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

Citation: *J. A. v. Minister of Employment and Social Development*, 2018 SST 375

Tribunal File Number: AD-16-1371

BETWEEN:

J. A.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: April 4, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] In May 2010, J. A. (the Claimant), was in a car accident. He closed the garden centre business he had run with his wife for five years because he says he could no longer perform the heavy work required in his role there. In November 2012, he was dismissed from his job in maintenance of a property because he says his employer would no longer continue to provide him with modified duties, and he could not fully perform his job due to his medical condition.

[3] The Claimant applied for the Canada Pension Plan (CPP) disability pension and his application was denied by the Minister, both initially and on reconsideration. At the General Division of this tribunal, the Claimant had to show that he had a severe disability by the end of his minimum qualifying period (MQP) on December 31, 2016. The General Division acknowledged that the Claimant had depression and that he experienced pain as a result of the injuries he had sustained in the car accident. However, the General Division concluded that the Claimant could work in a job suitable to his limitations, and therefore dismissed his appeal.

[4] The Appeal Division granted leave to appeal in October 2017.

[5] The Appeal Division must decide whether the General Division made an error. If there is an error, the Appeal Division must decide whether to substitute its own decision for the General Division's, or send the case back to the General Division for reconsideration.

ISSUES

1. Did the General Division make an error of fact by ignoring evidence that suggested the Claimant's condition had deteriorated from 2013 to the date of the hearing?

2. Did the General Division make errors of fact in its findings about the Claimant's education and proficiency in English?

ANALYSIS

Appeal Division's Review of the General Division's Decision

[6] The Appeal Division does not provide an opportunity for the parties to re-argue their case in full at a new hearing. Instead, the Appeal Division conducts a review of the General Division's decision to determine whether it contains errors. That review is based on the wording of the *Department of Employment and Social Development Act* (DESDA), which sets out the grounds of appeal for cases at the Appeal Division.[1]

[7] The Appeal Division must show some deference to the General Division on factual errors. The DESDA says that a factual error occurs when the General Division bases 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. For an appeal to succeed at the Appeal Division, the legislation requires that the finding of fact at issue from the General Division's decision be material ("based its decision on"), incorrect ("erroneous"), and made in a perverse or capricious manner or without regard for the evidence.[2]

Issue 1: Did the General Division ignore evidence that suggested the Claimant's condition had deteriorated from 2013 to the date of the hearing?

[8] The General Division's finding that there was work the Claimant could do that was suitable to his limitations was made in error, because it was made without regard for some of the evidence from 2013 onward that suggests deterioration of the Claimant's condition. The finding about work capacity was focussed on the fact that the Claimant had worked in 2012, but did not

[1] DESDA, s. 58(1)
[2] DESDA, s. 58(1)(*c*)

expressly consider the evidence the Claimant relied on to show his condition had deteriorated from 2013 to the date of the hearing. The medical evidence that suggested the Claimant's condition had deteriorated was probative and the General Division should have discussed it in its analysis, even if there were questions about the Claimant's compliance with treatment by 2013.

[9] The General Division had to decide whether the Claimant was incapable regularly of pursuing any substantially gainful occupation on or before his MQP, which ended on December 31, 2016. Medical evidence was required, as was evidence of employment efforts and possibilities.[3] The determination of the severity of a disability is not premised upon a person's inability to perform his or her regular job, but rather on his or her inability to perform any substantially gainful occupation.[4] All of the possible impairments are to be considered by the General Division, not just the biggest impairments or the main impairment.[5] The General Division is presumed to have considered all of the evidence before it, but that presumption can be set aside where the probative value of the evidence is such that it should have been discussed.[6] A failure to consider crucial evidence can constitute an error of fact.[7] If there is evidence that a claimant has not followed treatment recommendations, the General Division must decide whether the failure to follow those recommendations was reasonable. If it was not reasonable, the General Division must consider what impact the failure has on the claimant's disability status.[8]

[10] The General Division reasoned that because the Claimant had carried out some modified work after his accident until he stopped working in November 2012, "it is possible that had he not been dismissed he would have continued to work." As a result, when considering the totality of the Claimant's impairments, the General Division stated (at para. 48):

> It is acknowledged that the [Claimant] suffers from a number of medical issues including lower back pain and issues with his legs as well as depression and headaches. However none of his issues individually or

[3] *Villani v. Canada (Attorney General)*, 2001 FCA 248
[4] *Klabouch v. Canada (Minister of Social Development)*, 2008 FCA 33
[5] *Bungay v. Canada (Attorney General)*, 2011 FCA 47
[6] *Lee Villeneuve v. Canada (Attorney General)*, 2013 FC 498
[7] *Canada (Attorney General) v. Hoffman*, 2015 FC 1348; *Joseph v. Canada (Attorney General)*, 2017 FC 391, at paras. 47–48
[8] *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211

> collectively affect his ability to work. He was cleared for work and did return to work and only stopped when modified work was no longer available from his employer.

[11] The Claimant argues that because the General Division relied on the fact that he worked modified duties in 2012 to determine that he had capacity to work at the time of his MQP, the General Division inferred that his condition was static between 2010 and 2016. The Claimant argues that the General Division ignored crucial medical evidence from several sources that showed a deterioration of his condition.

[12] First, the Claimant relies on four separate magnetic resonance images (MRIs) that he argues show this deterioration in his medical condition. The Claimant had an MRI in 2010 (GD3-224), 2012 (GD3-75), 2014 (GD1-59), and 2015 (GD6-3). By 2015, the MRI report showed that the Claimant's condition had deteriorated from mild degenerative disc disease to "moderate to severe left foraminal narrowing."

[13] While the Minister is correct in noting that the General Division referenced the MRIs in its decision, almost all of the references to the MRIs are contained in the "Evidence" section of the decision (paragraphs 17, 21, 22, 24, and 32). Under the "Analysis" section, only one of the MRIs is referenced (at para. 38): "An MRI of the lumbar spine showed mild degenerative disc disease with broad based disc bulging and left foraminal stenosis related to loss of disc space height with mild facet overgrowth." This appears to be a reference to the MRI of February 2012, and therefore does not reflect the deterioration evidenced in the MRI of September 2015, which the General Division acknowledged under "Evidence" at paragraph 32.

[14] Second, the Claimant relies on the content of the clinical notes from his family physician, Dr. Wilkins, which he argues also show a worsening of his medical condition. Dr. Wilkins' notes include entries in July 2013, September 2013, and November 2013 (GD3-111 to GD3-129), which state variously that the Claimant's back was "more sore," that he received a prescription for Tylenol 3s for the pain, and that he was in "a lot of discomfort" and had "persistent back pain." The General Division referenced the clinical notes generally in the "Evidence" section of the decision (at para. 23): "Clinical notes from the [Claimant's] family physician from 2012 to January 2014 document the [Claimant's] visits for sciatic nerve irritation, back discomfort with

radiation down the right leg, persistent back pain and issues with mood and sleep." The General Division did not reference the fact that the notes indicate the Claimant's back was "more sore" in 2013 or that the notes show he was prescribed Tylenol 3s for that pain in 2013. The physician's notes were not referenced in the "Analysis" section of the decision.

[15] Third, the Claimant relies on a September 2013 report from a neurologist, Dr. Angel, which he argues shows a worsening of his condition. Dr. Angel's report indicates that the Claimant had "worsening radiculopathy" and that it may "represent progression of pre-existing spinal disease" (GD3-457). The General Division did acknowledge (at para. 30) that Dr. Angel's report had found that the Claimant had "a worsening of his migraine headache" and that the Claimant's prognosis was guarded. The General Division also acknowledged Dr. Angel's finding that the Claimant showed "clinical evidence of an L5-S1 predominant sensory radiculopathy on the left side which made it difficult for him to sit or walk for prolonged periods of time." In its analysis, with respect to Dr. Angel's evidence, the General Division referenced only his conclusion that the Claimant could perform light work (para. 42), and his recommendation of root injections (para. 41). The General Division's analysis does not refer to the evidence that may have suggested a worsening of the Claimant's condition or the limitations associated with sitting as a result of the sensory radiculopathy.

[16] The Minister argues that up to September 2013, there was objective medical evidence following each MRI indicating that the Claimant retained work capacity. Dr. North's April 2011 opinion indicated the Claimant was able to do some modified work (GD3-310). In August 2011, Dr. Chapman indicated the Claimant would not cause any harm to himself by working full time (GD3-342). In September 2012, Claude Martel (a physiotherapist, not a physician as indicated by the Minister) indicated that the Claimant was not deemed to be substantially unable to meet the essential job demands for his job, but did note that the Claimant required help with heavier tasks (GD3-390). In September 2013, Dr. Angel noted that from a neurological perspective, the Claimant was substantially unable to do the heavier tasks of his pre-accident employment. Dr. Angel also took note of the Claimant's pain and stated that the Claimant was willing to return to lighter duties (GD3-459).

[17] The Minister argues that by 2013, there was evidence that the Claimant had failed to follow treatment recommendations. The Minister submits that there is no error in the General Division's conclusion about the Claimant's capacity for work at the time of the MQP because it was based on the medical evidence from 2010 to 2013, and a failure to follow treatment recommendations from 2013 up to the date of the hearing.

[18] The General Division's finding at paragraph 48 that "none of [the Claimant's] issues individually or collectively affect his ability to work" was made in error because it was made without regard for some evidence the Claimant relied on to establish deterioration in his condition.

[19] In determining whether the Claimant had a capacity to work, the General Division had MRI results (objective medical testing), medical opinions from physicians, clinical notes, and the Claimant's own evidence to consider. Between 2010 and 2013, there certainly was evidence on record from physicians that supported the Minister's position that the Claimant had some capacity for work, and the General Division relied on those opinions in its analysis (para. 42).

[20] However, the General Division did not expressly discuss the evidence that suggested the Claimant's condition had deteriorated closer to his MQP. In the analysis, there is no mention of the clinical notes that show an increase in pain in 2013, or any reference to Dr. Angel's observation about possible progression of spinal disease. The analysis does not refer to the objective medical test completed closest to the end of the MQP (the MRI of September 2015). It refers only to an earlier test in 2012. The Claimant takes the position that his medical condition deteriorated such that by 2013, he could not work. In light of the timing of the MQP, the probative value of these pieces of evidence were such that they needed to be expressly discussed in the General Division's analysis about capacity to work on or before the MQP.

[21] The Minister argues that the evidence from 2013 to the date of the hearing shows that the Claimant failed in his obligation to follow treatment recommendations. The Minister argues that the General Division's conclusion about capacity to work was not made in error because the General Division did not need to discuss medical evidence from a period of time in which the Claimant was not following treatment recommendations.

[22] The General Division stated (at para. 41) that "in order to meet the definition of severe and prolonged disability, a claimant must follow his or her physicians' treatment recommendations." The General Division had to consider whether the refusal to undergo treatment was reasonable, and what impact the refusal might have had on the claimant's disability status if the refusal was unreasonable.[9] The General Division found (at para. 41) that "[n]o reasons were provided during the hearing of this appeal as to why the [Claimant] has not complied with recommendations made for treatment that could have improved his pain and his functional abilities." The treatments the General Division was referencing were a referral to psychotherapy, attendance at a chronic pain clinic, and a root injection for back pain.

[23] Reaching the conclusion that the Claimant did not comply with treatment does not excuse the General Division from considering medical evidence the Claimant relied on to argue a deterioration of his medical condition, including Dr. Wilkins' 2013 notes that the Claimant's back was "more sore," Dr. Angel's 2013 report that stated there had been a worsening that may represent progression of pre-existing spinal disease, and the most up-to-date MRI from September 2015.

[24] Unreasonable failure to comply with treatment is only relevant where it has an impact on the claimant's disability status. There can be no finding about that impact on disability status without fully canvassing what the disability status actually was in 2013 onward. Dr. Wilkins' note provides evidence that the Claimant was noticing that he was "more sore" in 2013 and that he received Tylenol 3s for that increase in pain. Dr. Angel's expert report raised concern about progression of spinal disease. The September 2015 MRI was an objective assessment of disability status close to the end of the MQP.

[25] It is not clear from the reasons whether or how participation in psychotherapy, attendance at a chronic pain clinic, or undergoing a root injection would have impacted the "disability status" as evidenced by these clinical notes and medical reports, and this objective test. An unreasonable failure to comply with treatment is relevant, but cannot trump the need to weigh objective medical evidence. The General Division cannot be expected to reference every piece of medical evidence in its analysis. However, given that the MQP was December 31, 2016,

[9] *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211

and that the Claimant argued that his condition had deteriorated over time and that he could not work as of 2013, the evidence that was suggestive of deterioration in his condition after he stopped working (and closer to the end of his MQP) was probative. The failure to discuss the evidence that suggested the Claimant's medical condition had deteriorated was an error of fact. It is a material error because it informed the finding about capacity for work.

Issue 2: Did the General Division make errors of fact in its findings about the Claimant's education and his proficiency in English?

[26] The General Division did not make any errors of fact in its findings about the Claimant's personal circumstances. While in one paragraph, the General Division misstated the Claimant's level of education, when the decision is read as a whole, it is clear that the General Division had sufficient regard for the Claimant's education and that the error is not material. The General Division also had sufficient regard for the record about the Claimant's proficiency in English, and its finding was neither capricious nor perverse.

[27] When deciding whether a claimant's disability is severe, the General Division must keep in mind the claimant's personal circumstances, such as age, level of education, language proficiency, and past work and life experience.[10]

[28] The Claimant argues that the General Division made a factual error by stating that he has a high school education, when in fact he did not complete education past Grade 11. The Claimant argues that he is not proficient in English, and that he testified that he is functionally illiterate (consistent with reports from psychologist Jeffrey Phillips at GD3-434 to GD3-444 and the Function and Pain Program Initial Assessment at GD1-13 to GD1-30).The Minister argues that the General Division discharged its duty without error because it set out which personal circumstances need to be considered and then considered them. The assessment of the Claimant's personal circumstances is a question of judgment for the trier of fact that should be afforded deference.[11] The Minister argues that the General Division considered the Claimant's evidence about his language proficiency, but determined that it did not pose a barrier because there was evidence that the Claimant (i) had completed a course in the operation of small drinking water systems in 2012, despite his writing and reading limitations, (ii) had completed

[10] *Villani v. Canada (Attorney General)*, 2001 FCA 248
[11] *Villani v. Canada (Attorney General)*, 2001 FCA 248, para. 49

administrative tasks while working at his last maintenance job; and (iii) had excellent executive functioning skills. The Minister argues that the General Division noted on multiple occasions that the Claimant did not have education past Grade 11 (at paras. 9, 33, 37, and 46).

[29] The General Division did consider the Claimant's dyslexia and challenges in reading and writing (para. 46). According to the Minister's submission, the General Division provided intelligible reasons for finding that the Claimant's challenges in this regard did not pose a barrier. It is not for the Appeal Division to find a factual error about the Claimant's literacy where the General Division's finding is not capricious, perverse, or made without regard for the evidence. There was both evidence of functional illiteracy and evidence of the Claimant succeeding in some education and work experiences despite that challenge. It was for the General Division to weigh that evidence and make a finding, which it did.

[30] There is no doubt that the Claimant does not have a high school education, and that the General Division's reference at paragraph 49 to the Claimant having a high school education (which normally means the person has graduated from or completed high school) is an error. However, there is ample evidence in the rest of the decision (as outlined by the Minister's argument) that the General Division was aware that the Claimant did not complete high school. The error is unfortunate but it is not material. Read as a whole, the multiple other accurate references to the Claimant's education support the fact that the General Division did not base its decision on a factual error about the Claimant's education.

Appropriate Remedy

[31] The General Division made a factual error by ignoring the record about the Claimant's deteriorating medical condition. The appropriate remedy is to allow the appeal and send the case back to the General Division for reconsideration.

CONCLUSION

[32] The appeal is allowed.

Kate Sellar
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVES:	John Wowk, Representative for the Appellant, J. A. Nathalie Pruneau, Representative for the Respondent, Minister of Employment and Social Development