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

Citation: *D. V. v. Minister of Employment and Social Development*, 2018 SST 176

Tribunal File Number: AD-16-1122

BETWEEN:

D. V.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: February 22, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, D. V., was born in 1960 and left school after Grade 11. He was trained as a carpenter, and he worked in that trade until May 1994, when he fractured his left leg and wrist in a motorcycle accident. Despite multiple surgeries and several courses of physiotherapy, he never fully recovered, and he reports ongoing pain and limitations in his left knee, left hand, and lower back. He has not worked, or looked for work, since.

[3] In January 2013, Mr. D. V. applied for a disability pension under the *Canada Pension Plan*. The Respondent, the Minister of Employment and Social Development (Minister), refused the application because it found that his disability was not "severe" and "prolonged," as defined by the legislation, as of his minimum qualifying period (MQP), which ended on December 31, 1995.

[4] Mr. D. V. appealed the Minister's determination to the General Division of the Social Security Tribunal. The General Division held a hearing by videoconference and, in a decision dated June 20, 2016, dismissed Mr. D. V.'s appeal because, among other reasons, it found that he had not attempted alternative work within his restrictions.

[5] In September 2016, Mr. D. V. requested leave to appeal from the Tribunal's Appeal Division, alleging various factual and legal errors on the part of the General Division, among them:

- It mischaracterized two vocational assessments, one in November 1997 and another in February 2001, which found that Mr. D. V. had residual earning capacity of "zero dollars." It erroneously found that their conclusions were reached after consideration of only a limited number of occupations in which Mr. D. V. had expressed an interest.

- In paragraph 40 of its decision, the General Division acknowledged that Dr. Kreder was mistaken when he wrote, in his August 2009 report, that Mr. D. V. continued to do heavy work, yet it still placed weight on the orthopedic specialist's conclusion that he might "be able to do so for another decade."

- In paragraph 41, the General Division noted Dr. Carey's opinion that Mr. D. V. was "capable of working three to four hours per day"; however, what Dr. Carey actually said was that Mr. D. V. could "likely only handle working three to four hours per day."

- The General Division failed to apply *Bungay v. Canada*[1] by failing to consider all Mr. D. V.'s conditions and their collective impact on his functionality in a "real world" context.

- The General Division disregarded *Nova Scotia v. Martin,*[2] in which the Supreme Court of Canada recognized that chronic pain is a compensable disability.

[6] In a decision dated August 18, 2017, the Appeal Division granted leave to appeal because it saw a reasonable chance of success for the first argument listed above.

[7] I have reviewed the parties' oral and written submissions on all grounds and concluded that two of them have sufficient merit to warrant overturning the General Division's decision.

ISSUES

[8] Under the *Department of Employment and Social Development Act* (DESDA), the only grounds of appeal to the Appeal Division are that the General Division erred in law, failed to observe a principle of natural justice, or 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.[3]

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[1] *Bungay v. Canada (Attorney General)*, 2011 FCA 47.
[2] *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 SCR 504, 2003 SCC 54.
[3] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA).

[9] I am limiting this discussion to three issues:

Issue 1: How much deference should the Appeal Division extend to General Division decisions?

Issue 2: Did the General Division mischaracterize the two vocational assessments as having been based only on jobs that Mr. D. V. preferred?

Issue 3: Did the General Division err in relying on Dr. Kreder's conclusions even though the orthopedic specialist was under the mistaken impression that Mr. D. V. was still performing heavy work?

ANALYSIS

Issue 1: How much deference should the Appeal Division show the General Division?

[10] Until recently, it was accepted that appeals to the Appeal Division were governed by the standards of review set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick.*[4] Where errors of law or failures to observe principles of natural justice were alleged, the applicable standard was held to be correctness, reflecting a lower threshold of deference deemed to be owed to a first-level administrative tribunal. Where erroneous findings of fact were alleged, the standard was held to be reasonableness, reflecting a reluctance to interfere with findings of the body tasked with hearing factual evidence.

[11] The Federal Court of Appeal decision *Canada v. Huruglica*[5] rejected this approach, holding that administrative tribunals should not use standards of review that were designed to be applied by appellate courts. Instead, administrative tribunals must look first to their home statutes for guidance in determining their role. This premise led the Court to determine that the appropriate test flows entirely from an administrative tribunal's governing legislation: "The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent…."

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[4] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9.
[5] *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93.

[12] The implication here is that the standards of reasonableness or correctness will not apply unless those words, or their variants, are specifically contained in the tribunal's home statute. Applying this approach to the DESDA, one notes that paragraphs 58(1)(*a*) and (*b*) do not qualify errors of law or breaches of natural justice, which suggests that the Appeal Division should afford no deference to the General Division's interpretations. The word "unreasonable" is not found in paragraph 58(1)(*c*), which deals with erroneous findings of fact. Instead, the test contains the qualifiers "perverse or capricious" and "without regard for the material before it." As suggested by *Huruglica*, those words must be given their own interpretation, but the language suggests that the Appeal Division should intervene when the General Division bases its decision on an error that is clearly egregious or at odds with the record.

Issue 2: Did the General Division mischaracterize the two vocational assessments?

[13] Following Mr. D. V.'s 1994 motorcycle accident, his insurer expended considerable resources in assessing his injuries and work prospects, commissioning, among much else, two multidisciplinary residual earning capacity (REC) evaluations under the auspices of Link With Work (LWW), a rehabilitation centre in Kitchener, Ontario. In November 1997, and again in February 2001, Mr. D. V. underwent separate medical, physiotherapy, psycho-vocational, and occupational therapy assessments. Mr. D. V.'s representative argues that the General Division mischaracterized the conclusions of the two REC evaluations and, having reviewed their constituent reports in detail, I am compelled to agree.

[14] On November 18 and 19, 1997, Mr. D. V. was assessed by Robert Carey, a psychologist, and Wendy Lamers, a vocational evaluator.[6] They assessed his future work prospects in the context of a range of factors, including his (i) cognitive abilities and aptitudes, (ii) academic skills, (iii) emotional stability and personality traits and (iv) vocational interests, and offered a preliminary conclusion that Mr. D. V. would be able to handle only three to four hours per day in a job that allowed him to do independent, sedentary work.

[15] In paragraph 21 of its decision, the General Division summarized the Carey-Lamers psycho-vocational report as follows:

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[6] Psycho-vocational report, November 1997, GD4-392.

> The report concluded the Appellant would prefer to work in occupations in the fields of Health Service, Social Service or Agriculture/Animal Science. The first two areas do not match well with his personality profile and the vast majority of occupations in these fields require College or University level education. The Appellant shows strong interests in jobs involving animals and outdoor work environment but these do not match well with his physical limitations. It is interesting to note that he shows little interest in occupations which match his transferable skills and work history and this is likely as he perceives himself as totally disabled. In summary the Appellant presents with average cognitive aptitudes and good potential to be able to perform clerical kinds of jobs that capitalize on his strong numerical reasoning abilities. His present level of emotional volatility and depression suggests that he could likely only handle working 3 to 4 hours per day at a job he can work relatively independently, doing sedentary work.

[16] The Carey-Lamers report is 24 pages long and recounts in exhaustive detail the results of extensive psycho-vocational testing. The above passage, which offers no indication that the report was only one component of a multi-part process, is adopted, almost word for word, from a single section that summarized Mr. D. V.'s vocational interests. While the General Division accurately relayed the report's conclusion that Mr. D. V. "could likely only handle working 3 to 4 hours per day," it notably omitted the next sentence: "The Situational Assessment should provide more detailed information regarding his specific tolerances and stamina for performing clerical job tasks."

[17] The situational assessment was part of the occupational therapy assessment report[7] prepared by Sheila McMillan and dated December 24, 1997. A synthesis of the prior LWW assessments, it developed six occupational options, "based on the claimant's medical limitations, measured aptitudes and transferable skills," as follows:

- Home renovations estimator;
- Tax return preparer;
- Credit clerk;
- Sales clerk – print shop;
- Inventory clerk;
- Car rental clerk.

[7] Occupational Therapy Assessment report, December 1997, GD4-422.

[18] Following detailed analyses of Mr. D. V.'s capacity to perform each of these occupations, Ms. McMillan concluded:[8]

> Based on the data outlined above, the claimant does not match with the physical and psychological skills required to perform the above-noted jobs. The claimant's residual earning capacity is, therefore, determined to be $0.00. The decision-making process outlined above is based on data obtained from all assessment components and discussion among all team members.

[19] Mr. D. V.'s February 2001 LWW REC evaluation followed a similar course and this time, eight occupational options were developed for a situational assessment:

- Forklift driver;
- Animal care worker;
- Electronic assembler;
- Ballast assembler;
- Nursery worker;
- Furniture inspector;
- Meter reader;
- Assembler – eyeglass frames.

[20] Once again, an occupational therapist, Tracey Christopher, made it clear that these potential jobs were based on prior assessments of Mr. D. V.'s "medical limitations, measured aptitudes and transferrable skills."[9] Once again, Mr. D. V. was found to have no residual earning capacity.[10]

[21] In its decision, the General Division noted the two findings of zero residual earning capacity but nevertheless relied on LWW reports to find capacity. In paragraph 41, it wrote:

> In November 1997 Dr. Carey opined the Appellant was capable of working 3-4 hours per day at a relatively independent and sedentary work. The Psycho-Vocational Assessment in February 2001 indicated the Appellant exhibited an average level of cognitive and vocational

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[8] Summary – Decision-Making Process, November 1997, GD4-433.
[9] Occupational Therapy Assessment report, February 2001, GD4-445.
[10] Summary – Decision-Making Process, February 2001, GD4-464.

> aptitudes. This indicates an ability to pursue retraining and ability to pursue any substantially gainful occupation.

[22] Here, the General Division neglected to include some crucial context—that the Carey-Lamers psycho-vocational reports were not meant to be viewed in isolation but as components of larger assessments of Mr. D. V.'s capacity in all its facets.

[23] This omission highlights what I see as the General Division's selective use of the LWW reports to support a thesis that Mr. D. V. had residual capacity. However, a more significant error comes in paragraph 43, in which the General Division attempts to discount the findings, in both REC evaluation summaries, that Mr. D. V. had a residual earning capacity of zero:

> The Appellant's solicitor submitted that the vocational reports indicated a residual earning capacity of $0.00. The Tribunal notes the vocational report in November indicated the Appellant's interests did not line up with his transferable skills. The Appellant is not entitled to limit his pursuit of an occupation to areas of his interest, but rather is obligated to pursue employment within his capabilities. The Tribunal does not place significant weight on the residual earning capacity of $0, as this conclusion was reached after discounting the Appellant's ability to undertake a relatively small finite number of listed occupations. The test is whether the Appellant is incapable regularly of pursuing "any" substantially gainful occupation and not occupation that he expressed an interest.

[24] A decision-maker is by no means obliged to take the findings of a vocational assessment, or any other expert report, at face value, but it must offer some rational basis for discounting material evidence. In this case, the General Division found that two vocational assessments found zero residual earning capacity after considering only occupations in which he had expressed an interest. Was this true? My review suggests that it was not.

[25] The General Division suggested that the pool of jobs on which Mr. D. V. was evaluated was "limited" to those in which he showed an interest. It is true that Mr. D. V. was interviewed, pursuant to the vocational assessment process, about the sorts of work that he liked, or would like, to do, but I saw nothing in the material to suggest that Mr. D. V.'s preferences were a significant factor in how the occupational lists were generated. Instead, as both the November 1997 and February 2001 vocational assessment summaries indicated, potential jobs were based

on prior assessments of Mr. D. V.'s "medical limitations, measured aptitudes and transferrable skills." It appears that those results were fed into database-linked software, which in turn generated lists of likely occupations. While Mr. D. V. expressed a desire to do certain types of jobs in health and social services or agriculture and animal sciences, the November 1997 Carey-Lamers report—as the General Division itself noted—explicitly deemed them outside his personality profile or physical capacity, again suggesting that Mr. D. V.'s preferences played only a marginal role, if any, in the process.

[26] The Minister argues that the General Division did not misquote any portion of the vocational assessment; while this is true, it is also beside the point: the error lies in the General Division's mischaracterization of the methodology by which the occupational lists were derived. The Minister also argues that the General Division's treatment of the LWW reports was merely a part of a larger discussion of Mr. D. V.'s supposed failure to investigate alternative employment options, as required by *Inclima v. Canada*.[11] Again, this is true, but it ignores Mr. D. V.'s essential argument that he lacked residual capacity altogether. The impugned LWW reports were his best evidence that he was relieved, under *Inclima*, from any obligation to seek so-called suitable work.

[27] In finding that the LWW vocational assessments were limited to jobs in which Mr. D. V. had expressed an interest, the General Division based its decision on an erroneous finding of fact that did not reflect the material before it.

Issue 3: Did the General Division err in relying on Dr. Kreder's conclusions?

[28] Mr. D. V. criticizes the General Division for giving undue weight to Dr. Kreder's opinion even while acknowledging that the orthopedic specialist misapprehended his vocational status. In paragraph 33 of its decision, the General Division wrote:

> Dr. Kreder, Orthopaedic Surgeon, issued a consultation report dated August 13, 2009. It was noted the Appellant had very significant patella, distal femur, and proximal tibia fractures that were treated with open reduction, internal fixation. Presently the Appellant was complaining of pain that interfere [*sic*] with his heavy construction work. On physical examination there is no abscess, fluctuance, or even significant warmth,

[11] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

> or erythema. He has a small joint effusion; his soft tissues look well. Radiographs showed marked degenerative arthritis involving the patellofermal [*sic*] and both the medial and lateral compartments. The Doctor further wrote: "Certainly, he is anxious to continue his heavy work as long as possible, and he may be able to do so for another decade" (documentation on file indicates the Doctor was mistaken in believing the Appellant was involved in heavy work at that time).

[29] Later, in its analysis, the General Division found that, notwithstanding Dr. Kreder's error, his conclusion still carried weight:

> [40] […] The evidence however indicates the Appellant recovered from his injuries to the point a suitable occupation was within his capabilities. Dr. Kreder wrote in 2009 the Appellant may be able to do heavy work for another decade. Dr. Kreder seemed to indicate the Appellant was working and this belief appeared to be mistaken. The conclusion that he may be able to do heavy work is still significant.

[30] Mr. D. V.'s representative notes that Dr. Kreder's error had been brought to the General Division's attention during the hearing, and I see that the General Division specifically conceded that error. The Minister did not address this issue in its written submissions, but it argued during the oral portion of the hearing that Dr. Kreder's error was immaterial—he had personally examined and treated Mr. D. V. and based his opinion on the results of those examinations and on available imaging reports.

[31] I must disagree. I think it matters that Dr. Kreder formed his opinion while under the mistaken impression that Mr. D. V. continued to do the kind of work that, in reality, he had not performed in 15 years. Physicians are trained to dispassionately evaluate, diagnose, and care for their patients, but they are not immune to the power of suggestion. If Dr. Kreder somehow believed that Mr. D. V. continued to perform "heavy construction work" despite objective evidence before him suggesting otherwise, in particular "very significant patella, distal femur, and proximal tibia fractures," then at some level, Dr. Kreder would be predisposed to believe that Mr. D. V. in fact retained significant capacity.

[32] In my view, the General Division based its decision on an erroneous finding of fact without regard for the record by failing to recognize that Dr. Kreder's assessment was irredeemably tainted by his misapprehension of Mr. D. V.'s vocational status in 2009.

CONCLUSION

[33] The General Division based its decision on erroneous findings that (i) the LWW vocational assessments were based only on jobs that Mr. D. V. preferred and (ii) Dr. Kreder's opinion was sound even though he believed that Mr. D. V. continued to perform heavy work. Since these, by themselves, are sufficient reasons to overturn the General Division's decision, I do not find it necessary to consider Mr. D. V.'s other grounds of appeal.

[34] Section 59 of the DESDA sets out the remedies that the Appeal Division can give on appeal. To avoid any apprehension of bias, it is appropriate, in this case, that the matter be referred back to the General Division for a *de novo* hearing before a different member.

Member, Appeal Division

HEARD ON:	February 1, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Alexandra Victoros, for the Appellant Jean-François Cham, for the Respondent