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

Citation: *Minister of Employment and Social Development v. U. G.*, 2018 SST 139

Tribunal File Number: AD-16-937

BETWEEN:

Minister of Employment and Social Development

Appellant

and

U. G.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: February 9, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] U. G. (Claimant) obtained post-secondary degrees in engineering and computer science in Pakistan before moving to Canada. In Canada, he obtained a diploma in network communication while working in a fast-food store. He then worked in a call centre until he was injured at work. He applied for a Canada Pension Plan disability pension and claimed that he was disabled by spine and leg pain, fibromyalgia, and mental illness. The Minister of Employment and Social Development (Minister) refused the application. The Claimant appealed this decision to the Social Security Tribunal. The Tribunal's General Division allowed the appeal and decided that the Claimant was disabled under the *Canada Pension Plan* (CPP). The Minister's appeal from this decision is dismissed because the General Division did not make any error in law or base its decision on erroneous findings of fact under the *Department of Employment and Social Development Act* (DESD Act).

ISSUES

[3] Did the General Division make an error by:

a) relying on the Claimant's medical diagnoses instead of the impact of his conditions on his ability to work?

b) failing to consider whether there was evidence of work capacity, and, if so, whether the Claimant was unable to obtain or maintain work because of his health condition?

c) failing to properly assess whether his condition was prolonged?

ANALYSIS

[4] The DESD Act governs the Tribunal's operation. It provides for only three narrow grounds of appeal, namely, that the General Division failed to observe a principle of natural

justice or made a jurisdictional error, made an error in law, or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it. The Minister's arguments on this appeal are considered below in this context.

Issue 1: Did the General Division rely on diagnosis rather than capacity to work?

[5] To be disabled under the CPP, a claimant must demonstrate that they have a disability that is severe and prolonged.[1] To do this, they must produce some medical evidence. In this case, the Minister contends that the General Division erred in finding that the Claimant was disabled in the absence of medical evidence at the time of the hearing that concluded that the Claimant's disability was severe and prolonged. However, the CPP requires only that medical evidence regarding the nature, extent, and prognosis of the disability; findings upon which a diagnosis and prognosis was made; any limitations resulting from the disability; and any other pertinent information[2] be produced, not medical evidence specifically at the time of the hearing regarding the severity of the condition. The Claimant provided medical evidence, which is summarized in the decision. This ground of appeal fails.

[6] Also, the Federal Court of Appeal instructs that when considering if a claimant is disabled, it is not the diagnosis of a condition, but the impact of that condition on the claimant's capacity regularly to pursue any substantially gainful occupation that must be considered.[3] I am satisfied that the General Division considered this. The General Division summarized the oral and written evidence before it. This included testimony that during the Claimant's gradual return to work after his injury, he had to call in sick on a regular basis, was often late for work and left early on numerous occasions;[4] that medication did not help with pain but made him tired,[5] caused head numbness, dizziness, drowsiness, and blurred vision;[6] and that he had difficulty with memory and concentration, could not look after his children or help with housework, and spent his time in his room resting or sleeping.[7]

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[1] Paragraph 42(2)(*a*) of the CPP.
[2] Section 68 of the CPP Regulations.
[3] *Klabouch v. Canada (Social Development)*, 2008 FCA 33.
[4] Paragraph 11 of the decision.
[5] Paragraph 14 of the decision.
[6] *Ibid*.
[7] Paragraph 16 of the decision.

[7] The General Division also reviewed all of the medical evidence,[8] including a history of symptoms consistent with fibromyalgia since 2004,[9] the family physician's poor prognosis unless there were a better treatment for fibromyalgia in 2009,[10] Dr. Faltas' conclusion that the Claimant was permanently disabled by chronic upper and lower back pain in 2014,[11] and the family physician's statement that the Claimant had been unable to function for the prior 10 days in September 2015.[12]

[8] The General Division's mandate is to receive evidence from the parties and weigh it, apply the law to the facts, and reach a decision. The General Division gave equal weight to the testimony at the hearing by the Claimant and his wife, and the written medical evidence.[13] It gave logical and intelligible reasons for this. The General Division concluded that the Claimant was limited by his physical ailments, and by severe generalized anxiety disorder and panic attacks with secondary symptoms precluding his ability to participate in employment.[14] When the decision is read as a whole, I am satisfied that the General Division understood the various diagnoses that the Claimant had, and considered the impact of his conditions and limitations on his capacity to work.

Issue 2: Did the General Division assess work capacity and efforts to work within limitations?

[9] The Federal Court of Appeal also teaches that where there is evidence of work capacity, a claimant must establish that they could not obtain or maintain employment because of their health condition.[15] The Minister argues that the General Division failed to properly conduct this analysis. The General Division considered that the Claimant made attempts to return to work in a sedentary role at an ergonomically assessed work station.[16] The General Division concluded that based on his failed attempts to return to sedentary work on a graduated basis and the failure of symptom reduction despite treatment, the Claimant's health condition precluded

[8] Paragraph 19 of the decision.
[9] Dr. Jovaisas, October 15, 2004.
[10] Dr. Chiam-Vimonvat, November 19, 2009
[11] July 8, 2014.
[12] Dr. Asrat, September 18, 2015.
[13] Paragraph 34 of the decision.
[14] Paragraph 34 of the decision; Dr. Khan, October 15, 2015.
[15] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.
[16] Paragraph 35 of the decision.

employment. Clearly, this means that the Claimant was not able to maintain work because of his health conditions.

[10] The capacity to work part time may preclude a claimant from being disabled under the CPP.[17] The Minister argues that the Claimant's ability to return to work and miss, on average, one day of work each week, demonstrates that he has capacity for part-time work. However, when the General Division considered the return-to-work program, it also considered that the Claimant missed days, had to leave work early on numerous occasions, and often arrived late.[18] This does not demonstrate a capacity to work on a regular, part-time basis. Consequently, the General Division did not err by not specifically dealing with the legal issues surrounding a capacity to work part time.

[11] The General Division made no error in law in this regard. The appeal cannot succeed on this basis.

Issue 3: Did the General Division fail to properly consider whether the Claimant's condition was prolonged?

[12] To be disabled under the CPP, a claimant must have a disability that is both severe and prolonged. Prolonged is defined as likely to be long continued and of indefinite duration or likely to result in death.[19] This is set out correctly in the decision.[20] The Minister argues that the General Division's statement that "the Tribunal finds little prospect that the Appellant's condition will improve to the point that he will be able to regularly resume substantially gainful employment"[21] demonstrates that the General Division failed to apply this legal test. It claims that the General Division again focussed on diagnosis instead of the impact of the Claimant's conditions on his capacity to work. I am not persuaded by this argument for the reasons set out above.

[13] The Minister also argues that the General Division erred in this analysis because it did not specifically consider Dr. Khan's statement in October 2015 that the Claimant had made

[17] *Miceli-Riggins v. Canada (Attorney General)*, 2013 FCA 158.
[18] Paragraph 11 of the decision. Paragraph 6 of the decision.
[19] Paragraph 42(2)(*a*) of the CPP.
[20] Paragraph 6 of the decision.
[21] Paragraph 37 of the decision.

some progress and should be able to return to work in a few months.[22] However, this statement was made approximately six months prior to the hearing, and there was no further written evidence from Dr. Khan. The best evidence regarding the Claimant's mental health at the time of the hearing was the oral testimony that the Claimant's mental health had not improved as expected and that he was not able to return to work. This testimony is not contradictory to Dr. Khan's opinion, but rather an "update" on his condition in light of ongoing treatment and intervening circumstances, including a car accident in February 2016, which exacerbated the Claimant's conditions. The General Division made no error in this regard.

[14] The General Division did not err in fact or in law. It considered all of the evidence before it, including a long history of fibromyalgia and pain-related symptoms that persisted despite treatment, mental illness that prevented the Claimant from working in October 2015 and that had not improved by the time of the hearing, and the Claimant's failed attempts to return to work. It applied the law to these facts in a logical, transparent, and intelligible way. When the decision is read as a whole in the context of the record, it is reasonable and defensible on the law and the facts.[23]

CONCLUSION

[15] The appeal is therefore dismissed.

Valerie Hazlett Parker
Member, Appeal Division

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[22] GD6-8.
[23] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

HEARD ON:	February 6, 2018
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	U. G., Respondent Laura Joe, Counsel for the Respondent Jean-Francois Cham, Counsel for the Appellant