifen until February 2022.[6]

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[4] See *R v Spence*, 2005 SCC 71. Courts are not the same as tribunals. When courts recognize certain fact without evidence, it's called "judicial notice." When tribunals do so, it's "official notice."
[5] See *Minister of Employment and Social Development v S.H. and Justice for Children and Youth*, 2021 SST 412, paragraphs 131–36.
[6] See General Division decision, paragraph 33.

[19] Despite this relatively positive history and outlook, the General Division still managed to find that the Respondent could no longer work. It did so by taking official notice of the following propositions:

- "Since early 2020, workplaces have had to manage the risk of spreading the COVID-19 virus. Many aren't as safe as they used to be."
- "Workplaces are particularly unsafe for many people with chronic or other diseases, including some cancer survivors, because they are at higher risk of severe illness if they get COVID-19."[7]

[20] The Supreme Court of Canada has said that official notice should only be used to dispense with proof of facts that are clearly uncontroversial or beyond reasonable dispute.[8]

[21] The propositions put forward by the General Division were not uncontroversial or beyond reasonable dispute. The pandemic and the public health measures to counter it have been the subject of ongoing public debate. There remains uncertainty about how much of a threat COVID-19 poses to, not just the public at large, but to specific subpopulations of the public, even after the introduction of vaccines.

[22] In particular, two aspects of the General Division's findings strike me as far from obvious:

- Although it may be true that "many" workplaces weren't as safe as they were before the pandemic, it doesn't necessarily follow that **all** workplaces became less safe. Even before the pandemic, some jobs could be performed remotely; after the pandemic, many jobs were reconfigured to be done from home.
- Although "some" or "many" cancer survivors may be at higher risk of severe illness if they get COVID-19, it may not be true that **all** cancer survivors are

[7] See General Division decision, paragraph 36.
[8] See *R v Find*, 2001 SCC 32 at paragraph 48.

> similarly imperilled. There are many different types of cancer survivors, and it is not obvious to me that someone a decade past their diagnosis with no sign of recurrence should be categorized alongside another person who is, for instance, still in the midst of primary treatment.

[23] In my view, neither of the propositions officially noted by the General Division was obvious, readily verifiable, or beyond debate among reasonable people. More than that, neither proposition was capable of bearing the weight that the General Division placed on them.

– **The General Division based its decision on unsupported findings**

[24] Looking at the General Division's decision as a whole, it is clear that it rested almost entirely on the two propositions that were legitimized through official notice. However, even if those propositions were obviously true (and, again, I don't think they were), they still wouldn't have been enough to support a finding of continued disability. That is because they themselves depended on findings that the General Division made without evidence, for instance:

- The General Division assumed that the Respondent was especially vulnerable to COVID-19, even though she had long since finished active treatment and remained cancer-free 10 years after her initial diagnosis;
- The General Division equated disability with the mere **risk** of getting a disease, whether cancer or COVID-19, but case law says that decision-makers must focus on **actual**, not just **possible** or probable, loss of functionality; and
- The General Division assumed that the public health crisis triggered by the COVID-19 pandemic was permanent and that workers, including those in potentially vulnerable subpopulations, would never again be able to engage in the employment market without jeopardizing their health.

[25] The General Division's decision rested on every one of the above assumptions, even though none of them were backed up by medical evidence. In doing so, the

General Division committed an erroneous finding of fact made without regard for the material before it.

– **The Federal Court has expressed reluctance to make broad use of judicial notice about pandemic-related matters**

[26] As the Minister notes, the Federal Court appears to have adopted a cautious approach to drawing conclusions about the COVID-19 pandemic. Although the Court has taken judicial notice of the pandemic's existence, it has otherwise been reluctant to go further as knowledge about the disease continues to develop:

> I also wish to emphasize that the Attorney General is asking me to take judicial notice solely of a narrow and basic fact regarding the COVID-19 pandemic, namely, the existence of the virus causing the disease. Of course, knowledge about various aspects of COVID-19 continues to develop, and there is a lively debate about which public health measures are most appropriate to fight the pandemic. In this process, some facts beyond the mere existence of the virus may or may not be sufficiently indisputable or notorious to warrant judicial notice. I am not, however, called upon to set the outer boundaries of judicial notice in relation to the COVID-19 pandemic. [9]

[27] This passage suggests that the Federal Court would not likely endorse broad assumptions about a pandemic whose causes, effects, and potential solutions remain controversial.

Remedy

There are two ways to fix the General Division's error

[28] 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.[10]

[29] The Tribunal is required to conduct proceedings as quickly as circumstances and considerations of fairness and natural justice allow. The Federal Court of Appeal has

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[9] On this point, the Minister cites *Khodeir v Canada (Attorney General)*, 2022 FC 44, paragraph 35.
[10] See DESDA, section 59(1).

also said that decision-makers should consider delays in bringing claims for benefits to conclusion. It has been nearly two years since the Minister revisited the Respondent's CPP disability entitlement. If this matter goes back to the General Division, it will needlessly delay a final resolution.

The record is complete enough to decide this case on its merits

[30] I am satisfied that the record before me is complete. The Respondent has filed numerous medical reports with the Tribunal, and she testified about her condition in an oral hearing before General Division. I have considerable information about the Respondent's cancer, her treatments for that cancer, and the effect it all had on her mental health. I doubt that the Respondent's evidence would be materially different if this matter were reheard.

[31] Contrary to the Minister's submissions, the audio recording of the hearing is complete. Although the Minister's representative wrote that the recording ended prematurely at the 48-minute mark, the recording to which I had access is 1:14 long and appears to fully document the Respondent's testimony. I listened to all of the recording and heard no indication that the Respondent was denied an opportunity to give evidence.

[32] As a result, I am in a position to assess the evidence that was available to the General Division and to give the decision that it should have given, if it hadn't erred. In my view, if the General Division had properly applied the official notice doctrine, it would have come to a different result. My own assessment of the record satisfies me that the Respondent lost her entitlement to the CPP disability pension as of January 2021.

The Minister had to prove that the Respondent's disability stopped being severe and prolonged

[33] A CPP disability pension is longer payable one month after the recipient stops being disabled.[11]

[11] See section 70(1) of the *Canada Pension Plan*.

[34] In cases where the Minister has terminated a disability pension that she previously awarded, the onus is on the Minister to show, on balance of probabilities, that a recipient ceased to have a severe and prolonged disability.[12] In other words, the recipient is presumed to be disabled until proven otherwise. The recipient is under no obligation to provide evidence that they remain disabled.

[35] The *Canada Pension Plan* says a person is disabled if they have severe and prolonged physical or mental disability.[13] A disability is **severe** if it makes a person incapable regularly of pursuing any substantially gainful occupation. A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.

[36] The disability has to be **both** severe and prolonged. In this case, that means that the Minister had to prove that the Respondent's condition stopped being severe, or that it stopped being prolonged. The Minister didn't have to prove both.

[37] Having reviewed the record, I am satisfied that that the Minister met the burden of proving that the Respondent's disability is no longer severe **or** prolonged.

The evidence does not point to a severe disability

[38] I have no doubt that the Respondent has health problems, but I simply did not find enough evidence to suggest that they now prevent her from regularly pursuing substantially gainful employment.

[39] The Respondent says that she is still disabled because, as a cancer survivor, she is vulnerable to COVID-19. She says that, in the years since her cancer diagnosis, she has developed a mental illness. She also says it is unfair for the Minister to retroactively decide that she stopped being disabled, or to expect her to have returned to work when unemployment was so high due to the pandemic.

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[12] See *Atkinson v Canada (Attorney General)*, 2014 FCA 187 and *Boudreau v Minister of Human Resources Development* (July 26, 2000), CP 11626 (PAB).
[13] See section 42(2)(a) of the *Canada Pension Plan.*

[40] Although the Respondent may feel that she is still unable to work, I must base my decision on more than just her subjective view of her capacity. In this case, the evidence, looked at as a whole, does not suggest a severe impairment that prevented her from performing suitable work after January 2021. The Respondent remains subject to some limitations, but she is not incapacitated from all types of work.

[41] I base my findings on the following factors:

– **The Respondent's cancer is in remission**

[42] The Respondent received a very serious diagnosis 12 years ago. In June 2011, her oncologist told her that she had metastatic stage III breast cancer.[14] She was treated with chemotherapy, surgery, and radiotherapy, all of which were completed by February 2012. After these primary treatments, she was then placed on tamoxifen, an adjuvant, or preventative, drug therapy, which was to last for 10 years.

[43] More than a decade later, the evidence indicates that the Respondent's cancer, if not cured, is in remission.

[44] A mammogram from January 2020 was negative for any "suspicious mass lesion."[15] An ultrasound taken around the same time was normal.[16] The Respondent's family physician reviewed these findings and concluded that the breast cancer was in remission.[17]

[45] In December 2020, her oncologist wrote that the Respondent had been "doing quite well over the past year" and that a right breast mammogram taken earlier that month had shown no evidence breast cancer recurrence. She remained on course to finish tamoxifen in February 2022.[18]

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[14] See report dated June 9, 2011, by Dr. Ashley Davidson, oncologist, GD2-186.
[15] See mammogram report dated January 12, 2020, GD2-134.
[16] See ultrasound report dated January 17, 2020, GD2-137.
[17] See clinical note dated January 29, 2020, by Dr. Jason Li, general practitioner, GD2-92.
[18] See report dated December 9, 2020, by Dr. He Katharine Xing, oncologist, GD2-115-116.

[46] Based on this medical evidence, I find it reasonable to conclude that the Respondent's cancer did not prevent her from rejoining the employment market.

– **The Respondent's cancer therapies did not produce disabling side effects**

[47] I saw no evidence that any of the Respondent's treatments or medications impaired her ability to offer consistent workplace performance.

[48] As noted, the Respondent's radiotherapy and chemotherapy ended more than a decade ago. There is nothing in the available follow-up reports to suggest that those treatments harmed the Respondent in any significant or long-lasting way.

[49] The Respondent has claimed that taking tamixofen for so many years had left her weak and tired, but that is not substantiated by the reports. It is true that, from 2017 onward, the Respondent experienced fatigue and hot flashes, but her physicians attributed those symptoms to menopause, not to medication. On several occasions, her oncologists made a point of relaying that she was tolerating adjuvant therapy well.[19]

[50] I don't see any evidence that side effects from the Respondent's treatments have left her impaired.

– **The Respondent's mental health problems are not disabling**

[51] The Respondent testified that, since she was first diagnosed with cancer, she has been depressed and irritable. She lacks focus, sleeps poorly, and is quick to anger.[20]

[52] However, the medical evidence doesn't support what she says. The Respondent's medical file shows no mental health concerns until June 2021, when she told her family doctor that she was depressed and reported recent insomnia (inability to sleep) and anhedonia (inability to take pleasure in life).[21] I find it notable that the Respondent did not disclose these symptoms to any treatment provider until shortly

[19] See Dr. Xing's reports dated November 9, 2017 (GD2-145) and November 6, 2019 (GD2-139); and Dr. Mita Manna's report dated November 7, 2018 (GD2-143).
[20] Refer to recording of General Division hearing at 34:00.
[21] See Dr. Li's clinical note dated June 9, 2021, GD2-95.

after the Minister had notified her that her disability pension was under review.[22] It is also telling that, although the Respondent saw or spoke with her family doctor several times in 2020 and in early 2021, she never mentioned any psychological problems.

[53] In the absence of any evidence other than the Respondent's subjective and belated complaints, I find it unlikely that mental health problems prevented her from working.

– **The Respondent's other conditions would not stop her from working**

[54] In addition to breast cancer, the Respondent has cited hypertension and gallstones among the reasons she can't work. However, the Respondent did not explain what symptoms these conditions produced and, if any, how they prevented her from regularly pursuing employment. In any case, both conditions are treatable with medication and surgery, respectively.

[55] The Respondent also testified that she suffered from abnormal vaginal bleeding, but I couldn't find enough evidence showing that this condition contributed to an impairment.[23] Her medical file contained a pelvic ultrasound report, which was normal, other than a thickened endometrium.[24] She then underwent a hysteroscopy and endometrial biopsy, which showed intrauterine adhesions and polypoid endometrial lesions.[25] Still, the file contains no further investigations or treatments, and the extent, frequency, and duration of the bleeding remains unclear. Above all, the Claimant never explained in concrete terms how this problem prevented her from working.

[22] See Minister's letter to the Respondent dated May 19, 2021, GD2-23.
[23] Refer to recording of General Division hearing at 48:30.
[24] See ultrasound of the pelvis dated May 12, 2021, GD2-129.
[25] See operative report dated June 18, 2021, GD2-97.

– **The Respondent's background and personal characteristics were not barriers to work**

[56] A case called *Villani* requires decision-makers to consider disability claimants as whole persons, taking into account background factors such as age, education, language proficiency, and work and life experience. [26]

[57] The Respondent was only 51 years old when the Minister revisited her file. She has a university education, albeit one received in China. Although she has little proficiency in English, she had shown herself capable of obtaining and maintaining jobs in this country before.[27] I see no reason to believe that, even with her medical conditions, she was unemployable as of January 2021.

The Respondent does not have a prolonged disability

[58] As mentioned, a disability must be both severe and prolonged. The Respondent's disability isn't severe, so her claim fails for that reason alone. Although I don't have to decide this question, her claim also fails because her disability isn't prolonged either.

[59] According to the *Canada Pension Plan*, a disability is prolonged if it is "likely to be long continued and of indefinite duration or is likely to result in death. When the Minister approved the Respondent's disability pension in March 2012, it did so because she was about to undergo "a long course of treatment" and would "need "more than a year before she will be able to return to work."[28]

[60] It is now more than ten years since the Respondent completed her primary treatment. She remains free of cancer and, since February 2022, she has been off tamoxifen. Given these realities, it is difficult for the Respondent to argue that her breast cancer is "long continued and of indefinite duration."

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[26] See *Villani v Canada (Attorney General)*, 2001 FCA 248, paragraph 49.
[27] The Respondent was working in the packaging department of a candy manufacturer when she was diagnosed with cancer in 2011. In her application for CPP disability benefits, she said that she had also worked as an office clerk for two months in 2009.
[28] See Minister's reconsideration worksheet dated March 3, 2012, GD2-160.

[61] I also find it unlikely that the Respondent's cancer is likely to result in her death. After years of remission, it is not obvious that the Respondent's risk of death—whether by cancer or an infectious disease such as COVID-19—is higher than anyone else in her age group. It is true that public health authorities identified cancer survivors as particularly vulnerable to COVD-19 in the early days of the pandemic, but that was before the development and distribution of vaccines and the return to something approaching normal conditions as the crisis passed. The Respondent seems to be arguing that workplaces will never again be safe for people with her profile, but I see no evidence before me that this is true.

Conclusion

[62] I am dismissing this appeal. The General Division erred in law by taking official notice of cancer survivors' special vulnerability to COVID-19 in the workplace. Having conducted my own review of the record, I am satisfied that the Respondent, whose breast cancer has been in remission for 10 years, ceased to have a severe disability as of January 2021.

Member, Appeal Division