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

Citation: *J. P. v. Minister of Employment and Social Development*, 2017 SSTADIS 620

Tribunal File Number: AD-16-1300

BETWEEN:

J. P.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

HEARD ON: October 20, 2017

DATE OF DECISION: November 9, 2017

REASONS AND DECISION

OVERVIEW

[1] The Appellant, J. P., stopped working as a longshoreman electrician in October 2007, finding that constant pain in his knee limited his mobility and that it affected his concentration. He was diagnosed with advanced osteoarthritis in both knees, as well as with psoriasis. He applied for and began receiving a Canada Pension Plan disability pension, effective November 2007.

[2] The Respondent, the Minister of Employment and Social Development, subsequently detected earnings on the Appellant's Record of Earnings. From 2009 to 2014, the Respondent reminded the Appellant of his obligation to disclose any earnings but, nevertheless, continued to pay him a disability pension.

[3] In March 2014, the Respondent determined that the Appellant had returned to work in March 2008. It concluded that the Appellant had ceased being severely disabled as of March 2008 and, therefore, that he was disentitled to a Canada Pension Plan disability pension between March 2008 and March 2014. This resulted in a significant overpayment.

[4] The General Division determined that the Appellant had ceased to be eligible for a disability pension on March 1, 2008, and that he is required to repay the overpayment.

[5] The Appellant denies that he ceased being severely disabled for the purposes of the *Canada Pension Plan*, or that he owes any overpayment. He maintains that he continues to be "incapable regularly of pursuing any substantially gainful occupation," as defined by subparagraph 42(2)(*a*)(i) of the *Canada Pension Plan*.

[6] 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 erred when it failed to determine whether the Appellant's disability was severe in a real-world context. It was otherwise unnecessary for me to address each of the Appellant's arguments in the context of the leave to appeal application, as it was sufficient to grant leave to appeal on the basis of one ground.

[7] I must now decide whether the General Division:

(a) based its decision on any erroneous findings of fact that it had made in a perverse or capricious manner or without regard for the material before it;

(b) failed to assess the medical evidence before it in determining whether the Appellant had ceased to be disabled; and

(c) failed to cite *Villani v. Canada (Attorney General)*, [2002] 1 FCR 130, 2001 FCA 248, and to conduct a real-world assessment.

[8] The hearing of this appeal was by videoconference, given the availability of videoconferencing facilities, and to provide both parties with an opportunity to make full submissions.

ISSUES

[9] The issues before me are as follows:

(a) Did the General Division err in its findings relating to the trucking business?

(b) Did the General Division fail to assess the medical evidence?

(c) Did the General Division err by failing to apply *Villani* ?

ANALYSIS

[10] Subsection 58(1) of the *Department of Employment and Social Development Act* provides for only limited grounds of appeal. The only reviewable errors are the following: the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; it erred in law in making its decision, whether or not the error appears on the face of the record; or it 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.

Issue 1: Did the General Division err in its findings relating to the trucking business?

i. ownership, management and operation of trucking business

[11] The General Division found at paragraph 36 that the Appellant "owned, managed, and successfully operated a trucking business" while receiving a disability pension.

[12] The Appellant claims that the General Division ignored the evidence before it and, in particular, any evidence that demonstrated that he was uninvolved in the day-to-day operations of the business or that his involvement was minimal. In particular, he claimed that it ignored his testimony that:

- he had limited involvement in the day-to-day management of the business (33:24 of the audio recording of the hearing before the General Division);
- the daily operation of the business had been managed through an external dispatching company and had not required his involvement (29:20 and 30:32);
- his wife managed all other aspects of the business, such as the bookkeeping and payroll (30:35); and
- he lacked the ability to participate in the business on and after March 1, 2008.

[13] The Appellant asserts that this evidence was material to any consideration of his involvement with the trucking business, and that the General Division should have therefore considered it.

[14] However, I find that the General Division had in fact clearly considered this evidence. In its decision, the General Division set out the Appellant's evidence, including the fact that a dispatcher notified his two truck drivers where they would be working that day. It specifically acknowledged the Appellant's testimony that his wife managed the company, that she looked after the bookkeeping and that his own work was minimal.[1]

[1] See paragraphs 24, 25 and 36.

[15] The Appellant further submits that the General Division made erroneous findings in a perverse or capricious manner when it found that he had hired employees, that he had monitored them and that he had leased vehicles. The Appellant denies that he ever oversaw or monitored his truck drivers, as he relied on an external dispatching company to assign jobs on his behalf. The Appellant also denies that he "signed for the truck leases," as he last signed a lease in 2005, prior to the deemed date of his disability of March 2008.

[16] The General Division indicated that the Appellant had "signed for the truck leases" in its evidence section.[2] It did not specify when the Appellant had signed for the truck leases or refer to any time frame when he might have leased the trucks. In its analysis, it wrote that the Appellant had "leased trucks as they were on his credit," again without any reference to any time frame. In concluding that the Appellant "owned, managed, and successfully operated" a trucking business, the General Division's references to the signing of leases could well have been to underscore the Appellant's ownership of the company, rather than to demonstrate any active ongoing involvement and management.

[17] While there was no explicit evidence that the Appellant or anyone else, for that matter, had been directly overseeing any employees on a regular basis, the Appellant testified that if the company was looking for a driver, he and his wife discussed it and said "look, we try him out" (AD3-285). Accordingly, the General Division could have reasonably construed this to mean that there had to have been some monitoring involved, by both the Appellant and his wife.

[18] The Respondent argues that there was evidence upon which the General Division could conclude that the Appellant managed and operated a trucking business. The Respondent argues that I should defer to the General Division's assessment of the evidence.

[19] The Appellant essentially is urging me to conduct my own assessment of the evidence and come to my own determination regarding the extent of the Appellant's involvement in the trucking business. This would involve weighing the evidence. However, there is no place or role for me to conduct such an assessment under subsection 58(1) of the DESDA.

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[2] See paragraph 25.

[20] In this regard, the General Division's decisions are entitled to significance deference. As the Federal Court held in *Hussein v. Canada (Attorney General)*, 2016 FC 1417, the "weighing and assessment of evidence lies at the hearing of the [General Division's] mandate and jurisdiction. Its decisions are entitled to significant deference."

ii. lucrative business

[21] The Appellant submits that the General Division erred in finding that P. Trucking and Associates was a "successful and lucrative business." The Appellant argues that by labelling the business lucrative, this led the General Division to conclude that the Appellant was thereby gainfully employed or that he was necessarily involved in the company, when the evidence was that he did not draw any income from the company.

[22] In fact, the General Division drew no findings as to whether the Appellant was gainfully employed by the trucking company. Further, the General Division was aware that the Appellant did not draw any income from the company. The Tribunal acknowledged that the company did not pay the Appellant a salary and that he did not receive any income from the company.[3]

[23] The General Division was focused on the extent of the Appellant's involvement with the company. It found that the Appellant's involvement with the trucking business "was not minimal." It also found that the business was lucrative and that the Appellant was involved in the operations of running a successful business and that he demonstrated a capacity regularly of pursuing a substantially gainful occupation.

[24] The General Division was not suggesting that the Appellant had to have been involved in the company for it to generate those levels of gross earnings. Rather, the General Division examined the scope of the Appellant's involvement in the trucking business.

[25] I am unconvinced that the General Division based its decision that the Appellant was no longer severely disabled on its finding that the trucking company represented a successful and lucrative business. After all, the company's level of success was immaterial

[3] See paragraph 37.

to whether the Appellant was severely disabled. At most, the General Division simply considered how involved the Appellant was with the business.

iii. benevolent employer

[26] The Appellant submits that the General Division ignored material evidence that establishes that he has been working for a benevolent employer.

[27] The Appellant accepts the General Division's findings that he did not require any accommodation or assistance from his colleagues, but claims that this overlooks the fact that his employer had provided and continues to provide "excessive levels of accommodation." In particular, the Appellant relies on his oral testimony at 20:30, when he indicated that his union had created the position specifically for him, or for anyone who was older and "[had] physical limitations … [or] the same kind of conditions." The position entailed distributing from two to upwards of 20 pairs of coveralls within a two- hour window. The Appellant had also testified that there was no job security and that he could be "bumped out at any time" and replaced by anyone who was even more disabled.

[28] The Appellant argues that the General Division failed to recognize that the position had been specifically created for someone of his profile, to accommodate disabled union members.

[29] Both parties rely on *Atkinson v. Canada (Attorney General)*, [2015] 3 FCR 461, 2014 FCA 187, where the Federal Court of Appeal found that the Tribunal in that case had recognized that Ms. Atkinson received accommodations from her employer, but that they did not go "beyond what [was] required of an employer in the competitive marketplace." The Tribunal found that Ms. Atkinson's work was productive and that the employer expected a similar amount of work from her than from her colleagues. The Tribunal did not find any evidence to suggest that the employer was dissatisfied with her work performance or that it had experienced hardship from the accommodations made.

[30] It is implicit from the General Division's decision that the nature of this employment, in another setting, would not require a benevolent employer, and that the Appellant would be able to fulfill the demands of a sedentary position. While the

Appellant's union had created the position for "severely disabled union members," the General Division examined the position itself and what demands it had exacted of the Appellant. It found that the position had required the Appellant to work 10.5 hours per day (with a break for two hours) and that, during this time frame, he had been required to stand and sit.

[31] In this regard, the Appellant argues that the General Division was required to consider his particular circumstances, in assessing his capacity regularly of pursing any substantially gainful occupation of a sedentary nature. The Appellant claims that, had the General Division applied this *Villani* assessment, it would have determined that he was wholly unsuited for any sedentary employment, given his limited education, training and past work experience, which was largely limited to physically demanding disciplines. Given the General Division's finding regarding the extent of the Appellant's involvement in the trucking business, going back to the time when he started the company, such an assessment was unnecessary.

[32] I have also considered the relevance of section 68.1 of the *Canada Pension Plan Regulations* to the Appellant's circumstances. The General Division did not address the impact of section 68.1 of the *Canada Pension Plan Regulations* on the Appellant's capacity regularly of pursuing any substantially gainful occupation. The section defines "substantially gainful" in respect of an occupation for the purposes of subparagraph 42(2)(*a*)(i) of the *Canada Pension Plan.* Under the section, "substantially gainful" describes an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension. The section does not make any specific provisions or allowances for a benevolent employer. In other words, section 68.1 of the *Canada Pension Plan Regulations* may apply, irrespective of whether a claimant relies on a benevolent employer.

[33] The General Division would have had limited pensionable earnings information for the Appellant, given that he had started working for his union only in October 2015 and that the hearing before the General Division took place in mid-February 2016. However, if the Appellant had been assured of being paid $39 hourly for eight hours per day over four days

per week, by any measure, this would seem to constitute a “substantially gainful” occupation such that the Appellant could not be considered severely disabled.

(b) Did the General Division fail to assess the medical evidence?

[34] The Appellant argues that the medical evidence conclusively establishes that he has been severely disabled since 2008, in that it showed that his advanced osteoarthritis and gouty pain preclude him from even sedentary employment.

[35] The Appellant indicates that he bore the onus of proof to establish that he remained continuously disabled. In fact, the onus lay with the Respondent to prove, on a balance of probabilities, that the Appellant ceased to be disabled and that the requirements of paragraph 42(2)(*a*) were no longer met: *Atkinson*, *supra*, at paragraph 39.

[36] There were various diagnostic examinations, consultation reports and medical opinions from the Appellant’s family physician, an orthopaedic surgeon and two rheumatologists, as well as clinical records from the family physician, in the hearing file before the General Division. The records cover the period from May 2007 to April 2015. The records show that the Appellant has advanced degenerative arthritis in both knees, among other things. The family physician’s most recent medical opinion outlines several other medical conditions, including atrial fibrillation.

[37] The parties accept the General Division’s findings that the Appellant is unable to return to his previous employment as a longshoreman electrician, given its physical demands, but none of the medical records specifically addresses whether the Appellant is precluded from sedentary opinion. None of the physicians has offered an opinion in this regard. In fact, both rheumatologists query whether the Appellant has any options for retraining.

[38] In his report of June 5, 2008, Dr. Reid, wrote, “I do not know anything about the options for retraining” (GD2-281) while Dr. Yorke, in a subsequent report dated March 4, 2009, wrote that he had discussed the need for the Appellant to consider retraining for alternative work, as it was highly unlikely that the Appellant would return to his previous employment.

[39] The Appellant asserts that the General Division was required to consider the relevant medical evidence but failed to do so. The Respondent claims that the General Division, at paragraphs 41 and 45 of its decision, had in fact considered the medical evidence.

[40] The General Division referred to the medical opinions of the Appellant's two rheumatologists and his family physician, but it did not undertake any analysis of that medical evidence. The General Division determined that the Appellant demonstrated a capacity regularly of pursuing any substantially gainful occupation because it found, one, that he was managing a trucking business and, two, that he was currently and regularly engaged in a substantially gainful occupation.

[41] Given that the General Division found that the Appellant was engaged in a substantially gainful occupation, I find that it was unnecessary for the General Division to assess the medical evidence. Under the circumstances, the General Division did not fail to assess the medical evidence. The fact that the Appellant was working was sufficient for the Respondent to meet the onus of proof and establish that the Appellant had ceased to be severely disabled.

(c) Did the General Division fail to apply *Villani?*

[42] The Appellant argues that the General Division failed to conduct the "real world" assessment articulated by the Federal Court of Appeal in *Villani*. This approach requires one to determine whether "an applicant, in the circumstances of his or her background and medical condition, is capable of regularly pursuing any substantially gainful occupation." The Federal Court of Appeal determined that there needs to be an "air of reality" in assessing whether an applicant is severely disabled under subparagraph 42(2)(*a*)(i) of the *Canada Pension Plan*, and that the subparagraph should be given a generous and liberal construction.

[43] Given that the General Division found that the Appellant demonstrated a capacity regularly of pursuing any substantially gainful occupation, in that he was involved in his trucking business and that, after October 2015, he was engaged in a substantially gainful

occupation, I find that it was unnecessary for the General Division to conduct a “real world” assessment.

DISPOSITION

[44] The Appellant bears the burden of proof and has failed to establish that the General Division either erred in law or that it based its decision on the erroneous findings of fact that the Appellant has identified. As such, the appeal is dismissed.

[45] The Appellant is nevertheless requesting that the overpayment be capped so that he is responsible for repaying, at most, the overpayment between March 2008 and January 2012, when he would have otherwise sought an early retirement pension. I note that the Appellant has yet to apply for a retirement pension but, even so, I do not have any jurisdiction to cap any overpayment.

[46] The Appellant is also requesting reimbursement for his travel expenses to the hearing of this matter. I do not have any jurisdiction to reimburse any party in this regard.

Janet Lew
Member, Appeal Division

IN ATTENDANCE (via videoconference)

Appellant	J. P.
Representative for the Appellant	Lucy Yuan (counsel)
Representative for the Respondent	Stéphanie Pilon (counsel)
	Jennifer Hockey (counsel)