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

Citation: *J. M. v. Minister of Employment and Social Development,* 2018 SST 78

Tribunal File Number: AD-16-1018

BETWEEN:

J. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Nancy Brooks

DATE OF DECISION: January 29, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant J. M. applied for a disability pension under the *Canada Pension Plan* (CPP). The Minister denied his application, both initially and upon reconsideration. Mr. J. M. then appealed to the General Division where he testified he could no longer work as of November 4, 2011, due to back pain, obsessive compulsive disorder (OCD) and hypochondria. The General Division dismissed his appeal, finding that his disability was not severe as defined in the CPP on or before the minimum qualifying period (MQP) date of December 31, 2013.

[3] The Appellant was granted leave to appeal that decision to the Appeal Division. On the appeal, he contends that the General Division committed errors of law and made findings of fact that were not supported by the record. I have concluded that he has not proven an error falling within the scope of s. 58(1) of the *Department of Employment and Social Development Act* (DESDA), and therefore his appeal should be dismissed.

ISSUES

[4] The issues to be addressed on this appeal are the following:

Issue 1: Did the General Division err in law by misinterpreting the definition of severe disability under the CPP?

Issue 2: Did the General Division err in law by misapplying the test for reasonable refusal of treatment?

Issue 3: Did the General Division commit an error under s. 58(1)(*c*) of the DESDA? In particular:

(a) Did the General Division misapprehend the facts by preferring some findings of physicians over other findings of the same physicians, as well as over the findings of other equally qualified physicians?

(b) Did the General Division ignore objective findings of fact regarding the Appellant's health?

ANALYSIS

[5] In order to succeed on this appeal, the Appellant has the burden to prove that the General Division committed one of the errors specified in s. 58(1) of the DESDA:

> (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

Issue 1: Did the General Division misinterpret the definition of severe disability?

[6] The Appellant argues that the General Division misinterpreted the definition of severe under the CPP. Specifically, he argues that it failed to apply the "real-world approach" to determine whether he was employable, i.e. capable regularly of pursuing any substantially gainful occupation.[1] If the General Division failed to apply the correct legal test, this would constitute an error of law falling within s. 58(1)(*b*) of the DESDA.

[7] Under this head of argument, the Appellant submits that the General Division failed to consider "the overall landscape of [his] mental and physical conditions", which, in his submission, demonstrated "he indeed has both a severe and prolonged disability with mental and physical components".[2] The Appellant also argues that the General Division made a finding that since he had fewer back flare-ups he would be able to work regularly; however, had the General Division also considered the fact that he required a 28-day inpatient psychiatric treatment less than a month after the MQP, it would have come to the opposite conclusion.[3]

[8] The Respondent submits that upon review of the decision, it is apparent that the General Division considered all of the Appellant's physical and mental illnesses and impairments as well as the treatment at the Centre for Addiction and Mental Health (CAMH). The Respondent

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[1] The real-world approach was described by the Federal Court of Appeal in *Villani v. Canada (Attorney General)*, 2001 FCA 248, and in *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

[2] AD2-6.

[3] AD2-7.

also submits that the General Division's finding that the Appellant's symptoms were mild as of the MQP was a finding open to it on the evidence before it, especially as the evidence noted flare-ups and improvements rather than a continuous level of symptoms.[4]

[9] The General Division's task was to determine whether the Appellant's disability was severe and prolonged on or before the MQP date, December 31, 2013. A disability is "severe" if "by reason thereof the person […] is incapable regularly of pursuing any substantially gainful occupation" (s. 42(2)(*a*)(i) of the CPP). The courts have directed that the severe requirement is to be assessed in a real-world context and employability is not to be assessed in the abstract, but rather in light of "all of the circumstances." The circumstances fall into two categories: the claimant's background (matters such as age, education level, language proficiency and past work and life experience) and his medical condition assessed in its totality.[5]

[10] The Appellant's argument in relation to this ground of appeal is that the General Division member failed to consider the totality of the Appellant's condition in reaching the conclusion that his disability was not severe.

[11] In my view, a reading of the General Division's decision does not bear this out.

[12] In her decision, the General Division member noted that, in accordance with *Villani*, she must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. She noted that in making her decision, she had considered that the Appellant was 37 years old as of the MQP, was fluent in English and "fairly well educated, having completed high school and one year of a college program. He has worked in many different types of jobs, including as a salesperson, driver and letter carrier."[6]

[13] At paras. 51 and 52 of her reasons, the member reviewed the Appellant's medical history, taking into account both his oral testimony and medical records. The member accepted that the Appellant suffered from both physical and psychological issues, and also accepted that he was incapable of returning to heavy physical work involving heavy lifting, twisting or

[4] AD3-16.
[5] *Villani* and *Bungay*.
[6] Reasons, para. 50.

bending; however, she concluded these limitations would not prevent him from pursuing alternate work within his restrictions.

[14] She noted the Appellant's multiple diagnoses, but considered that the key question was not the nature of the medical condition, but its functional effect on the claimant's ability to work, citing *Klabouch v. Canada (Attorney General)*, 2008 FCA 33 and *Ferreira v. Canada (Attorney General)*, 2008 FCA 81.

[15] With respect to the physical aspects of the Appellant's disability, the member analyzed the medical evidence. She noted:

> […] Dr. Bruma's clinical notes indicate that, just prior to the MQP, the Appellant himself felt that he was capable of working and this was supported by Dr. Bruma. For example, in a note dated September 19, 2013, the Appellant requested a letter from Dr. Bruma indicating that he is able to work, but not able to return to his previous job.[7]

[16] She also referred to and relied on the evidence of Drs. Harvey, Bednar, Abraham, Aleem and Bruma to support her conclusion that, while she accepted that the Appellant was incapable of returning to heavy physical work, his limitations did not prevent him from pursuing alternate work within his restrictions.[8]

[17] Regarding the psychological aspects of the Appellant's disability, the member considered both the Appellant's oral testimony and the documentary evidence. She expressly considered the evidence concerning the Appellant's attendance at CAMH in February, 2014, including his testimony that while he improved following his treatment at CAMH, his symptoms returned after he left the program.[9] Referring to the medical evidence, the member rejected the Appellant's submission that his symptoms of anxiety were temporarily controlled only while he was in treatment.[10] She concluded that the Appellant's symptoms of anxiety and OCD/hypochondriasis were mild as of the MQP date. She referred to Dr. Aleem's discharge report from CAMH, as follows:

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[7] Reasons, para. 54.
[8] Reasons, paras. 54 and 55.
[9] Reasons, para. 56.
[10] Reasons, para. 56.

> In a CAMH Inpatient Discharge Summary Report dated February 11, 2014, Dr. Nadia Aleem reported that his discharge diagnosis is OCD/Hypochondriasis in remission. He has a GAF of 70. Throughout his hospital stay, he was most focused on trying to remedy the separation with his wife. He was not focused on physical symptoms or impaired by Panic Attacks. He was socially active and often went out in the evenings to meet his brother or attend volunteer activities. He did not appear to be significantly impacted by OCD symptoms throughout his stay.[11]

[18] The member also noted that "[e]ven after the MQP on March 4, 2014, Dr. Bruma indicated that his anxiety is better controlled and that he is able to go on the treadmill for 25 minutes per day and do yoga and core strengthening."[12]

[19] Having carried out an extensive analysis of the evidence, the member concluded that the Appellant's psychological issues were not severe as of the MQP date.[13]

[20] The member properly instructed herself on the principles to be followed according to *Villani* and *Bungay* and carried out her analysis in those terms: she considered the totality of the Appellant's background and medical condition in the real-world context before concluding that his disability was not severe as at the MQP date.

[21] I conclude the Appellant has not proven on a balance of probabilities that the member erred in law by failing to apply the correct legal test of severe under the CPP.

Issue 2: Did the General Division misapply the test for reasonable refusal of treatment?

[22] The Appellant argues that the General Division misapplied the test for reasonable refusal of treatment. In this regard, the Appellant submits that he reasonably refused treatment and that the member erred in law by failing to consider the impact of his refusal on his disability status. [14]

[23] The Respondent submits that the application of the legal requirements[15] to the facts of this case could raise an error of mixed fact and law or an error of fact under s. 58(1)(*c*) of the DESDA, rather than an error of law. It says that errors of mixed fact and law and errors of fact

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[11] Reasons, para. 41.
[12] Reasons, para. 55.
[13] Reasons, paras. 55 and 56.
[14] AD1-21.
[15] As articulated in *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 2011,

are entitled to deference by the Appeal Division. The Respondent also submits that in this case, the General Division applied the law to the facts in an appropriate manner.[16]

[24] Having now considered carefully the General Division's reasons, the evidence and the submissions, and bearing in mind the burden of proof on the Appellant at the appeal on the merits, I have concluded that this ground of appeal must fail.

[25] I note that s. 58(1) of the DESDA does not include errors of mixed fact and law as a ground of appeal, but instead addresses errors of fact and law as distinct grounds. The Appeal Division therefore does not have jurisdiction to review a decision of the General Division to determine whether it committed an error of mixed fact and law.[17]

[26] On this appeal, the Appellant's argument relates to the content of the legal principles underlying refusal of treatment. Consistent with the leave to appeal decision outlining a possible error of law, the relevant ground of appeal to the Appeal Division, under s. 58(1)(*b*) of the DESDA, is whether the General Division erred in law in making its decision, whether or not the error appears on the face of the record. Based on the unqualified wording of s. 58(1)(*b*), no deference is owed to the General Division on errors of law.

[27] In accordance with cases decided under the CPP regime, claimants have a personal responsibility to cooperate in their health care[18] and claimants for a disability pension must show that they responded to recommendations of health care advisors and made reasonable efforts to do the things necessary to improve their condition.[19] The legal principles governing the question of whether a claimant reasonably refused treatment were set out by the Federal Court of Appeal in *Lalonde.* The burden of proving on a balance of probabilities that one's disability is severe and prolonged rests with the claimant and, therefore, claimants bear the onus to establish that they reasonably refused treatment. This may include any argument that the treatment refused would not have improved their condition.

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[16] AD3-10.
[17] *Quadir v. Canada (Attorney General)*, 2018 FCA 21 at para. 9.
[18] *Kambo v. Canada (Human Resources Development)*, 2005 FCA 353.
[19] *Adamson v. Minister of Human Resources Development* (August 1, 2002), CP13422 (PAB).

[28] All the instances of non-compliance identified by the General Division member concerned the Appellant's refusal to take medication to control the various symptoms identified by his physicians: medication aimed at heart palpitations; a trial with antipsychotic medication to address psychological issues; and pain medication, trigger point injections, Botox injections and nerve blocks to control muscle spasms in his back. The member was not persuaded that the Appellant had a clinically identified and untreatable phobia of medical treatment. Although she accepted that he had a fear of taking high doses of medication, she found that he had not taken any steps to address his fear of medication. She concluded that he had failed to establish the reasonableness of his non-compliance with treatment recommended by his physicians. The member's findings were supported by the record.

[29] It was open to the Appellant to put forward evidence to persuade the General Division that his refusal or failure to follow his physicians' treatment recommendations had no impact on his medical condition. I have reviewed the record: he adduced no such evidence. In considering the reasonableness of the Appellant's refusal, the member cited evidence that the treatment recommendations were made by the physicians in order to improve the Appellant's health condition; be it to control his pain or to address his heart palpitations, back muscle spasm or psychological complaints. Therefore, the Appellant's contention that the member failed to consider the impact of his refusal is not supported by the record.

[30] I conclude that the General Division did not commit an error of law in its determination of the issue of refusal of treatment.

Issue 3: Did the General Division commit an error of fact within the scope of s. 58(1)(*c*)?

[31] The Appellant submits that the General Division erred "by selectively picking out individual clinical notes from physicians while ignoring those other notes from physicians which are supportive of the Appellant's position".[20] The Appellant also submits that the General Division "misapprehended the facts by preferring some findings of physicians over other findings of the same physician, as well as over the findings of other equally qualified physicians" and ignored objective findings of fact regarding the Appellant's health.

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[20] AD1-14.

[32] On this issue, the Respondent submits that *Villani* does not require that the evidence be interpreted in a manner solely favourable to the claimant. The Respondent also submits that although the General Division may not have specifically mentioned or addressed all details in the medical reports, this is not a legal requirement and the reasons clearly set out why the Appellant was not successful in his claim for disability benefits and why the member concluded his disability was not severe on or before the MQP date. The Respondent argues that, by inviting the Appeal Division to consider certain portions of the evidence from the medical reports and not others, the Appellant is inviting the Appeal Division to engage in precisely the same alleged error he says the General Division committed. The Respondent also submits that an error of fact in and of itself is not ground for appeal; rather the General Division must also have based its decision on the error, which must be material, to warrant the intervention of the Appeal Division.[21]

[33] The Appellant is essentially arguing that the General Division based its decision on erroneous findings of fact. If the member based her decision on the alleged errors, and if they were made in a perverse or capricious manner or without regard for the evidence, the error would fall within the scope of s. 58(1)(*c*) of DESDA.

[34] In the following sections, I conclude that the General Division did not commit an error of fact falling within the scope of s. 58(1)(*c*) the DESDA.

Preferring certain evidence over other evidence

[35] The Appellant submits that the General Division "erred by preferring the evidence of Dr. Bruma, Dr. Bednar and Dr. Aleem over the evidence of Dr. Kiraly, Dr. Wong, and Dr. Doxey".[22]

[36] On the issue of whether the Appellant was capable of working on the MQP date, the General Division member gave more weight to the evidence of the Appellant's long-term physicians.[23] In stating that she preferred the evidence of Drs. Bruma, Bednar and Aleem because they were involved in the long-term treatment of the Appellant, she provided a rational basis for giving more weight to the evidence of these physicians. Dr. Bruma, the Appellant's

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[21] AD3-10, AD3-19 to 20.
[22] AD1-14.
[23] Reasons, para. 57.

family doctor, and Dr. Bednar, the Appellant's orthopaedic surgeon, both treated the Appellant over a number of years. Dr. Aleem, a psychiatrist, treated the Appellant during his 28-day stay at CAMH. In contrast, Dr. Kiraly prepared an Independent Medical/Psychiatric Report dated April 11, 2014, after seeing the Appellant on one occasion, for two hours[24]; Dr. Wong wrote his report based on one interview[25]; and Dr. Doxey prepared a report dated March 28, 2014, that was based on a two-hour clinical interview.[26]

[37] Assigning weight to the evidence, whether written or oral, is the province of the trier of fact. Accordingly, a body sitting on appeal may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact.[27]

[38] I find there is no basis to conclude the General Division member committed an error within the scope of s. 58(1)(*c*) of the DESDA in her weighing of the evidence.

Ignoring evidence

[39] The Appellant argues that the General Division relied on certain notes from physicians while ignoring other notes by the same physicians and that it ignored evidence that supported a finding of disability. He relies in particular on the fact that in December 2013, his family physician referred him to CAMH and, in February, 2014, he attended a 28-day residential program at CAMH. In the Appellant's submission, "a person with mild symptoms does not voluntarily seek out spending a month at CAMH".[28] The Appellant also argues that the General Division "focused on the flare-ups of back pain when considering whether or not [the Appellant] as of (and around the time of) the MQP had a severe disability and failed to consider his mental illness and psychological impairments".[29]

[40] Under s. 58(1)(*c*) of the DESDA, a factual error by itself is insufficient to constitute an error: the General Division must have also based its decision on that error, which itself must have been "made in a perverse or capricious manner or without regard for the material before it."

[24] GD2-79 to GD2-85.
[25] GD2-51 to GD2-62.
[26] GD2-64 to GD2-76.
[27] *Simpson v. Canada (Attorney General)*, [2012] FCJ No. 334 (QL), at para. 10.
[28] AD1-18.
[29] AD1-14.

[41] The General Division member was certainly alive to the fact that the Appellant had requested a referral to CAMH and to the impact of his stay at CAMH in her analysis of whether his disability met the definition of severe as of the MQP date of December 31, 2013. She considered the Appellant's oral testimony that, while he improved following his treatment at CAMH, his symptoms returned after he left the program. She also considered his evidence that he is "far less anxious when he is in the full-time care of medical professionals, but this improvement is only temporary while he is in care".[30]

[42] The General Division member summarized Dr. Aleem's discharge summary from CAMH as follows:

> On February 11, 2014, only several months after the MQP, Dr. Aleem noted that, throughout his stay in the hospital, he was not focused on physical symptoms or impaired by panic attacks. Pain did not appear to affect his functioning and he was not significantly impacted by OCD symptoms. He was socially active and often went out in the evenings. He was discharged from the program with a diagnosis of OCD/Hypochondriasis in remission and a GAF of 70, indicating mild symptoms.

[43] The member catalogued in detail the evidence on which she relied to conclude that the Appellant's symptoms were mild as of the MQP date, including both physical and psychological aspects of his condition. [31] The reasons do not support the Appellant's contention that the member focussed on flare-ups of back pain and failed to consider his psychological issues.

[44] Having considered the evidence, the member concluded she did not accept the Appellant's submission that his symptoms of anxiety were temporarily controlled only while he was in treatment. While the Appellant clearly does not agree with this finding, it was open to the member to make this finding based on the evidence before her.

[45] The Appellant also argues that the General Division member ignored evidence that he is not "capable of stable employment". However, this is not the test under the CPP. The measure of whether a disability is "severe" is not whether the claimant suffers from severe impairments or is not able to engage in "stable employment", but whether his disability prevents him from

[30] Reasons, para. 56.
[31] Reasons, para. 28, 32, 52, 55.

earning a living.[32] In the context of the CPP, the yardstick is employability.[33] Furthermore, the determination of the severity of the disability is not premised upon a claimant's inability to perform her regular job, but rather on her inability to perform any work, i.e. any substantially gainful occupation.[34]

[46] Ultimately, the member concluded that, while she accepted that the Appellant was incapable of returning to heavy physical work, his limitations did not prevent him from pursuing alternate work within his restrictions. She found it relevant that in September, 2013, the Appellant requested a letter from Dr. Bruma indicating that he is able to work, though not able to return to his previous job. She referred to Dr. Bruma's clinical notes, which indicated that on September 30, 2013, the Appellant reported he was ready to go back to work, but his employer did not have an accommodated position. Dr. Bruma noted that the Appellant "would be able to do a desk job."[35]

[47] A tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence.[36] Moreover, reasons do not have to include all the arguments or details before a decision-maker, nor is the decision-maker required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion. Reasons need neither be perfect nor comprehensive.[37] The General Division member carried out a comprehensive review and analysis of the medical evidence and oral testimony and provided an explanation for her decision, as she was required to do.[38]

[48] Appellant's counsel argues that the member "only preferred some aspects of those Doctors' clinical notes while conveniently ignoring others which supported the opposite conclusion". In this regard, counsel has provided references to evidence that, he asserts, supports a finding that the Appellant's disability was severe.[39] For example, he relies on a report of Dr. Bednar in a clinical note of July, 2013, where it is noted that the Appellant will

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[32] *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703, 2000 SCC 28, paras. 28 and 29.
[33] *Granovsky*, at para. 28.
[34] *Canada (Minister of Human Resources Development) v. Scott*, 2003 FCA 34, at paras. 7 and 8.
[35] Reasons, para. 54.
[36] *Simpson*, at para. 10.
[37] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.
[38] *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, at para. 13.
[39] AD1-14 to AD1-20.

have “some permanent back pain and functional limitations” that “cannot be effectively treated”; and a note from Dr. Bruma that the Appellant’s condition was “unlikely to improve”. He has set out other statements from the medical reports regarding the Appellant’s condition.

[49] Counsel is, in essence, asking me to reassess and reweigh the evidence in a manner more favourable to the Appellant’s position. This I am unable to do. It is not my role on this appeal to reassess and reweigh the evidence;[40] indeed, the weighing and assessment of evidence lies at the very heart of the General Division’s mandate and jurisdiction.[41]

[50] As was noted by the member in her reasons, it is a claimant’s capacity to work and not the diagnosis of his disease that determines the severity of the disability. The Appellant’s long-term physicians, including Drs. Bruma and Bednar, never stated that the Appellant was not capable of performing any work. Indeed, Dr. Bruma, his long-term family physician, stated in September 2013 that the Appellant would be able to do a desk job.[42]

[51] I conclude there is no basis on which to find that the member based her decision on an erroneous finding of fact made in a perverse and capricious manner or without regard to the material before her.

CONCLUSION

[52] The Appellant has not demonstrated on a balance of probabilities that the General Division committed an error falling within the scope of s. 58(1) of the DESDA. Accordingly, the appeal is dismissed.

Nancy Brooks
Member, Appeal Division

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[40] *Tracey v. Canada (Attorney General)*, 2015 FC 1300, at para. 33.
[41] *Hussein v. Canada (Attorney General)*, 2016 FC 1417.
[42] Reasons, para. 54.

METHOD OF PROCEEDING:	On the record
APPEARANCES:	J. M., Appellant Zack Silverberg, Counsel for the Appellant Minister of Employment and Social Development, Respondent Jennifer Hockey, Counsel for the Respondent