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

Citation: *M. M. v. Minister of Employment and Social Development,* 2016 SSTADIS 343

Tribunal File Number: AD-14-458

BETWEEN:

M. M.

Appellant

and

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

HEARD ON: February 26, 2016

DATE OF DECISION: September 1, 2016

Canada

REASONS AND DECISION

IN ATTENDANCE

Representative for the Appellant	Sonja A. Nuic (counsel)
Representative for the Respondent	Christine Singh (counsel)

OVERVIEW

[1] This is an appeal of the decision of the General Division dated May 23, 2014, which determined that the Appellant was not eligible for a disability pension under the *Canada Pension Plan,* as it found that he did not have a severe and prolonged disability on or before the end of his minimum qualifying period of December 31, 2008.

[2] I granted leave to appeal on two grounds: (1) the General Division may have erred by not assessing the Appellant's disability at the end of his minimum qualifying period of December 31, 2008, and (2) It may have based its decision on an erroneous finding of fact without regard for the material before it, in respect of the Appellant's capacity to be retrained for sedentary or other employment.

[3] A preliminary issue arose regarding the format and the procedures governing the appeal. Following oral submissions, I rendered a decision on February 10, 2016, in which I found that: (1) it is not appropriate for the Appeal Division to conduct a standard of review assessment and (2) there is no hearing *de novo* at the appeal stage. I also determined that only the evidence which had been before the General Division would be admissible in these proceedings, unless it addressed any of the grounds of appeal under subsection 58(1) of the *Department of Employment and Social Development* (DESDA). The hearing of the appeal resumed on February 26, 2016.

ISSUE

[4] The issues before me are as follows:

1. Did the General Division do any of the following:

a. fail to assess the Appellant's disability at the end of the minimum qualifying period of December 31, 2008, or

b. base its decision on an erroneous finding of fact in a perverse or capricious manner or without regard for the material before it, in respect of the Appellant's capacity to be retrained for sedentary or other employment?

2. What is the appropriate disposition of this appeal?

GROUNDS OF APPEAL

a. Did the General Division fail to assess the Appellant's disability at the end of his minimum qualifying period?

[5] The Appellant was involved in a motor vehicle accident on May 2, 2008, in which he sustained several injuries, including a wedge compression fracture of his L2 vertebrae with significant height loss and right calcaneal fracture. The Appellant also injured his low back, left shoulder, neck, arm, pelvis, left side and a laceration to his left knee, requiring stitches. He was hospitalized for several days. He also experienced headaches and sleep disruption. Despite the Appellant undergoing various treatment modalities, including physiotherapy and massage therapy, the medical evidence before the General Division showed that he continued to experience chronic pain, depression, anxiety and an adjustment and panic disorder. At the hearing of this appeal, his counsel noted that the Appellant continues to sleep in a special bed and that he continues to face restrictions as a result of the injuries sustained in the motor vehicle accident.

[6] The Appellant argues that since he continued to exhibit a severe level of disability in October 2009, as evidenced by an orthopaedic surgeon's report, it follows that he had to have been disabled by the end of his minimum qualifying period, as his injuries must have been more severe when it was closer in time to his motor vehicle accident. The Appellant relied on *D'Errico v. Canada (Attorney General),* 2014 FCA 95 and *Woodward v. Canada (Minister of Social Development),* 2004 CarswellNat 6490 (PAB). These decisions establish

that the crucial timeframe for consideration is the period before the end of the minimum qualifying period.

[7] In the leave application, the Appellant argued that, instead of focusing on whether he had a severe and prolonged disability before the end of his minimum qualifying period of December 31, 2008, the General Division focused on the fact that he had purchased a horse after this date. He suggests that the General Division inferred that he purchased a horse so that he could continue to engage in some employment, given his qualifications and past work experience in the horse racing industry. He submits that the General Division erred in law, as it was required to assess whether he had a severe and prolonged disability on or before the end of his minimum qualifying period.

[8] The Respondent argues that the decision of the General Division clearly analyzed the Appellant's medical condition, bearing in mind his minimum qualifying period and the test requiring that his disability also be severe and prolonged continuously thereafter. The Respondent points to paragraphs 18 to 20, 22 and 27 of the evidence section, and to paragraph 43 of the General Division's analysis. In particular, the Respondent notes that an occupational therapy in-home functional reassessment dated December 4, 2008 indicates that, apart from assistance for heavy outdoor maintenance activities, specifically with snow clearing, the Appellant at that time did not require any attendant care or housekeeping assistance (GT1-493 to GT1-517).

[9] At paragraph 30 of its decision, the General Division identified the test which the Appellant was required to meet. The General Division began its analysis on the severity issue by examining whether the Appellant had attempted to retrain or find alternative work, whether any such attempts had been unsuccessful by reason of his health condition and whether he had been compliant with treatment recommendations. The General Division then examined the severity of the Appellant's disability in the following paragraphs, after which it then assessed his disability in a "real world" context.

> [43] The medical reports show the Appellant suffered a severe injury due to a motor vehicle accident. Dr. Ugonwa Dag-Ellams completed a physical on the Appellant on July 7, 2008. The Doctor noted the right heel fracture was stable, the spinal fracture was stable and restricted forward flexion. He noted reactive

> depression and suggested counselling to the Appellant. The medical reports indicate the Appellant is no longer to meet the physical demands of his previous occupation. The reports do not show that the Appellant is incapable regularly of pursuing any substantially gainful occupation. The disability is not severe to render him incapable of more sedentary occupations, which occupations the Appellant refuses to pursue.
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> [44] The Appellant has occasional neck pain, constant low back pain, and right heal pain. The injuries preclude him from his previous employment, and any other employment requiring heavy lifting, and other physically demanding work. Surgery has not been recommended to date, and the Appellant is being treated with conservative measures. The medical condition of the Appellant does not preclude him from more sedentary occupations that do not require the heavy physical labour required in his former profession.

[10] Apart from mentioning the report of Dr. Dag-Ellams prepared on July 7, 2008, the General Division did not refer to the dates of any other medical records. From that perspective, the General Division did not specifically address the issue of whether the Appellant could be found disabled by the end of his minimum qualifying period.

[11] However, to meet the disability requirements under the *Canada Pension Plan*, in addition to establishing that one is disabled by the end of his minimum qualifying period, he must also prove that his disability is likely to be long continued and of indefinite duration or is likely to result in death. In other words, it is not enough to simply establish that one was disabled by the end of his minimum qualifying period. For instance, if one were to see resolution of symptoms two years after the end of his minimum qualifying period, he would not be entitled to a Canada Pension Plan disability pension on account of the fact that he had been disabled at the end of his minimum qualifying period.

[12] The Appellant's counsel urges me to find that the Appellant's injuries progressed over time (paragraph (viii) on page AD1-42), but it is not the role of the Appeal Division to undertake a reassessment of the evidence that was before the General Division.

[13] The General Division determined that the reports did not show the Appellant to be incapable regularly of pursuing any substantially gainful occupation. Although it is unclear whether the reports the member referred to were for the minimum qualifying period, irrespective of that, this ground must fail. If the Appellant is unable to establish that he was

either severely disabled prior to or following the end of his minimum qualifying period, he will not have met the test required of him.

b. Capacity for retraining or sedentary work

[14] The Appellant submits that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it, when it determined that he had the capacity for retraining or sedentary work. The Appellant claims that none of his physicians had recommended retraining or contemplated that he could return to work. Indeed, he claims that he had not been released from medical care to attempt a return to work. The Appellant suggests that the General Division erred by relying on the medical opinions of Drs. Doxey and Kumbhare. The Appellant argues that, given his ongoing medical problems, the progression of his injuries and the unpredictable nature of his condition, he is unable to mitigate his situation or commit to any retraining or future employment. In this regard, the Appellant argues that the General Division also erred in failing to follow *Atkinson v. Canada (Attorney General),* 2014 FCA 187, in that it failed to assess whether he was capable of working predictably.

[15] While certainly the Appellant experiences flare-ups of his pain, I can see no evidence in the documentary record that addresses the frequency of these flare-ups. I acknowledge that the Appellant testified that he experiences more bad days than good and is unable to predict whether the upcoming day will be good or bad (AD3-77, para. 16). The Appellant participated in a work hardening placement program, which saw him assist at a horse boarding farm. The program was scheduled for 8 weeks. He started the program at 3 hours per day and increased this to 4 hours per day, for a total of 16 hours per week. He was punctual and arrived as planned for almost all of his scheduled shifts, but reported that he left early on one or more days each week due to increased pain symptoms. However, his duties, which included cutting grass and brush, grooming track, inspecting and maintaining fencing, operating and maintaining machinery, and maintaining equipment and grounds, were, to some extent, physical in nature and beyond his physical abilities.

[16] Dr. Doxey suggested that retraining for a new career might be preferable for the Appellant, rather than pursuing employment as a horse trainer in the horse racing industry. I noted in my leave decision that Dr. Doxey is a clinical psychologist and likely is not qualified to render an opinion on an individual's physical capacities. I questioned whether the opinion of Dr. Kumbhare, a physiatrist, that the Appellant is unable to work in any type of employment for which he has been "trained, experienced and educated", could be, as the General Division determined, interpreted as evidence of the Appellant's capacity to be retrained for sedentary positions or occupations not involved in horse racing. Although the General Division appeared to rely upon the findings of Drs. Doxey and Kumbhare, I queried whether there was other evidence upon which the General Division might have concluded that the Appellant is capable of retraining or of other less physically demanding employment.

[17] The Respondent submits that there were medical reports, including Dr. Kumbhare's report of March 5, 2012, upon which the General Division could reasonably interpret and make the findings which it did regarding the Appellant's capacity for retraining and sedentary employment. Dr. Kumbhare had described the Appellant's past employment as:

> physically demanding … It required heavy lifting, sustained posturing and standing, repetitive lifting, bending, reaching, pulling and pushing; four beyond his current and future capabilities … In my opinion, [the Appellant] will not be able to work in any type of employment for which he has been trained, experienced and educated" (AD3-159).

[18] Dr. Kumbhare noted that this was the same opinion expressed in the vocational assessment performed by Ross Rehabilitation and Vocational Services. Following a functional capacity evaluation, the Appellant was found to have met all of the demands for light level work. He also demonstrated the potential to tolerate sitting on a frequent basis (GT1-237, GT1-250 and GT1-587).

[19] The Respondent notes that there was other medical evidence before the General Division upon which it could base its findings that the Appellant could pursue sedentary employment, including the Ross vocational exploration interim report dated October 31, 2010 (AD1-17, para. 21; GT1-51) and medical report dated January 10, 2012 of Dr. Dunlop,

orthopaedic surgeon (AD1-17, para. 22). I note however that Dr. Dunlop was of the opinion that the Appellant has pain with prolonged sitting and that his injuries interfere with sitting, amongst other activities, although there is no reference in the text of his report to any complaints of pain with sitting, or any indication when it might have arisen (GT1-266). This is significant, as the Appellant had seen Dr. Dunlop in October 2009, and there is no specific reference to any limitations with sitting, although Dr. Dunlop did indicate that the Appellant is going to have "back pain with all of his activities" (GT1-63 to GT1-64) .

[20] Dr. Dunlop did not offer an opinion regarding the Appellant's capacity for retraining or sedentary work in his report of January 10, 2012. Dr. Dunlop also did not address the results of the Ross functional capacity evaluation.

[21] I note also the Wastell & Associates in-home occupational therapy functional assessment indicates that the Appellant complained that he experiences mid- to low-back pain and increased pain in his lower back, right foot and ankle with prolonged sitting (GT1-411). This assessment was conducted early on after the Appellant's motor vehicle accident. A reassessment in December 2008 indicates that the Appellant reported improvement with sitting. He was assessed as having functional sitting tolerance at that time (GT1-502).

[22] Furthermore, when the Appellant completed the Questionnaire accompanying his application for a disability pension, he did not list sitting as one of the limitations that prevented him from working, though he mentioned "limited walking, lifting, bending, pulling, pushing and general mobility" (GT1-93).

[23] The Respondent observed that the General Division considered other evidence as set out at paragraphs 41 to 44 of its decision, in concluding that they do not show that the Appellant is incapable regularly of pursuing any substantially gainful occupation. The General Division member specifically referred to the medical opinion dated July 7, 2008 of the family physician. Although the member did not specify which reports he was referring to in paragraph 43, he noted that the "medical reports indicate the Appellant is no longer [able] to meet the physical demands of his previous occupation". The member found that these reports do not show that the Appellant is incapable regularly of pursuing any substantially gainful occupation.

[24] To be clear, I am not conducting an assessment on the evidence which was before the General Division. My role in reviewing this ground of appeal is determining whether there was sufficient evidence upon which the General Division could base its findings, irrespective of whether it specifically referenced that evidence. The Supreme Court of Canada has indicated that a decision-maker need not refer to every argument or detail, or to make findings on each element the reviewing judge would have preferred: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62. In this case, there was extensive medical documentation before the General Division. While the General Division did not undertake any extensive analysis, it indicated that there were reports which supported its interpretation and findings that the Appellant has functional sitting tolerance. This lent itself to a finding that, taking into account the Appellant's personal characteristics, he was capable regularly of pursuing a substantially gainful occupation of a sedentary nature.

CONCLUSION

[25] For the foregoing reasons, the appeal is dismissed.

Janet Lew
Member, Appeal Division