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

Citation: *M. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 391

Tribunal File Number: AD-16-334

BETWEEN:

M. S.

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: September 1, 2016

DATE OF DECISION: October 4, 2016

REASONS AND DECISION

IN ATTENDANCE (VIA VIDEOCONFERENCE)

Appellant	M. S.
Appellant's Representative	Angela James (counsel)
Respondent	Christina St.-Amant-Roy (articling student) and Christine Singh (counsel)

OVERVIEW

[1] This case is about whether the General Division conducted a cumulative assessment of the Appellant's various medical conditions.

[2] This is an appeal of the decision of the General Division dated November 24, 2015. The General Division determined that the Appellant did not have a severe disability by the end of his minimum qualifying period on December 31, 2012 and that he therefore was not eligible for a Canada Pension Plan disability pension. The Appellant filed an application requesting leave to appeal to the Appeal Division on February 22, 2016. I granted leave to appeal on April 4, 2016, on the ground that the General Division may not have assessed the Appellant's medical conditions on a cumulative basis.

[3] To succeed on this appeal, the Appellant must establish that the General Division erred in law.

ISSUES

[4] The issues before me are as follows:

1. Did the General Division fail to assess the Appellant's medical conditions on a cumulative basis?

2. What is the appropriate disposition of this appeal?

CUMULATIVE ASSESSMENT

[5] The Appellant submits that the General Division erred in law, as it viewed each of his injuries and impairments separately, without considering their cumulative impact. He claims that there is an interplay between his physical pain complaints and his mental health issues, including his depression, addictions and substance abuse issues, and that the General Division failed to address them or consider how they might have formed the basis for the severity of his disability.

[6] The General Division used the headings "pain", "seizure", "headaches", and "mental health" in reviewing the Appellant's injuries, as part of its analysis on the severity of the Appellant's disability. The General Division also used the headings, "Mexico", "Residual Capacity for Work", and "Summary".

[7] In my leave decision, I noted that the General Division had cumulatively assessed at least some of the Appellant's injuries or impairments, when it assessed his headaches together with his complaints of pain to his neck, back and hips. However, the Appellant has a longstanding history of mental health issues. These are documented throughout the medical records. I granted leave on the basis that the General Division did not appear to have considered the Appellant's general complaints of pain, together with his depressive symptoms, i.e. determined what cumulative impact they might have had on the [Appellant's] overall functionality and capacity on or before his minimum qualifying period".

[8] The Appellant was involved in a motor vehicle accident in 2010 in which he sustained several injuries, including a mild head injury, lower back pain and headaches, as well as various psychological effects. The Appellant's counsel submits that the Appellant's past medical history of substance abuse, addictions and depression rendered him more susceptible and predisposed to injury. The Appellant was also left with several limitations and restrictions and, as a result, he experienced intense distress over his inability to resume his usual activities, including work. Although he attempted to continue to operate his sign business, he was forced to sell it in the summer of 2010. His counsel submits that the General Division failed to consider the Appellant's overall impairments, and that it erred by

compartmentalizing each of his impairments, rather than considering them on a cumulative basis.

[9] The Respondent maintains that the General Division considered the totality of the evidence and that it conducted a comprehensive assessment of the medical evidence before it. In particular, it summarized and assessed the evidence regarding both his pain and mental health. The Respondent cited *Bungay v. Canada (Attorney General),* 2011 FCA 47, in which the Federal Court of Appeal held that all of the possible impairments of the claimant that affect employability are to be considered, "not just the biggest impairments or the main impairment". The Respondent argues that as the General Division looked at all of the medical conditions of the Appellant, it did not commit any errors of law. The Respondent submits that the analysis, while categorized, is a "synthesis of the various medical reports, the evidence from the Appellant's testimony and the questionnaire". The Respondent submits that the General Division followed the Federal Court of Appeal's instructions to look at the impact of all possible impairments which the Appellant faced.

[10] The Respondent argues that, furthermore, the Appellant failed to provide any evidence of how his physical conditions have affected his mental health and conversely, how his depressive symptoms have affected his ability to cope with his physical conditions. The Respondent argues that, in fact, the majority of the evidence by the various medical professionals is to the contrary, that the Appellant is able to cope with his mental health issues.

[11] The Appellant notes that his insurer recommended that he undergo a multi-disciplinary assessment, as his psychological features, which impact on his physical condition, must necessarily be considered together with his physical pain complaints. The Appellant suggests that his insurer deemed him disabled from any occupation only after undergoing a multi-disciplinary assessment. Otherwise, the insurer may not have determined that he was disabled under its policy on the basis of each of the assessments alone.

[12] The Appellant argues that there are several passages from the hearing file which are significant, as they highlight the interaction between his physical pain complaints and his mental health issues. The first of these includes the neuropsychological assessment dated September 20, 2012 of Dr. Duncan Day (GT6-103).

[13] The Appellant argues that Dr. Day was of the opinion that his distress and psychological situation caused him to be preoccupied with his physical pain complaints, to the point where he would be left fatigued. The Appellant argues that Dr. Day examined how his pain and psychological factors interacted. Dr. Day wrote:

> Mr. M. S. demonstrated a degree of somatic concerns that is unusual even in clinical samples. Such a score suggests a ruminative preoccupation with physical functioning and health matters and severe impairment arising from somatic symptoms. These somatic complaints are likely to be chronic and accompanied by fatigue and weakness that leaves him incapable of performing even minimal role expectations. He reported that his daily functioning has been compromised by numerous and varied physical problems. He feels that his health is not as good as that of his age peers and likely believes that his health problems are complex and difficult to treat successfully. The item endorsement pattern indicates that he reports symptoms consistent with both conversion and somatization disorders. He is likely to be continuously concerned with his health status and physical problems. His self-image may be largely influenced by a belief that he is handicapped by his poor health.

[14] I note that Dr. Day also diagnosed the Appellant with a pain disorder, associated with both psychological factors and a general medical condition. He recommended that the Appellant seek psychotherapeutic support to help him deal with the changes the accident had imposed upon him, to help cope with losses affecting him and to continue to develop strategies for adapting to his reduced abilities and chronic pain (GT6-129).

[15] The Appellant also relies on a psychological assessment report dated August 5, 2011 of Dr. M. Hogan, C. Psyc. (GT6-5). Dr. Hogan strongly recommended that the Appellant be referred for psychological therapy, preferably with a mental health professional trained in the treatment of difficulties associated with depression, pain

management, substance dependence and post-trauma reactions. The Appellant claims that the report explains his vulnerability. Dr. Hogan wrote:

> [The Appellant's] precarious position related to substance dependence and suicide ideation need to be considered foremost in his intervention plan. . . When evaluating his potential risk the specificity of his suicidal thoughts, substance dependence status, effectiveness of pain management strategies, degree of life disruption, and relationship status need to be taken into consideration.
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> Connected to the risk of suicide is his risk to become dependent on poly-substances. He requires a comprehensive pain management strategy that allows him to management his pain in a manner that minimizes his risk of becoming dependent on substances again. Ideally, this would be developed in conjunction with [the Appellant], his medical professionals, occupational therapist, physical therapist, psychological professional and AA mentors (if appropriate). (GT6— 16)
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> [The Appellant] is in significant distress, with particular concerns about his physical functioning. He reports significant levels of pain without the option of sufficient pain management options. [The Appellant] has experienced significant life stressors since he was a child. As an adult, stressors included poly-substance dependence, anti-social behaviour, legal issues, and a pattern of tumulus relationships. He has also had a history of mental health difficulties requiring several hospitalizations . . . (GT6-17)
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> . . . He has managed to stay away from alcohol and drugs but is in a precarious position. He has declined to take medication recommended to help him manage physical pain because of his fear of becoming dependent again on substances. This in tum impacts his ability to function successfully in his daily activities. Further, he has had a suicide attempt (December 20 I 0) in which he tried to overdose on Lorezapam and has had frequent suicide ideation . . . (GT6-18)

[16] In a catastrophic impairment evaluation dated September 15, 2014 (GT8-74). Drs. A. Herschorn, the primary care physician, and H. Becker, clinical coordinator, were of the opinion that the Appellant's physical impairments and mental and behavioural impairments, when assessed independently, did not meet the catastrophic threshold, but his level of impairment was elevated once a "*whole person impairment rating"* was taken into consideration, although it did not quite meet the catastrophic threshold. They shared the

opinion that the Appellant's "complex physical and cognitive presentation" required further characterization with additional testing and evaluation.

[17] The Appellant urges me to also review the mental/behavioural evaluation dated July 22, 2014 prepared by Dr. Dory Becker, C. Psyc. (GT8-93). The Appellant claims that this evaluation shows that the General Division failed to consider the impact that his mental health issues had on his physical state. The Appellant maintains that psychological and physical factors together have severely impacted his abilities to even initiate activities, including self-care and performing activities of daily living. Dr. Becker wrote:

> **Activities of Daily Living**
> [The Appellant] is evidencing impairment levels that are compatible with some but not all useful functioning. It appears that accident related depressive symptomatology, anxiety, and cognitive difficulties compromise his ability and willingness to engage in self-care, household, work, social, and recreational activities. Psychological factors may also contribute to disturbed sleep, although he had difficulty articulating this because of his dependence on Seroquel for sleep initiation. Anxiety reportedly compromises his travel experiences as a driver and passenger. Irritability reportedly contributes to problems communicating effectively.
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> **Concentration, Persistence, and Pace**
> [The Appellant] is evidencing impairment levels that are compatible with some but not all useful functioning. While he may have sustained a head injury in the subject accident, it appears that factors including depressive symptomatology, worry, anxiety, disturbed sleep, fatigue, low frustration tolerance, and medication side effects contribute to reported cognitive difficulties and problems sustaining focused attention and persisting with tasks.
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> **Causal/Stability**
> [The Appellant] reported a pre-accident mental health history of depressive symptomatology, anxiety, and substance abuse/dependence. Nonetheless, he indicated that he was functioning particularly well just prior to the subject accident as he was managing his own successful business and was working full-time hours. [The Appellant] reported a recurrence of depressive symptomatology following the subject accident which he attributed to perceived losses as well as anger and

> frustration at the owners of the horses involved in the subject accident. He also reported the onset of vehicular associated anxiety which was triggered by the subject accident, the onset of cognitive difficulties and a multitude of new pains, as well as an exacerbation of pre-existing neck pain. [The Appellant] further reported experiencing multiple lapses and at least one relapse with regards to alcohol and cocaine use post-accident and [the Appellant] opined that depressive symptomatology related to the subject accident contributed to these lapses. As such, it appears reasonable to conclude that the subject accident has indeed materially contributed to [his] current psychological difficulties and associated impairments in functioning. Furthermore, a pre-accident mental health history would have contributed to him being more vulnerable to the deleterious effects of the subject accident.
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> . . . As such, while he appears to evidence moderate impairments in functioning as a result of psychological factors at the present time, it is possible that we will continue to see fluctuations in his functioning and, accident related symptoms and impairments could contribute to an exacerbation of psychological symptomatology in the future. As such, he should be closely monitored (GT8-100 to GT8-101).

[18] The Appellant also urges me to review the orthopaedic insurer's examination dated December 16, 2014 prepared by Dr. Basil Johnston (GT8-18), the neurospychology insurer's examination dated December 22, 2014, prepared by Dr. Curt West (GT8-28) and neurology insurer's examination dated December 19, 2014, prepared by Dr. Richard Riopelle (GT8-47). Although Dr. Johnston examined the Appellant from strictly an orthopaedic perspective, this was part of the multi-disciplinary assessment. The neuropsychology's insurer's and neurology insurer's examinations were also part of the multi-disciplinary assessment.

[19] The Respondent is of the position that, on findings of fact or mixed fact and law, deference is generally owed to the General Division and the Appeal Division can only intervene in the General Division's decision if the Appellant can establishes that the General Division based its decision on an "erroneous finding of fact" that was "made in a perverse or capricious manner or without regard for the material before it". In other words, no deference is owed for erroneous findings of fact which are perverse or capricious or made without regard for the material before it. However, there is no suggestion by the Appellant that the

General Division erred in its findings of fact. The Appellant alleges that the General Division erred in law, and that, as such, no deference is owed. The Respondent concurs that Parliament intended that no deference be shown on questions of law.

[20] Considering the evolutionary path of the *Department of Employment and Social Development Act* (DESDA), the purported purpose and object of the DESDA, and the wording of subsection 58(1) of the DESDA, I agree that some measure of deference must be accorded by the Appeal Division to the General Division on findings of fact, subject to whether the findings of fact upon which the General Division bases its decision, is made in a perverse or capricious manner or without regard for the material before it. However, on questions of law, I agree with the parties that no deference is owed.

[21] It is insufficient for a decision-maker to assess each medical condition independently, as there may be a relationship between one's physical conditions and one's mental health issues: *Bungay, supra.* A decision-maker also needs to be mindful of the nature of the mental health issues facing an appellant, as they could manifest or magnify the scope of his or her physical problems, and also impact pain management strategies and affect treatment and recovery. Each case of course will depend upon the evidence.

[22] The evidence before me, which includes assessments undertaken in a multi-disciplinary context, would seem to suggest that there is such a relationship. The psychological assessment undertaken by Dr. Hogan; the mental/behavioural evaluations of Dr. Becker; and catastrophic impairment evaluation by Drs. Herschorn and Becker, in particular, allude to this. In the catastrophic impairment evaluation, the Appellant's physical impairments and mental and behavioural impairments, when assessed independently, did not meet the catastrophic threshold, but the level of impairment was elevated, which suggests that there was and may be a continuing connection between the Appellant's physical condition and his mental health issues. If the Appellant established such a connection and the General Division omitted to consider the Appellant's disabilities cumulatively, this constitutes an error of law.

[23] While headings are certainly of some assistance in managing and organizing the evidence when it is particularly voluminous or when, as here, an appellant has several medical considerations, they might be insufficient, such as in the circumstances of this case, given the seeming connection between the Appellant's medical conditions. At the very least, there should be some bridging of the analyses. It is not apparent that the General Division addressed the Appellant's disabilities on a cumulative basis in this regard.

[24] It would not be appropriate for me at this juncture to conduct an assessment of the evidence, since the General Division, as the primary trier of fact, is best positioned to assess and make findings on the evidence, and determine whether, after considering the medical evidence on a cumulative basis, it could lead to a finding that the Appellant's disability was severe and prolonged on or before the end of his minimum qualifying period and that it is likely to be long continued and of indefinite duration or likely to result in death.

CONCLUSION

[25] For the foregoing reasons, the appeal is allowed and the matter referred to a different member of the General Division for a redetermination.

Janet Lew
Member, Appeal Division