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

Citation: *R. M. v. Minister of Employment and Social Development*, 2018 SST 251

Tribunal File Number: AD-17-531

BETWEEN:

R. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: March 21, 2018

Canada

DECISION AND REASONS

DECISION

The appeal is allowed.

OVERVIEW

[1] The Appellant, R. M., who is now 59 years old, has a history of drug and alcohol abuse and has been diagnosed with bipolar disorder. He is a high school graduate and has a certificate in hospitality management. He has held a variety of jobs over the years, mainly in the retail industry. His most recent full-time employment was as a store manager for a sporting goods outlet, a job that ended in 2008 when he was laid off. He continued to apply, unsuccessfully, for managerial jobs, and has more recently taken a part-time job at a sign installation company.

[2] In December 2015, the Respondent, the Minister of Employment and Social Development (Minister), refused R. M.'s application for a disability pension under the *Canada Pension Plan* (CPP), citing his ongoing part-time job and what it deemed insufficient medical evidence that his condition prevented him from performing substantially gainful work.

[3] R. M. appealed the Minister's refusal to the General Division of the Social Security Tribunal of Canada. In its decision of April 25, 2017, it acknowledged that R. M. had followed a "tumultuous path," but found that his addictions and bipolarity did not amount to a "severe and prolonged" disability as of the minimum qualifying period (MQP), which ended on December 31, 2011.

[4] On July 26, 2017, R. M.'s legal representative filed an application requesting leave to appeal with the Tribunal's Appeal Division, alleging that the General Division had committed the following errors:

(a) It failed to observe a principle of natural justice by failing to record the oral portion of R. M.'s hearing;

(b) It erroneously found that

(i) R. M. had not been diagnosed as bipolar as early as 2002–03;

(ii) R. M. had refused opportunities to work more hours in 2015.

(c) It failed to apply *Canada (Attorney General) v. St.-Louis*[1] in giving insufficient consideration to evidence that R. M's disability was severe in the context of his personal circumstances;

(d) It improperly applied the CPP disability test by disregarding case law[2] that obliges consideration of "regularity;"

(e) It failed to apply *Bungay v. Canada*[3] by failing to consider all R. M.'s conditions and their collective impact on his functionality in a "real world" context; and

(f) It failed to apply *Inclima v. Canada*[4] when it found that R. M. had some capacity to return to work as of the MQP.

[5] In my decision of December 18, 2017, I granted leave to appeal, finding an arguable case that the General Division may have erred in finding R. M. may have declined opportunities for substantially gainful work in 2015.

[6] In a letter dated March 13, 2018, the Minister conceded that R. M.'s capacity to offer "regular" performance warranted reassessment. It asked that the matter be referred back to the General Division for redetermination.

[7] In view of the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness, and natural justice permit, I have decided to dispense with an oral hearing and consider this appeal on the basis of the existing documentary record.

ISSUE

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1 *Canada* (*Attorney General) v. St.-Louis*, 2011 FC 492.
2 *D'Errico v. Canada (Attorney General)*, 2014 FCA 95; *Atkinson v. Canada (Attorney General)*, [2014] FCJ 840 (QL); *Canada (Minister of Human Resources Development) v. Gallant* CP 06612; *Eddy v. Minister of Human Resources Development* (2000) 8586 PAB; *M.T. v. Minister of Human Resources and Social Development* 28161.
3 *Bungay v. Canada (Attorney General)*, 2011 FCA 47.
4 *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

[8] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: The General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact.

[9] The issue in this appeal is whether the General Division committed an error that falls within one of the grounds enumerated in subsection 58(1) of the DESDA.

ANALYSIS

[10] I have reviewed R. M.'s submissions against the record and concluded that his appeal must succeed.

[11] Several of R. M.'s grounds of appeal are linked. He argues that the General Division failed to apply the complete definition of "severe," as set out in subparagraph 42(2)(*a*)(i) of the CPP, which obliges the trier of fact to consider a claimant's capacity to offer regular performance—that is, attend work predictably or with consistent frequency. This raises the question of whether the General Division erred in finding that R. M. had residual capacity, which in turn demands examination of how it characterized the series of part-time jobs that occupied the last few years of his working life.

[12] In paragraph 18 of its decision, the General Division noted R. M.'s testimony about his last job at X X as follows:

> He stated he was working enough hours in the summer, and he probably could get more hours and work full time. He did not look for any other work while working part time in the summer at X X.

[13] The General Division clearly relied on this purported statement in its analysis, writing in paragraphs 80 and 81:

> The Appellant states he has not looked for any work since then though he worked at X X in 2015. The Tribunal accepts that this was not substantially gainful. He stated he was not called in to work much at X X as he was not skilled at using the tools involved in the job. He also stated it is likely he could have worked more or even full time. He chose not to pursue more work.

> The Tribunal finds there is evidence of work capacity at the time of the MQP and beyond and that the Appellant has failed to prove an effort at obtaining and maintaining employment was unsuccessful by reason of his health condition.

[14] The General Division accepted that R. M.'s seasonal sign installation job during the summer of 2015 was "not substantially gainful" and, indeed, his most recent record of employment[5] on file indicates that he has registered no earnings above the year's basic exemption since 2008. Nevertheless, the General Division found that R. M. had residual capacity because he said he could have worked more but "chose" not to.

> [15] I have listened to the relevant portions of the audio recording of the hearing that took place on April 13, 2017. R. M.'s job as a handyman at X X X was discussed on four occasions[6] during the proceedings. I did not hear R. M. testify to the effect that he probably could have worked "more hours" in 2015. In its decision, the General Division conveyed the impression that installation assignments were available on request and that R. M. chose not to take them for reasons other than his health or ability. However, the audio indicates that R. M. clearly said that X X X him up to 15–20 hours per week but sometimes two weeks would pass between calls. He said that he was probably last on the call list and that they did not call him the next summer. He said that he did not know why but suspected that his bipolarity had something to do with it: "I was getting nervous, because I felt like they were watching me all the time…"[7]

[16] The General Division also wrote that R. M. said he "did not look for any other work while working part time in the summer at X X," but the recording suggested otherwise. At 41:19 of part 1, there was this exchange:

> Q: Why could you not get another job while you worked for X X?
>
> A: I have no idea.
>
> Q: Did you look?
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> A: Not as much as I should have, but I tried. No one was willing to give me a chance, I guess. I'm not sure.

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5 Found at GD5-7.
6 Part 1 from 13:50 to 16:50 and 41:10 to 42:40; part 2 from 11:00 to 12:20 and 20:10 to 20:55.
7 Part 1, 42:20.

[17] Later, at 20:15 of part 2, the subject came up again, although this time R. M. indicated that he hoped to get more hours at X X:

> Q: Again, you didn't look for other jobs while working at X X? Or in between the periods?
>
> A: Well, because she had me working enough in that summer where I thought maybe I could work here part-time in the summer and then I could maybe get on there full-time or something. And nothing ever happened after that.

[18] I am satisfied that the General Division based its decision on an erroneous finding that R. M. was not seeking substantially gainful work in 2015 or may have passed up opportunities for same. In doing so, it also misapplied the test for severity, in particular the requirement to consider a claimant's capacity to offer regular performance.

CONCLUSION

[19] Since the appeal succeeds for the above reason alone, I see no need to consider any of the other grounds that R. M. has put forward.

[20] Section 59 of the DESDA sets out the remedies that the Appeal Division can give on appeal. The Minister has recommended a fresh hearing under the circumstances.

[21] I endorse that recommendation. To avoid any apprehension of bias, it is appropriate that this matter be referred back to the General Division for a *de novo* hearing before a different General Division member.

Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVES:	Bozena Kordasiewicz, for the Appellant Matthew Venz, for the Respondent