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

Citation: *T. M. v. Minister of Employment and Social Development,* 2017 SSTADIS 291

Tribunal File Number: AD-16-427

BETWEEN:

**T. M.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

---

# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

---

DECISION BY: Janet Lew

HEARD ON: May 4, 2017

DATE OF DECISION: June 22, 2017

Canada

## REASONS AND DECISION

### IN ATTENDANCE

| | |
|---|---|
| Appellant | T. M. |
| | Dan Edwards (assistant/support person) |
| Representatives for the Respondent | Regina Bah (articling student) |
| | Jennifer Hockey (counsel) |

### OVERVIEW

[1] This is an appeal of a General Division decision dated December 21, 2015. The General Division determined that the Appellant was disabled under the *Canada Pension Plan* commencing in May 2013, and that payments would start four months later, in September 2013, pursuant to section 69 of the *Canada Pension Plan*. The Appellant submits that the General Division erred in finding that he became disabled in May 2013, as he claims that he in fact became disabled in 2006 or 2007 and that payment of a Canada Pension Plan disability pension should have effectively commenced at that time. The Appellant's minimum qualifying period ended on December 31, 2016.

[2] The appeal before me proceeded by way of videoconference, pursuant to paragraph 21(*b*) of the *Social Security Tribunal Regulations.*

### BACKGROUND

[3] The Appellant raised several issues for appeal in his application requesting leave to appeal. He argued, for instance, that he has been continuously incapacitated since July 2008, to the point that he was unable to apply for a disability pension. In assessing the application requesting leave to appeal, I was not satisfied that there was an arguable case that the General Division erred in failing to find that he was incapacitated, because there was no medical evidence to support such a finding. Additionally, I noted that the earnings history indicated that the Appellant worked after 2008 (pages GD3-5 of the hearing file). I was not

satisfied that there was an arguable case that the General Division erred in failing to find that he should be paid a disability pension retroactive to 2006 or 2007, because the earliest that the Appellant can be deemed disabled under the *Canada Pension Plan* is June 2012, which is 15 months retroactive from September 2013, when he applied for a disability pension. (While the Appellant could be deemed disabled in June 2012, his actual date of onset could be much earlier than that.) The Appellant has not provided any additional submissions that warrant revisiting these grounds in this appeal before me.

[4] Nevertheless, the Appellant maintains that he has been continuously disabled dating back to at least July 2008, when he stopped working for the Steel Company of Canada, where he worked for 28 years. In his application requesting leave to appeal, he argued that his disability has prevented him from earning a living since July 2008. He acknowledges that he attempted work after 2008, but claims that his work attempts were unsuccessful "as it was not maintained or gainful employment." In his letter (which the Social Security Tribunal received on March 18, 2016), the Appellant reiterated that he has struggled to try to become gainfully employed, and that he has been unable to sustain employment "for any length of time."

[5] There was no evidence before the General Division that the Appellant had been unable to sustain employment "for any length of time." While new evidence is generally not admissible before the Appeal Division, unless it falls within the exceptions, these submissions nonetheless suggest that the General Division may have overlooked a vital issue when it decided on the appropriate form of hearing and when it assessed the severity of the Appellant's disability.

[6] In my leave to appeal decision, I determined that the General Division had concluded that the Appellant became disabled in May 2013 because he had been working until May 8, 2013. The General Division noted that the Appellant had worked as an industrial mechanic from April 2, 2013 until May 8, 2013, when he stopped working due to illness. The Appellant's work stoppage in May 2013 appears to have been the sole factor upon which the General Division determined that the Appellant became disabled in May 2013.

## ISSUES

[7] The primary issue before me therefore is whether the General Division erred in concluding that, because he was working until May 2013, the Appellant could not have become disabled until then. Put another way, did the General Division err in failing to examine whether the Appellant's employment prior to May 2013 constituted a substantially gainful occupation?

[8] This involves examining whether the Appellant's work between April 2, 2013 and May 8, 2013 represented a failed attempt to return to work. If so, that should have triggered an enquiry as to whether the Appellant became disabled sometime prior to May 8, 2013.

## GROUNDS OF APPEAL

[9] The Appellant had requested an in-person hearing in the proceedings before the General Division. He indicated that because of his severe anxiety, depression, dyslexia and other disabilities, he would be unable to fully participate in a written hearing. Nevertheless, the General Division conducted a hearing on the basis of the documentary evidence before it, having determined that there were no gaps in the information in the file and that there was no need for clarification. Although the Social Security Tribunal had notified the Appellant in early November 2015 that the General Division intended to make a decision on the basis of documents and submissions that had been filed, and had provided the parties with a deadline of December 14, 2015, to file any additional documents or submissions, the Appellant provided little, if any, records relating to his employment history, including for years 2012 and 2013.

[10] On December 14, 2015, the Appellant filed a document titled "A Brief Summary" with the Tribunal, in which he outlined his life, medical and work history since approximately the end of 1978 (GD5). The document apparently had been faxed to the Tribunal but was missing a page. The document also included a chronology up to 2006. At the end of the chronology, the Appellant wrote:

> Please Note: This Timeline is not finished; however, I am submitting it now due to the current deadlines. I plan to submit more information and documentation soon.

[11] The Appellant did not have the opportunity to submit any additional information and documents, because the General Division rendered its decision on December 16, 2015, having previously set a deadline of December 14, 2015, to file any additional records.

[12] The General Division recognized that the Appellant has been experiencing addiction and mental health issues since as early as 1990. The General Division relied on an opinion from the Appellant's family physician (GD3-42 to 45). The General Division indicated that it was particularly impressed by the "compelling letter" dated October 9, 2014, from Jennifer Radigan, MSW/RSW, a support worker with the AIDS Network (GD1-11 to GD1-12) who noted that the Appellant had been a client since 2005. However, the General Division found that neither opinion provided any guidance regarding the onset of disability.

[13] Neither the family physician nor Ms. Radigan described the Appellant's level of functionality or impairments after June 2012 up to May 2013, or for that matter, any other timeframe, although, as the Respondent points out, Ms. Radigan noted that the Appellant had reported that he had spent the majority of the last year "in bed." The Respondent asserts that this is further evidence that the Appellant became severely disabled in mid-2013 or thereabouts. However, being bedridden is not conclusive evidence of the severity of an appellant's disability. After all, an appellant can be severely disabled and not necessarily bedridden.

[14] Having found that the Appellant was disabled at the time of the hearing, the General Division should have determined the date of onset of disability, as well as the deemed date of disability. Irrespective of whether the Appellant had been working up to May 2013 and, given the paucity of medical records, the General Division should have addressed the Appellant's allegations that his employment in 2013 (and perhaps throughout 2012) was short-lived and that he may not have been engaged in (a) substantially gainful occupation(s) during these timeframes.

[15] The General Division noted that there was little information on file regarding the Appellant's work history. Insofar as I can determine, the General Division did not make any enquiries as to the nature of the Appellant's employment earnings for the years after 2008, such as the duration of his employment, his work hours and salary, his duties and responsibilities, or whether he required any workplace accommodations. The earnings history indicates that the Appellant reported earnings for years 2009, 2011, 2012 and 2013.

| Year | Unadjusted pensionable earnings |
| --- | --- |
| 2009 | $11,782 |
| 2011 | $29,940 |
| 2012 | $14,855 |
| 2013 | $13,377 |

[16] The only basis upon which the General Division determined that the Appellant's disability became severe was the fact that the Appellant had ceased working in May 2013. In other words, the General Division concluded that because the Appellant had been working up to early 2013, he necessarily had to have been capable regularly of engaging in a substantially gainful occupation. It is unclear from the General Division's decision whether the member drew any correlation between the level of earnings for 2013 and the extent of the Appellant's capacity.

[17] However, this employment was short-lived, although it is not entirely apparent from the documentary evidence why the Appellant stopped working in May 2013. There was no evidence before the General Division describing the nature of the Appellant's employment, duties and responsibilities and whether he had been able to fulfill them, his hours, earnings, or other. The only evidence from the Appellant was that he was "[unable] to maintain steady employment" (GD5-5). Simply, there was no concrete evidentiary foundation upon which the General Division member could conclude that the Appellant was capable regularly of pursuing a substantially gainful occupation in 2013, that the April-May

2013 employment constituted a substantially gainful occupation, or that the April-May 2013 employment did not represent a failed attempt to return to work.

[18] Similarly, there was little to no evidence regarding any other employment that the Appellant might have held between January 1, 2013 and April 2, 2013. It may well be that the Appellant did not have any employment earnings during this timeframe, although it is unlikely, given the earnings level for 2013. Hypothetically, the Appellant could have held multiple positions throughout early 2013, but was unsuccessful at maintaining these positions, owing to his health. If so, he might have satisfied the requirements set out in *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

[19] In written arguments, the Respondent submits that the General Division indeed analyzed whether the Appellant's earnings after 2008 indicated that he was engaged in a substantially gainful occupation (AD2-6). The Respondent identified two sentences where this analysis was arguably undertaken. The two sentences read as follows:

> The situation caused emotional problems and eventually led to his multiple addictions. It is doubtful that, with his history, he is employable in any gainful situation.

[20] In my view, these two sentences do not address the issue of whether the Appellant's earnings after 2008 indicate that he was engaged in a substantially gainful occupation. Nevertheless, the Respondent contends that the earnings history after 2008 establishes that the Appellant was capable regularly of pursuing a substantially gainful occupation. In written submissions, the Respondent argues that the evidence before the General Division clearly shows that the Appellant enjoyed substantially gainful earnings for 2011 and 2012. In the hearing before me, the Respondent has argued that the 2013 earnings also show that the Appellant had substantially gainful earnings.

[21] The Respondent referred me to *Fancy v. Canada (Social Development)*, 2008 FC 1414, at para. 13, where the Federal Court stated, "[…] the foundation for a person's disentitlement to CPP disability benefits is employability in <u>any</u> substantially gainful occupation." However, this is predicated on the assumption that that person is employed in a substantially gainful occupation. It is premature to determine entitlement or disentitlement,

whatever the case may be, if there has been no enquiry into (1) whether that person has any capacity regularly of pursuing any substantially gainful occupation and, (2) if that person is employed, whether it is in a substantially gainful occupation.

[22] The Respondent also referred me to *Atkinson v. Minister of Human Resources and Social Development*, 2013 SSTAD 6, at para. 36, affirmed by *Atkinson v. Canada (Attorney General)*, 2014 FCA 187. There, the Appeal Division member determined whether Ms. Atkinson's employment could be considered substantially gainful. In relying upon *Poole v. Minister of Human Resources Development*, (July 10, 2003), CP20748 (PAB), the Appeal Division member not only examined Ms. Atkinson's earnings, but it also examined whether it reflected the appropriate reward for the nature of the work she performed. The member also noted that Ms. Atkinson worked regular hours each week, with some evening work, and that she was able to complete assigned job tasks without assistance. Taking these factors into account, the member concluded that Ms. Atkinson had the capacity to work and that her employment was substantially gainful.

[23] However, the General Division member did not undertake this or any other type of analysis or enquiry into the Appellant's employment in 2013. Despite the short-lived nature of the Appellant's employment (which is undisputed), I do not see that the General Division conducted any real or meaningful analysis or enquiry into whether the Appellant's employment could be considered substantially gainful.

[24] As I have indicated above, the General Division concluded that because the Appellant was working up to early 2013, he necessarily had to have been capable regularly of engaging in a substantially gainful occupation. From this, it can be inferred that the General Division member readily assumed that the Appellant's level of earnings was substantially gainful, but until May 29, 2014, when section 68.1 of the *Social Security Tribunal Regulations* came into force and effect and provided a statutory definition for "substantially gainful," there was no concrete basis by which one could measure earnings as being substantially gainful.

[25] If the General Division had enquired into whether the Appellant was incapable regularly of pursuing any substantially gainful occupation for 2013 and determined that he

was, the General Division should have then turned its mind to determining whether the Appellant could be found disabled prior to 2013, dating back to at least June 2012. (This date is critical because it represents the earliest date on which the Appellant can be deemed disabled, though of course his actual date of onset could be much earlier.) While it would be tempting to conclude that the Appellant was necessarily engaged in a substantially gainful occupation throughout 2012, given his level of earnings, it may well be that the Appellant's earnings for 2012 were derived from employment prior to June 2012, i.e. the Appellant may not have worked after June 2012.

[26] The General Division erred in necessarily finding in this case that the Appellant's earnings reflected a substantially gainful occupation, without making further enquiries into the nature of the Appellant's employment. The duration of the Appellant's employment from April to May 2013 should have alerted the member that this may have represented a failed attempt to work. Rather than saying that the April to May 2013 employment could not have been substantially gainful, without having examined the employment in the first instance, it was a hasty conclusion to draw.

[27] Given the facts of this case, the General Division member erred in relying exclusively on the fact that the Appellant was employed, to find him capable regularly of pursuing a substantially gainful occupation. The General Division may have also relied on the fact that the Appellant had some earnings but, given the facts in this case, that too may have been an error. There may be occasions whereby a person's substantial earnings virtually demand such a finding, but this case merited some investigation, particularly given the nature of the Appellant's disabilities. He has been afflicted with mental health problems that spilled over into his work environment. Although the General Division member failed to notice that one of the pages in the Appellant's brief summary was missing, it is evident from the Appellant's "A Brief Summary" that his mental health and addiction issues were long pervasive.

[28] I recognize that the Appellant has provided information and made submissions before me that add to the evidentiary record before the General Division, but generally an

appeal to the Appeal Division does not allow for new evidence, unless it falls within the exceptions.

[29] I am, however, not relying on any new evidence in this appeal. After all, there was some evidence before the General Division that hinted at or suggested that the Appellant's employment after early 2012 may not have been substantially gainful. In his "A Brief Summary" (GD5-5), the Appellant wrote:

> As I gained more strength and mental capability, I tried to get back on my feet as soon as I could, working for short periods of time. I have a very strong work ethic, and it was important to me to re-establish this structure as soon as possible. It was all I could see at that time. Being able to work has always increased my mood; I loved my job, but not the constant discrimination and harassment, which I have suffered over the years. I have not been able to maintain steady employment, and I have had to turn down job offers. I have been harassed and discriminated upon due to being homosexual and due to my HIV Status on most jobsites, which has not done any good to my already bad mental / emotional state. I have not been capable of working at all since, I believe, sometime early in 2012.
>
> (My emphasis)

[30] Although I would generally defer to the General Division's choice as to when to proceed to a hearing and the form of hearing, in this case there were obvious evidentiary gaps in the hearing file, such that proceeding on the basis of the documentary record before him at the time did not enable the member to make a fully informed decision regarding the Appellant's employment situation. Much like *Murphy v. Canada (Attorney General)*, 2016 FC 1208, where the Federal Court, in the circumstances of that case, doubted that a proper assessment could take place without a *de novo* hearing before the General Division, in the proceedings before the General Division, a further hearing under either paragraph 21(*b*) or 21(*c*) of the *Social Security Tribunal Regulations* was likely more appropriate to provide the Appellant with an opportunity to provide oral evidence, particularly as the Appellant had notified the Tribunal of the barriers he faced with other forms of hearing.

[31] Further, it is clear from the Appellant's "A Brief Summary" that he intended to provide additional information and records. The General Division should have determined whether any proposed forthcoming additional information and records might have had any

probative value to the issues at hand and, if so, considered the appropriateness of an adjournment (even if the Appellant had not sought one), rather than so doggedly adhering to a strict deadline for the filing of records. (Given the closeness of the filing deadline and the release of the General Division decision, it may be that the member was unaware of the Appellant's "A Brief Summary" before he rendered his decision.)

[32] In summary, the General Division erred in equating the fact that the Appellant worked up to May 2013 with a capacity regularly of pursuing a substantially gainful occupation.

[33] The General Division instead should have focused on the issue of whether the Appellant was incapable regularly of pursuing any substantially gainful occupation and, if so, when the severe disability arose and whether it since has been continuous and of indefinite duration or likely to result in death. This would have led the General Division to examine whether the Appellant's employment could be considered substantially gainful. For this reason, I am allowing the appeal and returning the matter to the General Division.

[34] Ultimately, if the Appellant is unable to provide any additional evidence, including any evidence from witnesses or any supporting documentary evidence substantiating that his employment, including that after June 2012, represented failed attempts to return to work, or that he was unable to maintain any employment because of his medical conditions, his claim for greater retroactivity of a disability pension may fail. Without any supporting oral or documentary evidence, the General Division member may be left with no option but to conclude that the Appellant's earnings, including those for 2012 and 2013, established that he was engaged in substantially gainful employment up to May 2013. However, it would be premature to make such findings without an appropriate assessment having been undertaken.

## CONCLUSION

[35] Given the foregoing, the appeal is allowed. The Respondent does not contest the General Division's finding of disability and accepts that its determination of May 2013 as the date of onset of disability is correct. Accordingly, the matter shall be referred to a different member of the General Division for a determination on only the issue of whether

the Appellant is entitled to greater retroactive payments of a Canada Pension Plan disability pension, to possibly June 2012, the earliest date that he can be deemed disabled. This will necessarily involve an examination of whether the Appellant's employment should be considered substantially gainful or represents (a) failed work attempt(s).

Janet Lew<br>Member, Appeal Division