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

Citation: *R. T. v. Minister of Employment and Social Development*, 2017 SSTADIS 594

Tribunal File Number: AD-16-196

BETWEEN:

**R. T.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

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DECISION BY: Janet Lew

HEARD ON: October 25, 2017

DATE OF DECISION: November 2, 2017

Canada

## REASONS AND DECISION

## DECISION

[1] The appeal is dismissed.

## OVERVIEW

[2] The Appellant, R. T., stopped working as a heavy equipment operator in August 1998. He applied for and began receiving a Canada Pension Plan disability pension, with payments effective December 1998, based on a disability onset date of August 1998. However, he returned to the workforce in April 2006.

[3] The Respondent, the Minister of Employment and Social Development, subsequently learned that the Appellant had earnings for the years 2006 to 2009. It concluded that the Appellant had ceased to be severely disabled as of April 2006 and that he was therefore disentitled to a Canada Pension Plan disability pension between April 2006 and June 2010. This resulted in a significant overpayment.

[4] The Appellant sought a reinstatement of payments. Initially, he denied that he ceased to be severely disabled for the purposes of the *Canada Pension Plan*, or that he should owe any overpayment. He maintained that he continued to be "incapable regularly of pursuing any substantially gainful occupation," as defined by subparagraph 42(2)(*a*)(i) of the *Canada Pension Plan*.

[5] The General Division determined that the Appellant had ceased to be severely disabled as of August 1, 2006. The Appellant sought leave to appeal the General Division's decision. I granted the Appellant's application for leave to appeal the General Division's decision, as I was satisfied that the appeal had a reasonable chance of success, in that the General Division may have failed to provide the Appellant with a full and fair opportunity to present his case, and thereby may have failed to observe a principle of natural justice.

[6] In his written submissions and in the course of the hearing before me on October 25, 2017, the Appellant conceded that he was disentitled to a disability pension between

April 2006 and November 2009, when he was working. His condition has deteriorated since then and he is unable to work. He seeks reinstatement of a disability pension from January 2010 to present, or any assistance or support, given his precarious financial situation.

[7] Given the Appellant's concession that he worked at a substantially gainful occupation from 2006 to 2009, this appeal has been rendered moot. However, given the impact of this concession, I will nevertheless address the issue of whether the General Division erred when it ruled document GT11 inadmissible, as it included medical records and submissions that related to the period from 2006 to 2010.

[8] Further, I will address the issue of whether the General Division may have erred in law by failing to consider whether the Appellant had a benevolent employer who provided extensive accommodations to him, between April 2006 and November 2009.

[9] I will also address the issue of whether there is any relief that can be provided to the Appellant through this appeals process.

**FACTUAL BACKGROUND**

[10] The Appellant suffered a work injury in October 1982 but did not have the injury fully investigated at that time. Over time, he experienced a progressive deterioration in his symptoms, including pain in his neck and back, tingling, electric shock, tightness of muscles and an overall loss of strength and balance. He stopped working in August 1998.

[11] Investigations eventually revealed that the Appellant had a severe and rapidly progressive cervical myelopathy from spinal cord compression due to a disc herniation at C4-5 in his neck. He had weakness in both his upper and lower extremities and had encountered significant difficulties with walking. The Appellant underwent a cervical discectomy and fusion in November 1998. His neurosurgeon was of the opinion that the Appellant had improved from surgery, but even so, the Appellant was left with permanent disabilities owing to the spinal cord injury. He was at risk of developing further problems that might require further surgery.

[12] The Appellant returned to the workforce in 2006, largely on a seasonal basis, working as a driver for his brother's company. However, he had limited duties and worked fewer shifts, compared to other drivers. He also required assistance from other workers. At times, he missed work because of his pain.

[13] His family physician prepared a medical opinion advising that the Appellant was unable to perform any heavy duties without risk of exacerbation, and that he was chronically dependent on morphine.

[14] Updated medical information, including a report dated March 29, 2017, indicates that the Appellant underwent a posterior C3-C7 instrumentation fusion and decompression in August 2015, but that he continues to suffer from chronic neck pain.

## ISSUES

[15] The issues before me are as follows:

**1.** Did the General Division err when it determined that document GT11 was inadmissible?

**2.** Did the General Division err by not considering whether the Appellant had a benevolent employer who provided extensive accommodations to him?

**3.** Do I have any jurisdiction to reinstate the Appellant's benefits?

## ANALYSIS

**ISSUE 1:** Did the General Division err when it determined that document GT11 was inadmissible?

[16] The Appellant submits that the General Division deprived him of the opportunity to fully and fairly present his case, when it ruled document GT11 inadmissible. The General Division had established dates by which the parties were required to file any documents or submissions. The Appellant filed document GT11 after the filing deadline. The Appellant

argues that the document nevertheless included evidence as well as submissions that were material to establishing the ongoing severity of his disability.

[17] The Appellant provided document GT11 to "provide clarity in regards to the many facets of [his] condition and his disabilities." The document was also intended "to provide insight on why he decided to and how he was able to return to work in 2006." The Appellant's representative also intended to rely upon the document to assist her in presenting the evidence. The representative described document GT11 as a "presentation aid" rather than as an *aide memoire*.

[18] In written submissions, the Appellant argued that document GT11 was intended to establish the following:

- that the Appellant has cervical myelopathy secondary to cervical radiculopathy at C4-5 and that he experiences severe chronic pain, neurologic dysfunction, pathologic reflexes, and muscle weakness and/or numbness.

- that the Appellant's condition is progressive and that he can expect gradual deterioration and an increase in his symptoms.

- that the Appellant wanted to work and therefore took pain relief medication to mute his pain. It was only under these circumstances that he was able to consider working, even if only in a limited capacity.

- that he had numerous limitations and was unable to perform basic duties. He worked for his brother, who provided accommodations. The Appellant worked fewer shifts and was able to take more time to complete assigned duties.

- that working exacerbated his overall condition. The Appellant's pain levels increased substantially, and, consequently, he was taking more pain relief medication. His pain and related issues began taking a toll on his mental health

and the Appellant began drinking. As a result, this led to narcotic and alcohol addiction.

- that the Appellant explored employment options suitable for his limitations. He earned a trade certificate for gas appliance service technician but was unable to pursue employment in this field because of his deteriorating physical condition. The Appellant increased his narcotic and alcohol use at about this time.

- that further medical investigations revealed that the Appellant had a dilated bile duct and elevated liver enzymes. In November 2014, the Appellant underwent a sphincterotomy and pancreatic duct placement.

- in August 2017, the Appellant underwent a posterior C3-C7 instrumentation fusion and decompression.

[19] Much of this evidence was already before the General Division, through other documents and witnesses' testimony.

[20] Moreover, the only evidence or submissions in document GT11 that would have had any relevance to the proceedings before the General Division concerned the Appellant's medical condition and employment between 2006 and 2010. This is so, as the issue before the General Division was whether the Appellant had ceased to be severely disabled in 2006.

[21] The pre-2006 records and post-2010 records and submissions were irrelevant to the issue of whether the Appellant had ceased to be severely disabled in 2006. In any event, the record before the General Division largely included all the 1999 medical records, other than the family physician's 1990 to June 1999 clinical records. The General Division also had a copy of the August 2000 ergonomic assessment, the employer's questionnaire and the family physician's report of December 2010.

[22] In the hearing before me, the Appellant argued that document GT11 was vital to his case, because it established that the Appellant had a chemical dependency. The drugs

dimmed the Appellant's pain and enabled him to work, although at the cost of aggravating his pre-existing injuries.

[23] The Respondent submits that document GT11 was unnecessary to establish that the Appellant had a chemical dependency because the Appellant's daughter was permitted to and did in fact give evidence on this issue. Her evidence and submissions in this regard can be found at approximately 27:39, 51:12 and 57:33 of the audio-recording of the hearing before the General Division. She testified that the Appellant "has serious, serious issues with [addictions]." In closing submissions, she argued that they had not "touched enough on [the Appellant's] addiction issues." She stressed that without drugs, the Appellant was unable to work, yet his chemical dependency resulted in other medical problems.

[24] Given that this evidence and these submissions were before the General Division, I find that document GT11 was unnecessary to establish the Appellant's chemical dependency. Therefore, it cannot be said that the General Division failed to provide the Appellant with the opportunity to make his case in regard to this issue.

[25] Even so, because the Appellant was seen to be engaged in a substantially gainful occupation, the Appellant's chemical dependency was not relevant in determining whether the Appellant had ceased to be severely disabled.

[26] The Appellant's written submissions included references to expert opinions that had not been previously filed with the General Division, as there may have been an expectation that I would be conducting a reassessment of the medical evidence. However, a review or reassessment does not fall within any of the grounds of appeal under subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA). The subsection sets out very limited grounds of appeal. It is not the Appeal Division's role to reassess the evidence or reweigh the factors that the General Division considered in assessing whether an applicant is severely disabled under the *Canada Pension Plan*[1].

[1] *Tracey v. Canada (Attorney General),* 2015 FC 1300,

[27] Similarly, new evidence generally is inadmissible on an appeal under subsection 58(1) of the DESDA, except in limited situations[2]. There are no circumstances here that would enable me to consider the new expert opinions and other evidence upon which the Appellant relies. I note, in any event, that the expert did not examine or see the Appellant and that the opinions do not specifically refer to the Appellant.

[28] I find that the General Division did not deprive the Appellant of the opportunity to fully and fairly make his case, when it ruled that document GT11 was inadmissible. Much of document GT11 was irrelevant or was already before the General Division.

> **ISSUE 2:** Did the General Division err by not considering whether the Appellant had a benevolent employer who provided extensive accommodations to him?

[29] The Appellant acknowledges that he was disentitled to a disability pension from 2006 to 2009 but, at the same time, insists that he had a benevolent employer during that timeframe. Therefore, I will consider whether the General Division determined whether the Appellant had a benevolent employer.

[30] As the General Division noted, the Appellant completed a Return to Work form. He also prepared a letter dated March 21, 2006, in which he described his employment. Notably, the Appellant wrote that if his brother had not hired him, he would not have had any employment (GT1-111 to 112).

[31] The General Division also noted that the manager of the Appellant's employer had completed a questionnaire in June 2010, stating that the Appellant was unable to work on a full-time basis because he was capable of doing only limited activities and was unable to perform basic job duties, due to weakness and poor balance. For instance, the Appellant was unable to check antifreeze or clean truck windows. The manager stated that other people had to assist the Appellant and perform some of his work. The manager wrote that he was related to the Appellant and that he had been providing allowances to the Appellant but that the

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[2] *Canada (Attorney General) v. O'Keefe*, 2016 FC 503, at para. 28; *Cvetkovski v. Canada (Attorney General)*, 2017 FC 193, at para. 31; and *Glover v. Canada (Attorney General*), 2017 FC 363.

company could no longer employ someone who was unable to perform all the duties (GT1-138 to 140).

[32] The General Division noted that the Appellant completed a second Return to Work form in June 2010, in which he stated that he was not returning to the truck driving position with his brother's company because he was unable to perform the basic duties expected of him (GT1-128).

[33] The Appellant had written to the Respondent in 2011 that the "only reason [he had been] capable of earning such amounts was because his employer who is also related to [him] was a benevolent employer and reduced the expectations of [the Appellant] as to accommodate his disability" (GT1-177).

[34] The General Division did not refer to the word "benevolent" in its decision, other than at paragraph 16 in the evidence section, where it wrote, "[The Appellant] said his employer was his brother, who the Appellant said was benevolent and if not for him, the Appellant would otherwise not have employment." From this, the General Division clearly was mindful of the issue of whether the Appellant had a benevolent employer.

[35] On its face, the General Division's analysis does not appear to address the issue of whether the Appellant's employer could be considered benevolent. However, the General Division examined the nature and scope of duties that the Appellant performed, and found that he had managed to drive without difficulty, that he had worked hard in irrigation and that his back pain had been tolerable. The General Division found that the Appellant had stated that he was able to work an average of 20 hours per week in 2006. Additionally, the Appellant had "significant reported earnings."

[36] With these findings, it was implicit that the General Division had determined that it was unnecessary to examine whether the Appellant had a benevolent employer. The Appellant was still able to perform physically demanding work, even if it was lighter, relative to his past work and those of others. His work was productive, and it was only after November 2009 that the employer determined that it could no longer employ him because he was unable to perform all the duties expected of him.

[37] I find that with these evidentiary findings, it was unnecessary for the General Division to consider further whether the Appellant had a benevolent employer.

**ISSUE 3:** Do I have any jurisdiction to reinstate the Appellant's benefits?

[38] Section 70.1 of the *Canada Pension Plan Regulations* stipulates that any request for reinstatement must be made to the Minister and that a person is entitled to reinstatement of a disability pension if they become incapable of working within two years after the month in which they ceased to receive the disability pension.

[39] The Appellant seeks reinstatement of benefits from January 2010; however, he does not appear to have made a request to the Minister for a reinstatement of benefits within two years following this date. Accordingly, this issue is not properly before me. In any event, I do not have jurisdiction to reinstate benefits.

[40] The Appellant seeks other relief in the form of financial assistance. I do not have any jurisdiction to authorize such relief, but I do note that, provided the Appellant has sufficient valid contributions to the Canada Pension Plan, and provided that he has not been receiving a retirement pension for a certain period of time, he may be eligible to apply for and receive a disability pension. However, payment of any benefits to which he might be entitled may be limited because of the maximum retroactivity provisions under the *Canada Pension Plan*.

[41] The Appellant's representative states that Service Canada had informed them that the Appellant was precluded from reapplying for a disability pension, pending the outcome of this appeal. If the Appellant can substantiate that he received this advice, it may be a material consideration in determining the commencement of any payment to which the Appellant may be entitled.

## CONCLUSION

[42] Given the Appellant's concessions that he was working and was disentitled to a Canada Pension Plan disability pension between April 2006 and November 2009, this appeal has been rendered moot and is therefore dismissed. As well, I find that the General

Division did not breach any principles of natural justice, nor fail to determine whether the Appellant had a benevolent employer, and the appeal is therefore dismissed.

Janet Lew
Member, Appeal Division

**IN ATTENDANCE** (via videoconference)

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| Appellant | R. T. |
| Representative for the Appellant | A. T. (Appellant's daughter) |
| Representative for the Respondent | Marcus Dirnberger (counsel) |
| Observers | J. T. (Appellant's mother) |
| | D. T. (Appellant's father) |