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

Citation: *R. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 371

Tribunal File Number: AD-15-85

BETWEEN:

**R. S.**

Appellant

and

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

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division

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DECISION BY: Hazelyn Ross

HEARD ON: July 22, 2016

DATE OF DECISION: September 20, 2016

Canada

## REASONS AND DECISION

### PERSONS IN ATTENDANCE

| | | |
|---|---|---|
| R. S. | - | Appellant |
| Julia Betts | - | Counsel for the Respondent |

### DECISION

[1] The Appeal is dismissed.

### INTRODUCTION

[2] The Appellant applied for and was denied a disability pension under the *Canada Pension Plan, (CPP)*[1]. When the Respondent upheld its denial on reconsideration, he appealed to the General Division of the Tribunal. In a decision dated October 10, 2014, the General Division found that he had not met his evidentiary onus to establish that his disability was severe and prolonged within the meaning of paragraph 42(2)(a) of the CPP. The Appellant was not entitled to a disability pension. It dismissed his appeal.

[3] The Appellant sought and obtained leave to appeal from the General Division decision.

[4] The Appeal Division Member who granted leave did so on the basis that the General Division may have erred in regard to the following:-

1. the decision does not set out the basis on which the General Division reached its conclusion that the Appellant continued to operate his home business by choice.
2. that the General Division may not have considered the legal principle in *Boyle v. Canada (Minister of Human Resources Development)*, June 2003, CP 18508. Per *Boyle* "An applicant for CPP disability pension does not have to establish that s/he sought alternative employment, where the claimant understands that a job was always open to him with their previous employer, should the claimant wish it.
3. That scant reference was made to the Appellant's testimony or what he was physically able to do.

[1] *Canada Pension Plan,* R.S.C. 1985, c. C-8

4. There was very little analysis of the Appellant's physical abilities or his participation in any work activities.

**ISSUE**

[5] The issues in the Appeal are, did the General Division err:-

1. In reaching its conclusion that the Appellant continued to operate his home business by choice?
2. By failing to consider the legal principle in *Boyle?* If the General Division did not consider *Boyle,* was this an error of law?
3. By making only scant reference to the Appellant's testimony or what he was physically able to do?
4. By failing to analyse the Appellant's physical abilities or his participation in work activity?

**THE LAW**

[6] Subsection 58(1) of the Department of Employment and Social Development Act, (DESD Act), sets out three grounds of appeal, namely that:-

a. The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
b. The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
c. The General Division 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.

[7] To succeed on his appeal the Appellant must establish that the General Division breached one of the three grounds of appeal cited above.

**ANALYSIS**

**Was it an error to conclude that it was the Appellant's choice to work from home?**

[8] The Appellant submitted that the General Division erred in finding that "the decision to work from home was not made due to his medical condition." He contended that the General Division should have given reasons for this statement as required by the case law. He explained

that this was not entirely correct as working from home was his only option. He argued that the General Division's conclusion contradicted the statements in paragraph 32 of its decision.

[9] In response Counsel for the Respondent noted that the evidence supported the General Division's conclusion. At paragraph 12 of the decision the General Division records the Appellant's evidence that he started a company, R. C., which he ran out of his home. She also noted that the Tribunal record supports the General Division's statement. In completing the questionnaire for disability benefits (GT1-29), the Appellant stated that he started his business in 1998 and continued to operate it until January 10, 2003. At GT2-209-210 he makes the statement: "the business has always been home based with an office on the back of the house and a shop for fabrication etc. in a double garage".

[10] Counsel for the Respondent also contended that this was an irrelevant consideration as the General Division did find that he could continue to do many of the tasks that he used to do prior to the end of his minimum qualifying period, (MQP). This included hiring employees; managing a business; and planning. The test was not where he operated his business but what work capacity he retained. The Respondent's counsel submitted that the General Division's statement was made with regard to the material before it and was not perverse or capricious. The Appeal Division concurs.

[11] In the view of the Appeal Division, the General Division's statement that the Appellant's decision to work from home was not related to his medical condition is no more than an extension of its statement that he has worked from home for many years. The clear inference is that this was not a situation that had been brought about by or in response to his medical conditions. The Appeal Division is of the view that nothing turns on this statement. The General Division concerned itself with the Appellant's retained work capacity as, per *Klabouch v. Canada (Minister of Social Development)*, 2008 FCA 33, it was required to do. The Appeal Division finds that no error of law or erroneous finding of fact arises from the statement. It could not have because the Tribunal record and the Appellant's testimony supports it. (GT2-210) The appeal cannot be allowed on this basis.

[12] The Appeal Division finds that the General Division was also correct in its conclusion that it was not required to assess the profitability of the Appellant's business as part of its determination of whether he retained work capacity: *Canada (Minister of Human Resources Development) v. Rice,* 2002 FCA 47. Although it did concluded that the reason why the Appellant's business fell off was more likely due to external, forces.

**The General Division may not have considered the principle in *Boyle*.**

[13] In his application for leave to appeal the Appellant likened himself to the appellant in *Boyle*. He stated that as a self-employed individual his position was always open to him.

[14] At the hearing, the Appellant advanced conflicting arguments. First, he argued that *Boyle* does not apply to him. He stated that he was not aware of how this argument arose, however, he submitted that the legal test is simple; he did not have to look for work because he was already self-employed, which argument repeats the principle in *Boyle.*

[15] In rebuttal, the Respondent's representative submitted that the General Division did consider the appropriate law and applied the correct tests. She submitted that the General Division had considered the legal principle required by the CPP, namely that the Appellant had to show that his medical conditions rendered him incapable regularly of pursuing any substantially gainful employment.

[16] The Respondent's representative also argued that the General Division applied the legal principles in *Villani v. Canada (Attorney General)* 2001 FCA 248 and in *Inclima v. Canada (A.G.)*, 2003 FCA 117. Further, there was sufficient evidence to support the General Division's findings. She also argued that *Boyle* could be distinguished from the Appellant's case as in *Boyle* the Pension Appeals Board, (PAB), found that the appellant did not have retained work capacity, and could not function even with a benevolent employer:[2] (paras. 14 & 15), which is not the case with the appellant. Therefore, the General Division followed the correct legal principles. As a result it did not commit an error of law; nor did it commit an error of fact in respect of this ground.

[2] The PAB held that *Boyle* did not have to show efforts at obtaining and maintaining alternate employment because his job was open to him whenever he could do it. Thus the principle that derives from *Boyle* is that "an applicant for CPP disability pension does not have to establish that s/he sought alternative employment, where the claimant understands that a job was always open to him with their previous employer, should the claimant wish it."

[17] The Appeal Division finds that the General Division did not have to apply the principle in *Boyle. Boyle* arises in the context of the waiver of the requirement that applicants for CPP disability benefit show effort at obtaining alternate employment where there former employment was always open to them. However, unlike *Boyle,* the General Division found, on the basis of the material before it, that the Appellant did retain work capacity. Thus, he was not exempt from the requirement that applicants for a disability pension make effort to obtain alternate employment and to show that their efforts to do so were unsuccessful because of their health condition: *Inclima, Villani.*

[18] The Appeal Division is not persuaded that by not applying the principle in *Boyle* the General Division committed an error of law that could vitiate its decision. The appeal is not allowed with regard to this ground.

**The General Division erred by making only scant reference to the Appellant's testimony or what he was physically able to do and by failing to sufficiently analyse the Appellant's physical conditions.**

[19] The Appeal Division finds that these two grounds raise or speak to similar considerations. Therefore, it is advantageous to discuss them simultaneously.

[20] The Appellant submitted that the General Division only listed his symptoms, medical reports, findings and diagnoses and that its decision contains very little analysis of his physical condition and his abilities. He argued that the General Division ought to have analysed the evidence and findings regarding his ability to function contained in the Functional Abilities Evaluation. As the General Division failed to do so, its decision demonstrated an amounted to an error of law and was unreasonable.

[21] In reply, the Respondent noted that leave to appeal was granted on the basis that the General Division decision was deficient in certain aspects of its analysis. However, she noted that contrary to the leave decision, the General Division did consider the Appellant's testimony, as it was required to do. This, she stated, is borne out at paragraphs 14 and 32 where the General Division addressed his testimony regarding his work activity, and also addressed the ways in which his medical conditions affected or limited his function. At paragraph 14 the General

Division recounts the medical evidence, while paragraph 32 it set out the submissions that were made on the Appellant's behalf.

[22] The Respondent's representative advanced the further argument that, as required by *Klabouch,* the General Division considered the Appellant's limitations with respect to his work capacity and did not limit its consideration to whether the Appellant was capable of performing his former occupation. This was precisely the analysis the case law required the General Division to perform.

[23] With respect to its application of the case law, the Respondent's representative argued that the General Division cited and considered *Villani v. Canada (Attorney General)* 2001 CA 48. Furthermore, per *Monk v. Canada (Attorney General),* 2010 FC 48 at paras. 8 and 10, the General Division looked at his pattern of activity to see whether it had slowed; and also considered his revenues. The Respondent's representative submitted that when the General Division analysed the Appellant's circumstances in paragraphs 42, 46 and 47 of the decision, it did what the Federal Court instructed it do in *Monk,* distinguishing profitability from capacity. She also submitted that there was ample evidence in the Tribunal record that he Appellant had retained work capacity, therefore, the General Division did not err in law nor did it base its decision on an erroneous finding of fact.

[24] Lastly, the Respondent's representative submitted that inadequacy of reasons was not a "stand alone" basis or ground of appeal under section 58 of the DESD Act.

[25] The Appeal Division find that, while, strictly speaking, it may be true to say that the General Division made scant reference to the Appellant's physical condition, this does not necessarily give rise to an error.

[26] The main thrust of the General Division's decision was the Appellant's retained work capacity. At paragraphs 14 through 20 of its decision, the General Division did summarise the Appellant's physical conditions, the medical evidence, and findings. At paragraph 26 of the decision, the General Division addressed the Functional Abilities Evaluation to which the Appellant refers, noting that "a disability assessment report completed in November 2003

oncluded that the Appellant was not able to meet the requirements of his pre-accident employment". (GT5-23)

[27] In response to the Appellant's arguments, the Appeal Division notes that the Federal Court of Appeal has definitively stated that a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence: *Simpson v. Canada (Attorney General)*, 2012 FCA 82. What the General Division was obliged to do was to ensure that an appellate body could decipher its reasons for the decision: *Doucette v. Canada (Minister of Human Resources Development)*, 2004 FCA 292.

[28] The Appeal Division finds that the General Division's reasons amply demonstrate the basis for its decision, namely, that the Appellant by virtue of his acquired skills retained capacity to pursue regularly any substantially gainful occupation, namely to manage his business.

[29] Given its extensive reference of the medical evidence, the General Division was clearly aware of the evidence regarding the Appellant's physical abilities in general and the Functional Abilities Evaluation, in particular. The Appeal Division is not persuaded that the General Division erred in this regard. Furthermore, the Appeal Division finds that the Functional Abilities Evaluation does not support the Appellant's position in that it does not support a finding that the Appellant is or was disabled from all work. It merely states that it was:-

> "highly likely he may have difficulty doing his previous self-employed job in the same way and thus vocational rehabilitation resources may be needed. It is possible he may be able to supervise other employees, do the administrative aspects of his job, the sales component of his job, but it is possible that he may only tolerate part time work, particularly initially. He may be able to use his skills in a more sedentary role. However, he would likely require further training and possibly further educational input in order to obtain new skills."

[30] The Appeal Division finds that the General Division decision follows along the same line as the conclusion in the Functional Abilities Evaluation. After considering the Appellant's work history and the business history, the General Division found that Appellant though likely incapable of performing the physical tasks linked to his self-employment was still capable of

performing and, did perform, the managerial tasks of the business. The Appeal Division agrees that in coming to its conclusion the General Division did consider the Appellant's work capacity as required by *Klabouch*.

[31] The Appellant sought to make the argument that contrary to the General Division's conclusion, he did not have consistent income. He submitted that the difficulty lay with his company's year-end. He stated that his business' year-end varied, and that his highest net income was irrelevant. In his view his earnings were neither substantial nor gainful.

[32] The Respondent's representative noted that this was a new point that had not been raised at the General Division hearing; that the question of extending the MQP was new and she argued that the General Division did not err in law; and that it applied the correct principles and had summarised a large body of evidence.

[33] For his part, the Appellant submitted that the Minister was just trying to justify the evidence.

[34] The Appeal Division was not persuaded by the Appellant's arguments, which it did not find helpful in addressing the question on which leave to appeal had been granted. As stated earlier, the Appeal Division found that the medical evidence did not clearly support the Appellant's position that he was disabled from all work.

[35] The General Division, as the trier of fact, found that the Appellant retained capacity to work and that he could do some aspects of his former employment. The Appeal Division is not satisfied that the Appellant has demonstrated that the General Division erred in reaching its conclusions, as it finds that his submissions on his company's year-end did not address the issue in question. The appeal cannot be allowed in regard to this ground.

[36] In light of the above discussion, the Appeal Division finds that the General Division did not err in law nor did it base 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.

## CONCLUSION

[37] Leave to appeal was granted on the basis that the General Division may have erred in its assessment of the evidence and its application of certain case law. The Appeal Division has found that the General Division did not, in fact, err as the Appellant submitted.

[38] The Appeal is dismissed.

Hazelyn Ross,
Member, Appeal Division