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

Citation: *Y. M. v. Minister of Employment and Social Development,* 2018 SST 120

Tribunal File Number: AD-17-83

BETWEEN:

Y. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: February 2, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, Y. M., worked as a resident care attendant until March 2015, when she stopped working due to chronic pain, anxiety, depression and headaches. She has several physical limitations, including difficulty with sitting or standing for prolonged periods, as well as difficulty with her memory and concentration.

[3] The General Division found that the Appellant had a severe and prolonged disability by March 2016 and that she was therefore eligible for a Canada Pension Plan disability pension. The Appellant submits that the General Division erred in finding that she became severely disabled in March 2016. She claims that she became severely disabled in March 2015 and that, as a result, she stopped working at this time.

[4] I granted leave to appeal on the basis that the General Division may have erred if it did not explain why it determined that the Appellant became disabled in March 2016, rather than on another date, such as March 2015, when she stopped working. I must now decide whether the General Division failed to explain why it determined that the Appellant became disabled in March 2016, rather than on another date.

[5] The parties have not requested a further hearing and, as I have also determined that a further hearing is unnecessary, this appeal is proceeding on the basis of the parties' written submissions.

ISSUE

[6] Did the General Division fail to adequately explain why it determined that the Appellant became severely disabled in March 2016 rather than on another date?

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 contends that the General Division erred under paragraphs 58(1)(*a*) and (*c*) of the DESDA.

ANALYSIS

[9] The General Division concluded that the Appellant became disabled by March 2016 because Dr. Jennifer Laidlaw, a psychiatrist, prepared a report at that time, stating that the Appellant's chronic pain and depression were functionally debilitating.

[10] The Appellant argues that the General Division likely made a typographical error in finding that she became severely disabled in March 2016, rather than in March 2015. As I indicated in my leave to appeal decision, I am unconvinced of this because the member explained that he had relied on Dr. Laidlaw's March 2016 report as the basis for finding that the Appellant became severely disabled in March 2016.

[11] The Appellant asserts that, if the General Division found that she was severely disabled, it should have deemed her disabled as of March 2015, when she stopped working.

Did the General Division fail to adequately explain why it determined that the Appellant became severely disabled in March 2016 rather than on another date?

[12] 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 to the material before it, because it determined that she became severely disabled in March 2016, without any consideration for the medical evidence or for the fact that she had stopped working in March 2015. The Appellant argues that there is no rational connection between the General Division's own analysis and its determination of the date of onset.

[13] The Appellant urges me to rely on the General Division's findings at paragraph 56 regarding the prolonged nature of her disability, and argues that I should conclude that her disability was not only prolonged, but that it was also severe, dating back to March 2015 or possibly even earlier, to 2011, when she was injured in a motor vehicle accident. The General Division noted that the family physician had indicated that the Appellant was injured in 2011 and that she "suffered from her disabilities for 5 years with no indication of same resolving." From this, the General Division concluded that the Appellant's disability was prolonged.

[14] The fact that the Appellant's ongoing symptoms were caused by an accident in 2011 in no way establishes that her disability was continuously severe from that time. Indeed, the earnings history suggests that the Appellant was regularly engaged in a substantially gainful occupation after 2011. In 2014, her earnings exceeded $20,000.[1] The Appellant also disclosed in the questionnaire accompanying her application for a disability pension that she was able to work after 2011[2] (although, generally, being able to work does not necessarily indicate that one has the capacity regularly of pursuing a substantially gainful occupation).

[1] See GD2-50.
[2] See GD2-139 and 14.

[15] The Appellant suggests that because the General Division placed significant weight on the vocational assessment[3] of January 26, 2015, the date of that report could coincide with the date of onset of disability. However, the General Division also accorded significant weight to the opinions of other health caregivers, so the fact that the General Division placed significant weight on the vocational assessment is not definitive.

[16] The vocational consultant was of the opinion that the Appellant would require accommodations, including a reduced work week schedule. At paragraph 52, the General Division wrote:

> Given the nature of her injuries and her work history working primarily in service work and cooking and cleaning the Appellant would be at a significant disadvantage in ever returning to gainful employment. At best Mr. Nordin`s report supports that a return to work would require significant accommodations and is unlikely given the real world context as set out in *Villani v. Canada (A.G.)*, 2001 FCA 248.

[17] The Appellant contends that the General Division seemed prepared to accept the vocational consultant's opinion that, even as early as January 2015, the Appellant would require significant accommodations if she were to ever return to gainful employment. The Appellant argues that any reasonable person would interpret the General Division's finding in paragraph 52 to mean that it was "unlikely" that the Appellant could have returned to work in January 2015. However, the Appellant managed to work until March 4, 2015 [or possibly March 6, according to the family physician's April 1, 2015 report]. The vocational consultant did not offer any opinion or prediction that the Appellant would be unable to work by March 2015. Consequently, there was no basis for the General Division to have been able to rely on the January 2015 vocational assessment to find the Appellant severely disabled by March 2015.

[18] The Appellant urges me to examine the family physician's opinions of April 1, 2015,[4] and October 26, 2015,[5] as she claims that they both establish that she was

[3] See GD2-16 to GD2-30.
[4] See GD2-87.
[5] See GD2-57 and GD2-107.

incapable of working at that time. The April 1, 2015 report is the *pro forma* physician's statement that the family physician prepared for the Appellant's disability insurer, while the October 26, 2015 report is the *pro forma* Canada Pension Plan medical report.

[19] In the April 1, 2015 report, the family physician wrote that the prognosis was "guarded, unable to predict a return to work." By that time, of course, the Appellant had stopped working. The physician diagnosed her with a chronic pain syndrome, soft tissue injuries to her low back and right shoulder, depression and a somatization and conversion disorder, the latter which prevented the Appellant from fully engaging in rehabilitation to resume her occupation. The physician noted that the Appellant continued to experience shoulder and back pain, which prevented her from working. Work and home activities reportedly aggravated her pain. The physician listed medications, including antidepressants, as the only treatment that the Appellant was undergoing.

[20] In her October 2015 report, the family physician wrote that the Appellant had had a poor response to medication, resulting in an inability to work "post-MVA."[6] However, the October 2015 medical report can hardly be used as a basis to establish the onset of a severe disability in March 2015. There is no specific reference to the Appellant's condition in March 2015. The family physician was of the opinion that the Appellant has been unable to work since her motor vehicle accident in 2011. Yet, even the Appellant acknowledges that she was able to work between 2011 and March 2015.

[21] The Respondent argues that the General Division did not err. As the trier of fact, it was best-positioned to weigh and assess the evidence and determine the date of onset. The Respondent claims that the General Division fully considered other reports, such as the family physician's report and the vocational assessment. The Respondent urges me to show deference to the General Division's decision in this regard.

[22] I agree that some deference generally should be accorded to the General Division's factual determinations, where it has weighed and assessed the evidence. However, I agree with the Appellant that the General Division was required to explain not only why it chose March 2016 as the date of onset of disability, but also why it

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[6] See GD2-59/109.

might have rejected an earlier date for onset, when there was other evidence that could have suggested an earlier onset date. Indeed, there were also (typewritten) clinical records, but there does not appear to have been any consideration given to them.

[23] The General Division indicated that the family physician had the benefit of following the Appellant and was able to set out in detail the nature of the Appellant's medical conditions and the functional limitations that flowed from these conditions. The General Division accepted that the Appellant was generally restricted in her physical function and was prone to chronic pain. Notably, the General Division accepted that the Appellant has "significant mental health issues including chronic depression and anxiety."

[24] The General Division indicated that it accorded significant weight to the opinions of the family physician, physiatrist and vocational consultant. Yet, if the General Division had indeed weighed and assessed the evidence, it did not articulate or provide any analysis as to why it was unprepared to accept the opinions of either the family physician or the vocational consultant, both of whom had alluded to the possibility that the Appellant was severely disabled when they prepared their reports. The General Division failed to indicate why it may have rejected an earlier date of onset than March 2016.

[25] Further, if the General Division found that the Appellant became severely disabled when her condition became "functionally debilitating," then it employed the wrong test under paragraph 42(2)(*a*) of the *Canada Pension Plan*. A disability is severe if a person is incapable regularly of pursuing any substantially gainful occupation.

[26] In other words, the General Division's reasons may be deficient in this regard. In *Sheppard*,[7] the Supreme Court of Canada concluded that reasons must be given for findings of fact made upon disputed and uncontradicted evidence and upon which the outcome of the case is largely dependent. And, in *D'Errico*,[8] the Federal Court of Appeal concluded that the reasons of the Pension Appeals Board did not allow it to

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[7] *R. v. Sheppard*¸ [2002] 1 S.C.R. 869, 2002 SCC 26.
[8] *D'Errico v. Canada (Attorney General)*, 2014 FCA 95.

understand why the Board had made the decision it did on the basis of the medical evidence before it.

[27] The General Division's decision that the Appellant's disability commenced in March 2016 may have been based on an improper test for severity, if it was based on when her conditions became "functionally debilitating."[9] While the General Division was not required to undertake a detailed assessment to support its conclusion, its analysis of the evidence does not enable me to understand how it reached its decision and what test for severity it may have employed, when an earlier date of onset may have been just as plausible and reasonable.

[28] I am therefore prepared to allow the appeal and find that the General Division erred by failing to provide adequate reasons.

What is the appropriate disposition of this matter under subsection 59(1) of the DESDA?

[29] The Appellant submits that it is unnecessary to return this matter to the General Division for a redetermination, as there is sufficient evidence on the record for me to substitute my own decision for that of the General Division, regarding the date of onset of her disability. She requests that I find that she had a severe and prolonged disability as of March 2015, with payments to start as of July 2015. The Respondent did not provide any submissions on this particular issue.

[30] The relief sought by the Appellant is generally an exceptional one. As Stratas J.A. indicated in *D'Errico*, "The word 'exceptionally' recognizes that administrative tribunals should be allowed another chance to decide the merits of the matter and not have the reviewing court do it for them. But in certain cases, the circumstances support resort to the latter option." The Federal Court of Appeal determined that the threshold of exceptionality was met in that case, given that the delay was substantial, and if the matter were to be remitted for re-decision and a party then applied for judicial review, a further two years could pass, bringing the total to eight years. Those same

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[9] *Osaj v. Canada (Attorney General)*, 2016 FC 115.

circumstances are not present in these proceedings, although of course there would be further delays if the matter were returned to the General Division.

[31] However, as Stratas J.A. wrote,

> [20] Overall, as a majority of the Supreme Court recognized in a different context, "remitting the issue to the tribunal may undermine the goal of expedient and cost-efficient decision-making, which often motivates the creation of specialized administrative tribunals in the first place": *Alberta Teachers' Association,* [2011 SCC 61 (CanLII), [2011] 3 S.C.R. 654] at paragraph 55.

[32] One of the objectives of the Social Security Tribunal is to ensure the just, most expeditious and least expensive determination of appeals and, by this, to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit. It is with this consideration, along with any delays that might ensue if this matter were returned to the General Division, and the factual circumstances of this case, that I am prepared to exercise my jurisdiction under subsection 59(1) of the DESDA and, if there is an appropriate evidentiary basis, vary the General Division's decision.

Does the medical evidence support an earlier onset of disability than March 2016?

[33] This necessitates an assessment of the clinical records[10] for the period from April 1, 2015 to December 21, 2015, along with any other relevant medical records that may have arisen between March 2015 and March 2016. If these records suggest, in any way, that the Appellant had any residual capacity regularly of pursuing any substantially gainful occupation and that her condition deteriorated progressively over time up to February 2016, then this may not support an onset of a severe disability in March 2015.

[34] During this timeframe between April and December 2015, the Appellant met with either her family physician or with Dr. Mary Glen, another physician operating out

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[10] See GD2-80 to 83.

of the same medical clinic. The clinical entries and consultation reports generally can be summarized as follows:

- **April 1, 2015** — diagnosis of a conversion disorder. Dr. Lipkowitz advised the Appellant that she could resume all tolerated activities. The family physician would be completing a disability form.
- **May 8, 2015[11] —** the Appellant saw Dr. Twist, an anesthesiologist, at a pain management clinic. The Appellant reported that she "continue[d] to do okay from her right medial branch blocks and trigger point [injection]." The Appellant also received treatment from an acupuncturist and found that the treatment "ma[d]e her better for weeks on end." She was looking to return to work in the near future; however, she was having problems with sleep hygiene. They discussed the possibility that she see an occupational therapist to assist with her sleep hygiene and a return to work.
- **May 27, 2015** — diagnosis of psychogenic pain, site unspecified. The Appellant reported that she had ongoing right-sided neck and back pain. The Appellant also reported that she was experiencing pain with breathing and that it was hard to breathe when her pain was bad. This had been occurring intermittently for the past four years. The Appellant reported that she did not have constant pain or breathing problems when her pain was absent. Dr. Lipkowitz recommended that the Appellant continue with activity as tolerated and that she should follow up with a chronic pain clinic and when necessary, with the medical clinic.
- **July 6, 2015** — the Appellant missed a pain clinic appointment; she had another one scheduled for August 5. She hoped to get an injection into her shoulder to alleviate the pain. She felt that she was unable to return to work, "partly due to pain, partly due to mood." Effexor helped, but she struggled to manage stress and thought that if she took some time away or was on vacation, that might help.

[11] See GD2-93 and GD2-137.

Dr. Glen wrote, “Extension off work until August/clinic assessment.” She encouraged the Appellant to try counseling.

- **July 30, 2015** — diagnosis of psychogenic pain, site unspecified. The Appellant reported that she had stress due to her daughter’s medical issues. She was no longer going to be going away on vacation. She was struggling financially and wanted to return to work. She would be going to the pain clinic and hoped for a shoulder injection that would improve her ability to return to work.

- **August 10, 2015** — diagnosis of a conversion disorder. She had been seen by Dr. Twist. The Appellant indicated that she would be going to see an occupational therapist. She was getting treatment from an acupuncturist and was considering (right medical branch) blocks. She indicated that she needed to work as she had no income.

- **August 12, 2015** — diagnosis of a conversion disorder. The Appellant indicated that she did not wish to return to work until September, after she had been to the pain clinic and after an occupational therapist had set up a return to work schedule and protocol for her.

- **September 24, 2015** — diagnosis of chronic pain. The Appellant had seen an occupational therapist and social worker at the pain clinic. They advised her to see a psychiatrist and to apply for social assistance for funding for cognitive behavioral therapy. Her employer had advised her that they did not want her to return unless she was able to return in a full capacity, given that she had failed a gradual entry “so many times.” Dr. Lipkowitz was of the opinion that there had been no improvement in the Appellant’s chronic pain syndrome. The Appellant would be applying for a disability pension with the family physician’s assistance. The physician advised there was a possibility that she would be denied. The Appellant remained optimistic that she could return to work.

- **September 30, 2015** — the Appellant indicated that she needed an income so wished to try retraining to enable her to find a new job that would not be as

physically demanding as working as an aide. She completed employment forms, which she understood would enable her to participate in a retraining program.

- **October 19, 2015** — diagnosis of chronic pain. At this point, the Appellant indicated that she was not planning on returning to work. She asked Dr. Lipkowitz to complete a disability form.

- **November 18, 2015** — diagnosis of a chronic pain syndrome. The Appellant complained that her right eye felt swollen in the morning and that she had headaches. She did not have any pain or tearing around her eyes. Dr. Lipkowitz was unable to detect anything in the Appellant's eyes.

- **December 21, 2015** — diagnosis of a chronic pain syndrome. The Appellant reported that she had continuing pain in her left leg and that she had trouble sleeping. The plan was for the Appellant to undergo bone density scanning.

- **February 1, 2016**[12] — the Appellant returned to see Dr. Twist. He found that she continued to be unable to work because of her chronic pain and depression. The Appellant's pain was in her right shoulder, low back and left hip. She continued to be in counseling and in active exercise therapy.

[35] In her March 3, 2016 report, Dr. Laidlaw provided a diagnosis of major depressive disorder, moderate to severe, post-traumatic stress disorder and generalized anxiety disorder. The General Division could have determined that, until this date, the Appellant had neither exhibited any symptoms of nor been diagnosed with post-traumatic stress disorder or generalized anxiety disorder, and arguably a major depressive disorder (as distinct from depression). On this basis, it could have determined that she became severely disabled in March 2016, but the General Division made no reference to these additional diagnoses.

[36] However, the Appellant provided a history to the psychiatrist that is consistent with the clinical history after she stopped working in March 2015.

[12] See GD1-10.

[37] From a psychiatric perspective, notwithstanding the additional diagnoses that Dr. Laidlaw made, there is no indication in the medical records that the Appellant had seen any deterioration in her depression or major depressive disorder, or other psychiatric illnesses, throughout 2015. In other words, her presentation in March 2016 largely mirrored her presentation throughout much of 2015. Indeed, Dr. Laidlaw accepted that there had been no significant improvement (dating back to her motor vehicle accident), likely largely due to the contribution of ongoing pain, as well as financial stressors.

[38] Based on the medical records, the Appellant has satisfied me that she was severely disabled when she stopped working in March 2015. The records disclose that the Appellant had a chronic pain syndrome as well as major depression and anxiety, and that she did not see any discernible improvement or deterioration in her condition by the time she saw Dr. Laidlaw approximately one year later.

CONCLUSION

[39] The appeal is allowed and the General Division's decision is varied such that the Tribunal finds that the Appellant had a severe and prolonged disability as of March 2015. Payments shall commence as of July 2015, in accordance with section 69 of the *Canada Pension Plan.*

Janet Lew
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
APPEARANCES:	Peter Beaudin, Representative for the Appellant Stéphanie Pilon (paralegal), Representative for the Respondent