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

Citation: *M. M. v. Minister of Employment and Social Development*, 2018 SST 75

Tribunal File Number: AD-16-1276

BETWEEN:

M. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

HEARD ON: October 11, 2017

DATE OF DECISION: January 26, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, M. M., worked as a continuing care assistant. She claims that she has been severely disabled because of depression and chronic low back pain radiating down her legs since at least December 31, 2014. She applied for a Canada Pension Plan disability pension but the Respondent, the Minister of Employment and Social Development, rejected her application.

[3] On appeal, the General Division also determined that the Appellant was ineligible for a disability pension. It found that she did not have a "severe disability" for the purposes of the *Canada Pension Plan*, by the end of her minimum qualifying period on December 31, 2014. (The end of the minimum qualifying period is the latest date by which a claimant is required to be found disabled.) It decided that she had the capacity for retraining, as she had been able to train in 2012 or 2013, when she was already experiencing chronic low back pain and had been depressed.

[4] The Appellant denies that she had any capacity for retraining at that time or since then, and claims that she last retrained in 2003, before she developed significant chronic lower back pain and depression.

[5] I granted leave to appeal as the appeal had a reasonable chance of success on the issue of whether the General Division erred in finding that she had completed a continuing care assistant certificate course in 2012 or 2013. The Appellant claims that she completed this course in 2003.

[6] I must decide whether there was any evidence before the General Division to support the Appellant's claims and, if so, determine whether the General Division erred.

GROUNDS OF APPEAL

[7] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

> (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.

[8] The Appellant submits that 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

[9] The issue before me is as follows:

> Did the General Division err in finding that the Appellant had completed a continuing care assistant certificate course in 2012 or 2013?

ANALYSIS

Did the General Division err in finding that the Appellant had completed a continuing care assistant certificate course in 2012 or 2013?

[10] This issue of when the Appellant completed the continuing care assistant certificate course is significant because it was partly on this basis that the General Division determined that the Appellant was not severely disabled and had the capacity for retraining and the capacity regularly to pursue a substantially gainful occupation.

[11] The General Division conducted a real-world assessment when it assessed whether the Appellant's disability could be found "severe" for the purposes of the *Canada Pension Plan*. The General Division considered the Appellant's personal circumstances, such as her age, education, language proficiency and life and work experience. It found that she could be retrained as she had completed a certificate course in 2012 or 2013, at a time when she reported having back pain and being depressed.

[12] The General Division concluded that if the Appellant was able to train despite her back pain and depression, nothing would prevent her from doing other retraining for work more suitable for her limitations.

[13] The Appellant indicates that she was confused and that her memory was impaired when she testified before the General Division. She now states that she trained as a continuing care assistant in 2003, and denies that she has been able to retrain, either close to the end of her minimum qualifying period or since then. She attributes this inability to retrain to her depression and back pain.

Evidence before the General Division

[14] The General Division noted the Appellant's 2003 training. It referred to the Appellant's questionnaire that accompanied her application for a disability pension. The Appellant indicated that she had obtained a continuing care assistant certificate in 2003.

[15] The General Division stated that, throughout her testimony, the Appellant "was quite unclear about dates" and gave conflicting dates of events. The Appellant indicates that she was confused and may have therefore provided incorrect dates. However, she does not claim that she lacked the competence to give evidence, and she has not provided any medical evidence to suggest this.

[16] Having reviewed the oral evidence, I find that there was no issue that the Appellant's ability to give evidence was in any way limited or impeded, despite the fact that she was uncertain about dates. There was no issue, for instance, regarding the Appellant's lack of understanding or difficulty comprehending and responding to questions. Although the Appellant was unclear about dates, she offered her evidence generally without hesitation

and responded to questions on multiple issues. There was no reason for the General Division to question her fitness to give evidence or for it to question the veracity of her responses.

[17] In the leave to appeal decision, I stated that I had yet to review the audio-recording of the hearing before the General Division. I indicated that if the Appellant could establish that she had testified or otherwise adduced any evidence that she had trained more than three or four years ago—and had no training relatively recently, when she had back pain and was depressed—she should identify this evidence.

[18] The Appellant has not referred me to any portions of her oral testimony but she provided a copy of her October 2003 course certificate. Providing the October 2003 certificate was unnecessary as there is sufficient evidence that she completed the course in 2003 and new evidence generally is not admissible on an appeal under subsection 58(1) of the DESDA.

[19] The Respondent provided me with the timestamps of the audio-recording of the hearing before the General Division. The Respondent submits that the Appellant indeed testified that she had completed the course "about three years ago, four years ago."[1]

[20] The General Division provided the Appellant with an opportunity to clarify and address any conflicting evidence. The General Division specifically asked the Appellant when she worked as a continuing care assistant, when she started and finished working in this capacity and for how long. The General Division also questioned the Appellant on her work history.

[21] In response to questions from the General Division, the Appellant testified that she had worked as a continuing care assistant for "probably two, 2.5 years," believing that she had started working in this capacity three years ago, finishing sometime in 2016. When the General Division subsequently asked her again how long she had worked as a continuing care assistant, she responded "four or five [years]," though indicated that she was "not 100% sure." The Appellant also testified that she had done babysitting "about eight to ten years ago."

[1] At approximately 10 minutes, 55 seconds of the audio-recording of the hearing before the General Division.

[22] During the hearing, the General Division sought clarification regarding the responses that the Appellant had provided in her questionnaire. The Appellant had indicated in the questionnaire that she had received the continuing care certificate in 2003 and subsequently worked at Canso Seaside Manor in this capacity from 2006 to 2014. The General Division noted that if the Appellant had worked from 2006 to 2014 as a continuing care assistant, this was more than the two to two and a half years or four to five years that she had indicated in her oral testimony. The Appellant testified again that she was uncertain about the years in which she worked as a continuing care assistant.

[23] The General Division noted that the Appellant had also received Employment Insurance. The Appellant indicated that she received Employment Insurance for one year and after that, did not have any income. The Appellant noted that the last day that she worked was on February 3, 2014, and that it was after this date that she collected Employment Insurance. The Appellant's questionnaire indicates that she received Employment Insurance between July 2012 and June 2013 and again from July 2013 to May 2014.

[24] The Respondent's statement of benefits lists when the Appellant received regular and sickness Employment Insurance benefits. The Respondent indicates that the Appellant most recently received Employment Insurance between February 9 and May 24, 2014, when she collected sickness benefits.

Examining the General Division's decision

[25] The General Division relied on both the documentary and the Appellant's oral testimony. There was no issue regarding the Appellant's credibility but the reliability of that evidence was questionable, given the passage of time and the conflicting information that the Appellant provided.

[26] The General Division had to assess the quality of the evidence before it and determine what was the best and the most reliable evidence before it. One of the challenges confronting the General Division was that little of the Appellant's oral testimony or the

information in the questionnaire on the subject of the Appellant's training and work history was corroborated by documentary evidence or by witnesses.

[27] On the basis of the Appellant's testimony, the General Division found that she had completed a certificate course three or four years ago.

[28] However, the General Division also had evidence that the Appellant was confused about dates. Moreover, there was also evidence that the Appellant completed the certificate course in 2003, as well as evidence that she worked as a continuing care assistant before 2012 or 2013. It is somewhat improbable that the Appellant would have been able to work in the capacity of a continuing care assistant, if she was not appropriately qualified and had not undergone training.

[29] While there was certainly some evidence that the Appellant had completed a certificate course in 2012 or 2013, at the same time, there was evidence that the Appellant was confused about dates, that she had completed the course in 2003 and that she worked for several years as a continuing care assistant before 2012 or 2013. Yet, the General Division did not address this evidence in its analysis. On this basis, I find that 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 and that this constitutes an error under paragraph 58(1)(*c*) of the DESDA.

Respondent's submissions

[30] The Respondent argues that, even if the General Division had misapprehended or overlooked some of the evidence, the outcome was inevitable because there were other issues on which the General Division had to conclude that the Appellant was not severely disabled by the end of her minimum qualifying period.

[31] In this regard, the Respondent points out that the General Division found that there was insufficient documentary evidence to establish that the Appellant's depression and back pain were of such severity that they rendered her severely disabled or precluded her from retraining. The documentary file consisted largely of copies of diagnostic examinations and the family physician's clinical records. Otherwise there were few medical

records that addressed the Appellant's medical condition at around the time of the end of her minimum qualifying period.

[32] With regards to her back, the General Division accepted that the Appellant has a nerve root impingement, but found that her condition could not have been that severe if surgery was not indicated, and if diagnostic examinations failed to substantiate a diagnosis of spondyloarthrosis. (Her family physician had provided this diagnosis in an undated handwritten letter.[2])

[33] There are diagnostic examinations for 2014, including a CT scan[3] and MRI[4] of her lumbar spine that showed central disc bulges and herniations. X-rays taken in June 2014 also revealed degenerative disc disease at levels L5-S1.[5] The Appellant's family physician Dr. Dobek verified these findings in his Canada Pension Plan medical report dated October 1, 2014.[6] He indicated that the Appellant had new lower back pain in July 2014, although there was no known trigger. He noted that she had had a poor response thus far to physiotherapy and being active at home. He was of the opinion that the prognosis was guarded and that she might require further management, although he was uncertain what that would consist of. He also indicated that the Appellant was unable to return to the workforce at that time. The General Division did not address this particular opinion that the Appellant was unable to work at that time; notably, Dr. Dobek had prepared this report close to the end of the minimum qualifying period.

[34] Yet, I note that in clinical records—presumably those of Dr. Dobek—there is an entry dated October 28, 2014,[7] in which the physician wrote, "back pain is long-standing and not preventing [patient] from working." Rather, he identified right abdominal pain—ongoing for the past two years—as the primary factor precluding a return to work. (There was no mention of the right abdominal pain in the Canada Pension Plan medical report, which had been prepared at the beginning of that month.) Although the General

[2] See GD1-17.
[3] See GD1-10 to 11, GD2-63 to 63 and 90 to 91.
[4] See GD1-12, GD2-69 and 94.
[5] See GD1-14, GD2-64 and 92.
[6] See GD2-86 to 89.
[7] See GD2-44.

Division referred to the abdominal pain at paragraph 27 of its decision, the General Division focused solely on the Appellant's depression and her back pain. There was no consideration or any analysis regarding the contribution that the right abdominal pain might have had towards the Appellant's disability. The General Division was required to assess the totality of the evidence as well as the cumulative impact of her multiple medical complaints, but it failed to do so when it overlooked the Appellant's right abdominal pain.[8]

[35] The family physician referred the Appellant to an orthopaedic surgeon. The General Division found Dr. Alexander's opinion of April 18, 2016[9] particularly compelling because he found her to be neurologically intact and that her presentation of pain was greater than any clinical findings of disability. The Tribunal interpreted Dr. Alexander's opinion that surgery was not required "as he cannot find any pathology for her complaints." In fact, the General Division misinterpreted Dr. Alexander's report, as he clearly found some pathology to account for her pain. He wrote, "Her MRI discloses some minor abnormalities in her lower lumbar spine at L4-5 and L5-S1 levels. The low back pain that she is having could be as a result of this degenerative changes [*sic*] in the lower spine."

[36] Furthermore, Dr. Alexander also found that there was a significant psychological overlay manifested by the Appellant's overt findings clinically. Ultimately, he believed that treatments would be difficult, based on her presentation. The General Division failed to address these aspects of Dr. Alexander's opinion. I recognize that the Appellant saw the orthopaedic surgeon more than a year after the end of the minimum qualifying period had ended, but nevertheless, it misapprehended the essence of his report.

[37] I note that the Appellant had also undergone a functional capacity evaluation days after the end of the minimum qualifying period had passed. Only a functional scan report[10] was produced but it showed the Appellant's functional limitations and her purported tolerances. Given the closeness of this testing to the end of the minimum qualifying period and its likely probative value, the General Division should have given some consideration to the report.

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[8] *Bungay v. Canada (Attorney General)*, 2011 FCA 47.
[9] See GD6-1 to 2.
[10] See GD1-9, GD2-78 and 82.

[38] The Respondent argues that the outcome was still inevitable and that the appeal had to be dismissed because the General Division found that there were still treatment options for her back, from which the Appellant could benefit. The Appellant had yet to try them. Some of these recommendations had been made relatively recently, just weeks or months before the General Division hearing. There were other recommendations, including exercise and core strengthening. The General Division found that the Appellant had failed to comply with these particular recommendations.

[39] That may be so, but it is unclear whether the General Division considered the reasonableness of the Appellant's non-compliance or refusal to pursue treatment recommendations or what impact that might have had on her disability status. Having determined that the Appellant had failed to comply with treatment options, the General Division was required to then direct its attention to whether her non-compliance or refusal was reasonable and what impact that refusal or non-compliance might have had on her disability status.[11] It is unclear what evidence there was on this issue, but if non-compliance was a basis upon which the General Division determined that the Appellant could fail to qualify for a disability pension, it should have also addressed any explanations provided for the non-compliance, as well as the impact of any non- compliance.

[40] All in all, the Respondent has not convinced me that the General Division properly considered the evidence before it, in assessing the severity of the Appellant's disability.

[41] The General Division misapprehended critical evidence regarding the Appellant's capacity, when it determined that she had been able to train at a time when she suffered from both depression and back pain, when it was contrary to the documentary record. If the General Division had properly considered the evidence, this may have resulted in a different outcome when it conducted its real-world assessment. It is principally for this reason that I am allowing the appeal.

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[11] *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211, at paragraph 19.

CONCLUSION

[42] The General Division failed to adequately explain why it preferred the Appellant's oral testimony over the documentary evidence on the issue of the Appellant's retraining and work history. I am concerned also that the General Division may have failed to properly assess the totality of the evidence before it and that it may have misapprehended key medical reports. For these reasons, the appeal is allowed and the matter returned to a different member of the General Division for a redetermination.

Janet Lew
Member, Appeal Division

APPEARANCES (via teleconference)

Appellant	M. M.
Representative for the Appellant	Margie Horne (retired nurse)
Representative for the Respondent	Stéphanie Pilon (paralegal)
	Dale Randell (counsel)