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

Citation: *P. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 152

Tribunal File Number: AD-15-73

BETWEEN:

P. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: April 7, 2017

REASONS AND DECISION

OVERVIEW

[1] This case is about whether the General Division applied the proper legal test for "severity" when assessing the Appellant's disability and his eligibility for a Canada Pension Plan disability pension, and whether it required him to meet a higher standard of proof. The Appellant is appealing the decision of the General Division rendered on December 12, 2014, which found that his disability was not severe on or before the end of his minimum qualifying period on December 31, 2013. It determined that he was therefore not eligible for a disability pension.

[2] The Appellant was unprepared or unable to offer dates for scheduling and attending an in-person hearing on this matter due to his mental health issues, despite the passage of time since the leave decision was rendered in May 2015, and consequently, the appeal before me proceeded pursuant to paragraph 43(*a*) of the *Social Security Tribunal Regulations.*

ISSUES

[3] The two issues before me are, whether the General Division:

i. applied the proper legal test for "severity" under subparagraph 42(2)(*a*)(i) of the *Canada Pension Plan*; and

ii. required a higher standard of proof of the Appellant.

GROUNDS OF APPEAL

[4] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the following grounds of appeal:

(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.

[5] Leave to appeal was granted on two grounds, each relating to whether the General Division may have erred in law.

SEVERITY

[6] Subparagraph 42(2)(*a*)(i) of the *Canada Pension Plan* provides that:

> **When person deemed disabled**
>
> **(2)** For the purposes of this Act,
>
> (a) a person shall be considered disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,
>
> (i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation […]

[7] The General Division cited paragraph 42(2)(*a*) and also re-stated this test for a "severe disability" at paragraph 8 of its decision.

[8] However, at paragraph 37 of its analysis, the General Division wrote, "the onus rests on the Appellant to substantiate that they are not capable of work as a result of their health condition." Then, at paragraph 39, the General Division wrote that the Appellant failed to establish that he was suffering from a severe disability that "precluded him from some type of employment." This restatement of the law implies that the General Division required a different standard of the Appellant—rather than requiring him to be incapable

regularly of pursuing any substantially gainful occupation, it required that he be “incapable of work.”

[9] The Respondent submits that the General Division’s analysis of whether the Appellant’s disability was severe is thorough, considered, intelligible, logical and transparent and supported by Federal Court of Appeal jurisprudence. The Respondent notes that the General Division cited *Villani v. Canada (Attorney General)*; 2001 FCA 248, *Inclima v. Canada (Attorney General)*, 2013 FCA 117; and *Klabouch v. Canada (Minister of Social Development*, 2008 FCA 33.

[10] The Respondent argues that the General Division did not err in its summary of both *Inclima* and *Klabouch.* At paragraph 36, the General Division wrote:

> Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person’s health condition (Inclima v. Canada (A.G.), 2003 FCA 117).

[11] Some context is necessary, as the Federal Court of Appeal referred to paragraph 50 of *Villani* which reads:

> This restatement of the approach to the definition of disability does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation". Medical evidence will still be needed *as will evidence of employment efforts and possibilities.* (emphasis added)

[12] It is clear that the expression “evidence of work capacity” in *Inclima* was not made in a vacuum and that the Federal Court of Appeal was mindful that an appellant had to demonstrate that he was incapable regularly of pursuing any substantially gainful occupation, to meet the “severity test.”

[13] Similarly, in *Klabouch*, although the Federal Court of Appeal also used the expression “capacity to work” (at paragraph 14), it is clear from the remainder of the decision that the test was whether the disability rendered the person incapable of regularly

pursuing any substantially gainful occupation. This was set out by the Federal Court of Appeal at paragraphs 9, 15, 16 and 20.

[14] Despite my initial concerns that the General Division may have applied a different test for "severity," ultimately it determined that he nonetheless had the capacity for light sedentary work, based on a preponderance of the evidence before it. In other words, if the General Division determined that he was capable of light sedentary work, the Appellant therefore could not have been found incapable regularly of pursuing any substantially gainful occupation in any event.

ONUS OF PROOF

[15] At paragraph 39, the General Division wrote that it required the Appellant to substantiate that he is not capable of working because of his health. I queried whether its use of the word "substantiate" indicated that the General Division required a higher standard of proof of the Appellant than on a balance of probabilities.

[16] Given that the General Division set out in paragraph 33 that the Appellant had to prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2013, I am satisfied that the General Division applied the proper onus of proof.

TOTALITY OF EVIDENCE

[17] The Appellant argued in his application requesting leave to appeal that the General Division had failed to consider the totality of the evidence. Although the Appellant had failed to provide particulars in support of this submission, and I did not grant leave on this ground, I have determined that it is appropriate to more fully review this issue.

[18] The Appellant has multiple medical conditions, including diabetic neuropathy, coronary artery disease, post-traumatic stress disorder, major depressive disorder, substance abuse disorder, obsessive compulsive disorder, possible attention deficit hyperactivity disorder and unexplained weakness, dizziness and balance issues, possibly attributable to Guillan-Barré syndrome. Some of these conditions were relatively well- documented in the

medical evidence, while others were not. The General Division addressed each of these medical conditions, to varying degrees, in either the evidence or analysis sections.

[19] There was relatively little in the way of medical documentation contemporaneous with the end of the minimum qualifying period of December 31, 2013. The only 2013 medical record is a report dated June 19, 2013 prepared by his family physician, which lists the Appellant's diagnoses and medications (GT1-169 to 170). The family physician also provided a brief narrative in his June 2013 report.

[20] The Appellant's family physician had also prepared three other brief medical reports, all of which were dated August 8, 2012 (GT1-24/186, GT1-25/187 and GT1-27 to 28). The first of these three reports listed the Appellant's diagnoses and medications. There was also an endocrinologist's report dated December 11, 2012 (GT1-177 to 179). There were also 2013 prescription drug related request forms. Most of the medical documentation consisted of records from 2011.

[21] The family physician's report of June 19, 2013 was very similar to the reports of August 8, 2012, although the family physician now also diagnosed the Appellant with arthralgias/arthritis and Guillan-Barré syndrome.

[22] There is a general presumption in law that a decision-maker has considered all of the evidence before him. Generally, one should pay deference to the General Division in its assessment of the facts, and one should be reluctant to displace this presumption, unless an applicant can establish that the evidence was of such probative value that the decision-maker ought to have analyzed it. I am prepared to find that the General Division overlooked this report; after all, it referred to other opinions from the family physician, but not this particular report, despite its closeness to the end of the minimum qualifying period. I am also prepared to find that the report held some probative value. After all, not only was the report the closest in time to the end of the minimum qualifying period, but the family physician also listed additional diagnoses.

[23] In *Plaquet v. Canada (Attorney General)*, 2016 FC 1209, the Federal Court addressed a similar situation, where an applicant argued that the General Division had failed

to consider allegedly new conditions that arose after the Canada Pension Plan Review Tribunal had rendered its decision in July 2004. The Federal Court found that the General Division in that case had failed to reasonably assess how the new diagnoses, outlined in three new reports, impacted and affected Ms. Plaquet's employability. The three reports provided a new understanding of what she suffered from, and what she faced in her "real world" employability context. The Court found that the three reports "do not simply give new labels to old symptoms; instead they provide evidence of a profound change in her prognosis, both medically and more importantly in terms of her employability."

[24] There is one fundamental difference between the new reports in *Plaquet* and the June 19, 2013 report from the Appellant's family physician. Notably, the three reports provided evidence of a "profound change" in Ms. Plaquet's prognosis in terms of her employability, whereas the June 19, 2013 merely listed two new diagnoses and provided no indication of any change in the Appellant's capacity or employability.

[25] I am acutely aware that a diagnosis alone does not determine the severity of a disability under the *Canada Pension Plan*. However, although the family physician provided no indication that the arthralgias/arthritis and Guillan-Barré syndrome impacted the Appellant's capacity, and although there were no other medical reports or records documenting the Appellant's arthralgias/arthritis, I do not see that the member considered or undertook any analysis in connection with these two conditions, or whether, taken cumulatively with his other medical conditions, he considered whether they could have impacted his overall capacity. In other words, the General Division failed to consider the totality of the evidence before it, by neglecting to consider the two new diagnoses and how they might impact the Appellant's capacity.

DISPOSITION

[26] Unlike *Plaquet*, there was a paucity of documentary evidence regarding the Appellant's arthralgias/arthritis and Guillan-Barré syndrome. As I have indicated above, there were no other medical reports or records documenting the Appellant's arthralgias/arthritis or Guillan-Barré syndrome, or how the family physician concluded that the Appellant has these two conditions. There is no indication that further investigations or

any treatment was warranted, whether the Appellant was referred to any specialists for these two conditions, what the long-term prognosis was, or how the two conditions—alone or considered cumulatively with his other conditions—impacted the Appellant's capacity, by the end of his minimum qualifying period. The fact that the Appellant was noted to have been seen by a neurologist and peripheral nerve specialist and has a poor prognosis does not establish a severe disability either.

[27] Given these considerations, it would serve no purpose to refer the matter back to the General Division for a redetermination and, therefore, the appeal is dismissed pursuant to subsection 59(1) of the DESDA.

Janet Lew
Member, Appeal Division