Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: R. S. v Minister of Employment and Social Development, 2019 SST 387

Tribunal File Number: AD-18-712

BETWEEN:

R. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: April 30, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, R. S., holds a Bachelor of Science in math and computer science. He worked as X at X for 23 years and is now 61 years old. In 2002, he began to experience panic attacks and other symptoms of anxiety. Three years later, he was laid off from his job for reasons that he suspects were related to his declining productivity. He has not worked since.

[3] In March 2016, the Appellant applied for a Canada Pension Plan disability pension. The Respondent, the Minister of Employment and Social Development (Minister), denied the application because it found that the Appellant's disability was not "severe and prolonged," as defined by the *Canada Pension Plan* (CPP), during his minimum qualifying period (MQP), which ended on December 31, 2015. The Minister noted that a 2014 psychiatric consultation found that the Appellant was only mildly anxious. The Minister acknowledged that the Appellant was subject to some limitations but found that they did not prevent him from performing alternative work.

[4] The Appellant appealed the Minister's decision to the General Division of the Social Security Tribunal. The General Division conducted a hearing by videoconference and, in a decision dated July 4, 2018, found that the Appellant had provided insufficient evidence that he was incapable regularly of performing substantially gainful work as of the MQP. The General Division placed particular emphasis on the Appellant's education and work experience, which, in its view, made him "capable of being a reliable employee in a real world context for a real world employer."[1]

[5] On October 24, 2018, the Appellant requested leave to appeal from the Tribunal's Appeal Division, alleging that the General Division based its decision on two erroneous findings of fact:

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[1] General Division decision, para 20.

- It found that the Appellant could have paid for cognitive behavioural therapy (CBT) because he received a severance package when he lost his job. However, the Appellant notes that he lost his job in 2005 and that a psychiatrist did not recommend CBT until November 2014.
- It attributed the Appellant's neck pain to a February 2017 motor vehicle accident (MVA). However, the Appellant says that available evidence shows that he experienced neck pain during the MQP because of another, earlier, MVA.

[6] In my decision dated November 19, 2018, I allowed leave to appeal because I saw an arguable case for both of the Appellant's submissions.

[7] In written submissions dated December 27, 2018, the Minister defended the General Division's decision, noting that, since the Appellant had lived off proceeds from his settlement, there was reason for the General Division to find that he had the means to pay for CBT. The Minister also pointed to evidence on the record that the Appellant had complained of neck pain as far back as the MQP; the General Division was therefore entitled to find that the pain did not significantly contribute to any impairment at that time.

[8] Having reviewed the parties' oral and written submissions, I find that the General Division's decision was based on erroneous findings of fact made without regard for the material before it. I am satisfied that the record is sufficiently complete for me to make my own assessment of the evidence and to find the Appellant disabled as of the MQP.

ISSUES

[9] According to section 58 of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: the General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[10] I must answer the following questions:

Issue 1: Did the General Division err when it found that the Appellant had the means to pay for CBT?

Issue 2: Did the General Division ignore evidence that the Appellant experienced neck pain during the MQP?

ANALYSIS

Issue 1: Did the General Division err when it found that the Appellant had the means to pay for CBT?

[11] In its decision, the General Division addressed the Appellant's efforts to seek treatment for his psychological conditions:

> He indicated he did not attend group therapy due to anxiety. The Family Doctor recommended cognitive based therapy. I note he has been able to play hockey a team sport, and attended a job fair. **There is no indication he made reasonable efforts to follow up and obtain any cognitive behavioural therapy as recommended.** He obtained a severance package and had the financial ability to engage in therapy if unable to obtain a referral to a medical provider covered by without charge…. [emphasis added][2]

There is little doubt that the General Division based its decision, at least in part, on what it deemed the Appellant's failure to pursue CBT. Of course, disability claimants must comply with medical recommendations, but decision-makers must also consider whether a claimant's refusal to follow such recommendations is reasonable under the circumstances.[3] Even if it has been established that a claimant did not submit to recommended treatment, the decision-maker must still conduct an inquiry into whether there was some good reason for not doing so.

[12] The Appellant did not begin seeing his current family physician until May 2014, at which time Dr. Winter made several specialist referrals, including one to Dr. Nasri, a psychiatrist. In my review of the file, I was unable to find any reference to CBT that predated Dr. Nasri's

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[2] General Division decision, para 9.
[3] *Lalonde v Canada (Minister of Human Resources and Development)*, 2002 FCA 211.

October 2014 psychiatric report.[4] There, Dr. Nasri wrote that he "explained" CBT to the Appellant and provided him with a list of community resources. The General Division found that Dr. Winter had "recommended" CBT, but his February 2016 Canada Pension Plan medical report said only that CBT had been "suggested" but was not "financially feasible."[5] I am unwilling to find an error that flows from the distinction between a "suggestion" and a "recommendation," but I do think the General Division went too far in assuming that the Appellant had the financial resources to pursue CBT.

[13] In this case, no treatment provider "recommended" mental health counselling until Dr. Nasri suggested CBT in October 2014, but this came more than nine years after the Appellant lost his job and long after he presumably received his severance package. Dr. Nasri mentioned that the Appellant had been living off his savings, but there was no information in the file about the extent of those savings or whether the severance package had been depleted. In my review of the audio recording of the hearing before the General Division, I did not hear the presiding member ask the Appellant about his financial resources when his doctors were urging him to seek CBT. In the absence of such information, it hardly seems reasonable to assume that a lump sum paid in 2005 or 2006 would have still been available to cover treatment nearly a decade later.

[14] It is the General Division's role to weigh evidence and make findings of fact. Where there are gaps in the evidence, the General Division is entitled to make assumptions and draw conclusions, so long as there is a rational basis for doing so. In assuming, on the basis of little more than conjecture, that the Appellant had the resources to pay for CBT, the General Division based its decision on an erroneous finding of fact without regard for the material before it.

Issue 2: Did the General Division ignore evidence that the Appellant experienced neck pain during the MQP?

[15] In its decision, the General Division addressed the Appellant's claimed physical limitations:

> The [Appellant] stated that most of the time he remains at home. He noted he has a herniated disc in his neck and lower back pain that "comes and

[4] Report by Dr. Masood Nasri dated October 30, 2014, GD2-67.
[5] GD2-64.

> goes". He experienced loss of range of motion in his left shoulder. He is right handed. He has experienced migraines. The [Appellant] may have some physical restrictions however he has been able to continue to play hockey often twice a week. **He has experienced neck pain that affects sleep. This symptom is due to a car accident in February 2017 after the MQP.** His physical limitations would not interfere with the ability to engage in sedentary employment [emphasis added].[6]

The Appellant points to one of Dr. Winter's clinical notes as evidence that his neck pain can be dated to the MQP. On May 1, 2014, Dr. Winter wrote, "[The Appellant] notes that several years ago had MVA, some whiplash injury was getting [headache] and neck pains years later […] told herniated C5/6; did scan at the time."[7]

[16] My review of the record convinces me that the General Division based its decision, in part, on an erroneous finding that the Appellant's neck pain did not occur until after the MQP. Although the Appellant rooted his disability claim in his mental health problems, he also made it clear from the outset that neck pain contributed to his inability to work: in the questionnaire accompanying his Canada Pension Plan application,[8] the Appellant listed a herniated disc among his medical conditions, and his reported functional limitations indicated that his impairments were as much physical as they were psychological.

[17] The Minister argues that the Appellant's neck problems were plainly evident in the medical information from the MQP; the General Division is therefore presumed to have considered that information. Of course, any presumption is subject to rebuttal, and here I have reason to believe that the General Division erred by finding that the Appellant's neck pain originated entirely after December 31, 2015. First, as seen in the passage quoted above, the General Division said as much in its decision. Second, the General Division made this mistake not once but twice in its decision, writing several paragraphs later, "[The Appellant] experienced a sore neck due to a car accident post-MQP."[9] Finally, it is notable that the decision contained no discussion of the Appellant's neck pain as it existed **during** the MQP. Although the General Division briefly mentioned the cervical herniation, it did not assess the potential impact of this injury on the Appellant's ability to work before December 31, 2015. This omission leads me to

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[6] General Division decision, para 10.
[7] GD3-36.
[8] GD2-69.
[9] General Division decision, para 18.

suspect that the General Division did not think the cervical herniation was worth assessing because it originated outside the MQP.

REMEDY

[18] The DESDA sets out the Appeal Division's powers to remedy errors by the General Division. Under section 59(1), I may give the decision that the General Division should have given; refer the matter back to the General Division for reconsideration in accordance with directions; or confirm, rescind, or vary the General Division's decision. Furthermore, under section 64 of the DESDA, the Appeal Division may decide any question of law or fact that is necessary for the disposition of any application made under the DESDA.

Is the record complete?

[19] In oral submissions, both parties agreed that, if I were to find errors in the General Division's decision, the appropriate remedy would be to give the decision the General Division should have given. Of course, the parties disagreed about what that decision should be, with the Appellant arguing that the available evidence proved disability and the Minister arguing the opposite.

[20] The Federal Court of Appeal has stated that a decision-maker should consider the delay in bringing a disability claim to conclusion. The Appellant applied for a disability pension more than three years ago. If I referred this matter back to the General Division, it would add further delay to what is already a protracted proceeding. The Tribunal is obliged to conduct its affairs as quickly as considerations of fairness and natural justice allow, and I doubt that the evidence would be materially different if the General Division were to rehear the matter.

[21] I am satisfied that the record before me is complete. Neither of the General Division's errors hindered or prevented the admission of relevant evidence, before or during the hearing. The Appellant has had an adequate opportunity to submit medical documents, and there is considerable information about his employment history on file. There is an audio recording of the hearing, and I have listened to all of it. It reveals that the General Division conducted a full oral hearing and heard the Appellant's testimony about his impairments, their progression, and how they affected his ability to work.

[22] As a result, I am in a position to assess the evidence that was on the record before the General Division and to give the decision that it should have given, had it not erred. In my view, if the General Division had properly assessed (i) the Appellant's reasons for failing to enrol in CBT and (ii) the impact of his physical injuries as of the MQP, then it would have come to a different conclusion. My own assessment of the record satisfies me that the Appellant had a severe and prolonged disability as of December 31, 2015.

Does the Appellant have a severe disability?

[23] To be found disabled, a claimant must prove, on a balance of probabilities, that they had a severe and prolonged disability at or before the end of the MQP. A disability is severe if a person is 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."[10]

[24] The Appellant presents a difficult case. He is well educated and has high-level skills as X. His disability claim is based primarily on anxiety, a medical condition that is difficult to objectively measure and cannot be diagnosed without relying on a patient's subjective account of his or her symptoms. There is also the relative lack of medical documentation from 2005, when he was laid off by his last employer, to 2014, when he moved to X and changed family doctors.

[25] Despite these obstacles, I have concluded that the Appellant has for many years had a severe disability—one that originated well before the end of his MQP. I base my decision on the following factors:

(i) The Appellant's anxiety is significant and well documented

[26] As noted, the file contains few medical records dating before 2014, so it is difficult to assess the Appellant's mental health in the years after he lost his job in 2005. However, there was at least some evidence that all was not well: in September 2007 the Appellant attended the emergency department of Markham-Stouffville Hospital with symptoms of anxiety, dizziness,

[10] CPP, s 42(2)(a)(ii).

and shortness of breath.[11] This episode, the second in two or three months, corroborates the Appellant's account of longstanding and debilitating anxiety.

[27] By 2014, the Appellant had begun seeing Dr. Winter, who evidently took a more aggressive approach to patient management than his predecessor. In a history taken at their first appointment,[12] Dr. Winter relayed that, over the previous four or five years, the Appellant had been experiencing panic attacks—two or three times per year—and that the problem was getting worse. In this and in subsequent clinical notes, Dr. Winter documented several other conditions that were possible manifestations of the Appellant's anxiety, including alopecia (diffuse hair loss), migraine headaches, and alcoholism.[13]

[28] Soon after he began seeing the Appellant, Dr. Winter referred him to a psychiatrist, Dr. Nasri, who prepared an initial assessment report dated October 30, 2014.[14] In it, Dr. Nasri relayed the Appellant's history of social anxiety and irregular panic attacks. Dr. Nasri noted that the Appellant's scores on self-reporting tests for anxiety and depression were relatively mild;[15] however, Dr. Nasri did diagnose the Appellant with an anxiety disorder and assigned him a global assessment of functioning score of 52, indicating moderate symptoms.

[29] For whatever reason, Dr. Nasri saw the Appellant only once. Later, after the Appellant had applied for Canada Pension Plan disability benefits, Dr. Winter attempted to rebut Dr. Nasri's earlier findings, insisting that they underestimated the severity of his anxiety that time.[16]

[30] Both Dr. Nasri and Dr. Winter agreed that the Appellant suffered from anxiety and depression, although they differed on the degree. All things considered, I am inclined to give more weight to Dr. Winter's opinion, even though he is a general practitioner with no specialized training in mental health. I note that Dr. Winter's opinion, though it was issued in a medical-legal context, is broadly consistent with his prior clinical notes, which portray an individual beset by anxiety and a host of related symptoms. Furthermore, I am unsure whether the Appellant was entirely truthful with Dr. Nasri in what was, after all, an initial consultation: Dr. Nasri wrote that

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[11] Markham-Stouffville Hospital emergency record dated September 7, 2007, GD3-26.
[12] Clinical note by Dr. Winter dated May, 1, 2014, GD3-34.
[13] Office note, August 26, 2016, GD2-60.
[14] Report by Dr. Mahmood Nasri dated October 30, 2014, GD2-67.
[15] By Dr. Nasri's account, the Appellant scored 3 on the GAD-7 and 6 on the PHQ-9.
[16] Letter by Dr. Winter dated September 8, 2016, GD2-12.

the Appellant told him that he occasionally has a beer while watching sports; by contrast, Dr. Winter recorded a dramatically higher alcohol intake less than two years later—24 beers, 40 ounces of whisky, and three bottles of wine per week.

(ii) The Appellant suffers from a variety of conditions whose combined effect is disabling

[31] In assessing the Appellant's disability, his anxiety cannot be considered in isolation from his other medical conditions or from who he is as an individual. The leading case on the meaning of "severe" is *Villani v Canada*,[17] which requires the Tribunal, when assessing disability, to consider the "whole person" in a "real world" context. Employability is not to be assessed in the abstract, but rather in light of "all of the circumstances." Those circumstances fall into two categories:

(a) The claimant's medical condition — this is a broad inquiry, requiring that the claimant's condition be assessed in its totality; and

(b) The claimant's background — matters such as "age, education level, language proficiency and past work and life experience" are relevant.

[32] The first point was amplified by *Bungay v Canada*,[18] which held that all of a claimant's possible impairments affecting employability are to be considered, not just the biggest impairments or the main impairment. This approach is consistent with section 68(1) of the *Canada Pension Plan Regulations*, which requires claimants to submit highly particular information concerning "any physical or mental disability," not just what the claimant might believe is the dominant impairment.

[33] As already noted, there is evidence to support the Appellant's claim that he experienced neck pain as of the MQP: in May 2014, well before he applied for disability benefits, he told Dr. Winter, in specific terms, that he had injured his cervical spine in a motor vehicle accident.[19] Although it is not supported by a primary document, I find the report of this injury reliable, and I also find that the residual symptoms from this injury (occasional neck pain, recurrent migraine headaches) would have likely contributed to the Appellant's disability. In a February 2016

[17] *Villani v Canada (Attorney General)*, 2001 FCA 248, [2002] 1 FCR 130.
[18] *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[19] Clinical note dated May 1, 2014, GD3-36.

clinical note,[20] Dr. Winter noted that the Appellant's panic attacks usually left him flat on his back for a couple of days. This, combined with his neck pain, migraines and overarching social anxiety, would prevent the Appellant from offering the kind of regular performance that most employers demand.

[34] The Appellant has a good education and high-level work experience, assets that would ordinarily leave him well-positioned in the job market. However, he was in his mid-50s by the end of his MQP, well past what most employers would consider prime working age. This, combined with his documented psychological and physical problems, rendered the Appellant effectively unemployable.

(iii) The Appellant was reasonably compliant with treatment recommendations

[35] Unlike the General Division, I find that the Appellant took reasonable steps to mitigate his impairments through treatment. An individual who has been diagnosed with social anxiety disorder and agoraphobia is less likely to be proactive in seeking medical help, but I see nothing in the record to indicate that the Appellant has ever refused to follow medical advice. He has tried a variety of antidepressant and anti-anxiety medications. Once he changed family physicians, the Appellant saw every specialist to whom Dr. Winter made a referral. It is true that the Appellant did not pursue CBT, as Dr. Nasri had suggested, but I accept that he lacked the financial resources to do so by 2014. His severance from X had come nine years earlier, and the record shows that he was divorced in 2013 and shortly afterward moved back to his hometown to live with his mother. All of these factors lend credence to the Appellant's claim of poverty.

(iv) The Appellant's testimony was compelling and credible

[36] The Appellant's testimony before the General Division conveyed forthrightness, and his description of his symptoms and their effect on his ability to function in a vocational setting were credible. The Appellant spoke about his last few years at X, where he found himself increasingly nervous at meetings of more then four people. He began to miss deadlines and then began to miss time off work—on average once per week. Near the end, he was obliged to submit to regular one-on-one reviews with his manager—something that had never been previously

[20] Clinical note dated February 11, 2016, GD3-51.

demanded of him in this more than two decades with the company. Eventually, he was included in a lay-off with several other co-workers. He was offered no reason for his termination, but he remains certain that it had to do with his declining productivity.

[37] The Appellant also described his attempts to find work, none of which were successful. It is true that he confined his search to jobs that were compatible with his education and experience, but I doubt that he would have been capable of any employment, given his low tolerance for stress. The testified that he wanted to work but recognized that his psychological impairments limited the number and types of jobs potentially available to him. He told the General Division that, at one point, he was under consideration for a one job that would have permitted him to work mostly from home. The fact remains that he was ultimately not hired because he was late in submitting a screening assignment, but even if he had got the job, I question whether he would have been able to maintain it, since he cannot work every day and has difficulty sticking to schedules.

[38] Very few jobs can offer the kind of flexible and stress-free environment that the Appellant seems to require. Given the realities of the labour market, I am satisfied that the Appellant lacks the residual capacity to pursue alternative employment.

(v) The Appellant has a strong work history

[39] The Appellant's record of earnings[21] shows that he had nearly 30 consecutive years of employment. For 23 of those years, he worked for a multinational corporation, where he was a well-compensated technical professional. Then things started to go wrong. In 2005, he was terminated from his job, and he has not worked since. His marriage fell apart. He now takes a suite of mood-altering drugs.

[40] Something caused these reversals. The Appellant claims that he was seized by a debilitating anxiety disorder, and I am inclined to believe him. One can assume that someone with a work record as strong as the Appellant's would not have left the labour market unless there was some substantive underlying cause.

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[21] Record of earnings, GD2-4.

Does the Appellant have a prolonged disability?

[41] The Appellant's testimony, corroborated by the medical reports, indicates that he has suffered from debilitating anxiety since the early 2000s. Treatment has produced only a limited effect, and the Appellant has become effectively unemployable. It is difficult to see how his health will significantly improve, even if he submits to counselling or additional forms of therapy. In my view, these factors qualify the Appellant's disability as prolonged.

CONCLUSION

[42] I am allowing this appeal. The General Division based its decision on erroneous findings that the Appellant (i) unreasonably refused treatment advice and (ii) did not experience neck pain as of the MQP. Having decided that there was sufficient evidence on the record to permit me to give the decision that the General Division should have given, I find that the Appellant has a disability that became severe and prolonged as of July 2005, the month he was terminated by X. Under section 42(2)(b) of the CPP, a person cannot be deemed disabled more than 15 months before the Minister received the application for a disability pension. In this case, the Minister received the application in March 2016; therefore, the Appellant is deemed disabled as of December 2014. According to section 69 of the CPP, payments start four months after the deemed date of disability. The Appellant's disability pension therefore begins as of April 2015.

Member, Appeal Division

HEARD ON:	April 1, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. S., Appellant Alexandra Victoros, Representative for the Appellant Sandra Doucette, Representative for the Respondent