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

Citation: *T. M. v. Minister of Employment and Social Development*, 2018 SST 528

Tribunal File Number: AD-16-1319

BETWEEN:

T. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Nancy Brooks

DATE OF DECISION: May 14, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, T. M., made an application for a *Canada Pension Plan* (CPP) disability pension on April 25, 2014. The Minister of Human Resources and Skills Development[1] denied his application initially and upon reconsideration.

[3] T. M. appealed the reconsideration decision to the Social Security Tribunal's General Division, which concluded he had a capacity to work at his minimum qualifying period (MQP) date of December 31, 2013, but that he had not attempted work suitable to his medical condition and physical limitations. It concluded he had failed to prove, on a balance of probabilities, that he had a severe disability on or before his MQP date and dismissed his appeal.

[4] T. M. appeals that decision.

[5] For the reasons that follow, I conclude the General Division failed to consider the totality of T. M.'s medical condition when it carried out its analysis regarding whether his disability was severe on or before the MQP date—specifically with respect to his anxiety and insomnia—and this constitutes an error of law falling within the scope of s. 58(1) of the *Department of Employment and Social Development Act* (DESDA). However, exercising my authority under ss. 59 and 64 of the DESDA, I find that even when these conditions are considered, T. M. does not meet his burden to prove that his disability was severe, in accordance with the CPP criteria, on or before his MQP date. Accordingly, the appeal is dismissed.

[1] Now the Minister of Employment and Social Development and referred to in this decision as the Minister.

ISSUE

[6] The issue on this appeal is whether the General Division failed to consider the question of whether the Appellant's disability was severe in a real-world context, in accordance with the principles set out in *Villani v. Canada (Attorney General)*[2] and *Bungay v. Canada (Attorney General).*[3]

ANALYSIS

[7] Subsection 58(1) of the DESDA states that the only grounds of appeal are 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] In order to allow the appeal, I must be satisfied that the Appellant has proven it is more likely than not that the General Division committed an error falling within the scope of s. 58(1).

Issue: Did the General Division fail to consider the question of whether the Appellant's disability was severe in a real-world context?

[9] In his notice of appeal,[4] the Appellant submits that the General Division erred in law because it failed to consider in a real-world context the background factors identified by the Federal Court of Appeal in *Villani.* He also submits that the General Division erred in law because it did not consider the totality of his medical condition when it failed to consider medical evidence, testimony and submissions that supported a finding that he also experienced insomnia, hepatitis and anxiety when it was determining whether his disability was severe on or before the MQP date, contrary to the principles set out by the Court in *Bungay*. Instead, he submits, the General Division focused primarily on his knee, shoulder and hip problems.

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[2] 2001 FCA 248.
[3] 2011 FCA 47.
[4] AD1.

[10] The Minister submits that the General Division considered the totality of the Appellant's medical conditions. The Minister submits that, while the evidence showed the Appellant had trouble sleeping, no referral to or report from a sleep clinic or specialist was produced and there was no evidence that this disorder was severe or prolonged. Furthermore, if this condition had been of such significance to prevent the Appellant from working, it would have been identified on the questionnaire completed in support of his application for a CPP disability pension. With respect to the Appellant's hepatitis, the Minister says the Appellant's evidence was that it was in remission until the latter part of 2014, which was one-year post-MQP. As a result, it was not a condition that could have had an impact on the Appellant's disability at his MQP date. With respect to anxiety, the Minister contends that the General Division member considered the Appellant's anxiety in both her review of the evidence and in her analysis. The Minister submits that assigning weight to the evidence is the province of the trier of fact and the General Division is to be shown significant deference.

[11] The General Division's task was to determine whether the Appellant had a severe and prolonged disability on or before December 31, 2013 (the end of his MQP) and continuously thereafter. Under the CPP, a disability is "severe" if "by reason thereof the person […] is incapable regularly of pursuing any substantially gainful occupation".[5] According to the Supreme Court of Canada, in the context of the CPP, "the yardstick is employability": an individual may suffer severe impairments but will not be entitled to CPP benefits if those impairments, serious though they may be, do not prevent him or her from earning a living.[6]

[12] In *Villani*, the Federal Court of Appeal directed that, when assessing whether a disability is severe, the General Division must adopt a "real-world" approach.[7] The real-world approach requires it to determine whether a claimant, in the circumstances of his or her background and medical condition, is employable, i.e. capable regularly of pursuing any substantially gainful occupation. Employability is not to be assessed in the abstract, but rather in light of all of the circumstances. In *Bungay*, the Court confirmed that a claimant's circumstances fall into two categories:

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[5] CPP, s. 42(2)(*a*)(i).
[6] *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, at para. 28.
[7] *Villani*, at paras. 38 and 39.

(a) The claimant's background: Matters such as age, education level, language proficiency and past work and life experience are relevant here;[8] and

(b) The claimant's medical condition: This is a broad inquiry, requiring that the claimant's condition be assessed in its totality. All of the possible impairments of the claimant that affect employability—both physical and psychological—are to be considered, not just the biggest impairments or the main impairment.

[13] If the General Division member failed to apply the principles set out in *Villani* or *Bungay*, this would constitute an error of law. The Appellant contends that the General Division member erred in law in because she failed to apply the correct legal principles to both the background factors and his medical condition.

Background factors

[14] With respect to the background factors identified in *Villani*, the General Division member considered these in her analysis at para. 67. She stated that she appreciated he did not have a high school education and had worked only in manual labour type jobs. She had noted earlier in her reasons that the Appellant had held jobs in a saw mill, as a car salesman and as a roofer. She noted his relatively young age at the MQP date, the lack of any evidence that he did not read and write English or that he did not possess the aptitude to be retrained. The General Division member properly instructed herself regarding the need to consider the Appellant's background factors, and she then considered them as part of her analysis to determine whether the Appellant retained any capacity to work.

[15] In my view, there is no basis to find the member did not appropriately consider the Appellant's background factors, in accordance with *Villani*, in her severity analysis.

Totality of medical condition

[16] With respect to the Appellant's medical condition, he contends that, although the member reviewed his difficulties with hepatitis, insomnia and anxiety in her summary of the evidence, she did not take these conditions into account in her severity analysis. At the hearing of the appeal, the Appellant's representative submitted that the General Division member did not give

[8] *Bungay v. Canada (Attorney General)*, 2011 FCA 47, at para. 8.

appropriate weight to the evidence concerning the Appellant's hepatitis, insomnia and anxiety. I agree that the General Division member did not refer to these three conditions in her severity analysis. She gave them no weight in her analysis.

[17] The Appellant was the only witness who testified at the General Division hearing. I have listened to the recording of the hearing and reviewed the medical evidence relating to these three conditions.

[18] With respect to his hepatitis, the Appellant testified that he had contracted Hepatitis C, but that it was in remission before the latter part of 2014, and it did not bother him at the MQP date. He testified that the hepatitis did not affect his health during his roofing career or in his work in car sales. He stated that it came out of remission in the latter part of 2014 and he underwent treatment to cure it in 2015. He testified that it was a difficult treatment. The General Division member summarized this testimony in her reasons.[9] There were only three references to the Appellant's Hepatitis C in the medical evidence: (i) in a September 24, 2014, report to the Appellant's long-term disability insurer, the Appellant's family physician, Dr. Jansen, noted that the Appellant was seeing Dr. Mahoney for his hepatitis;[10] there is a prescription dated April 5, 2015, from Dr. Mahoney for treatment of hepatitis;[11]and (iii) a report from Dr. Jansen dated August 31, 2015, stated that the Appellant had completed eradication treatment for his hepatitis.[12]

[19] Based on the Appellant's testimony and the medical evidence, it is apparent that his hepatitis was not causing him any problems on or before the MQP date. Therefore, there was no need for the General Division member to take the hepatitis into account in her severity analysis. I find no error in relation to the Appellant's hepatitis.

[20] With respect to his insomnia, the General Division member accurately summarized the Appellant's testimony at para. 19 of the reasons. In his testimony, the Appellant did not relate his symptoms of insomnia to the MQP date of December 31, 2013, but instead testified as to its

[9] General Division decision, para. 12.
[10] GD16-4.
[11] GD4-4.
[12] GD9-14.

effects at the date of the hearing.[13] There were three references in the medical documents to his difficulty sleeping, the first in May 2011 when a Dr. Klein noted the Appellant was not sleeping.[14] On March 18, 2012, Dr. Klein prescribed Garbapentin for the pain in his knee and groin "which will hopefully help with his insomnia".[15] Finally, Dr. Jansen noted on August 31, 2015, "he has had difficulty managing with insomnia". There was no evidence of a referral to a sleep expert and or of medication prescribed to the Appellant expressly to treat insomnia.

[21] With respect to the Appellant's anxiety, there was medical evidence from May 2011 that the Appellant was experiencing anxiety relating to "his severe situational stresses". [16] There was a brief reference in August 2011 to adjustment disorder being experienced by the Appellant.[17] The next reference to anxiety in the medical documentation is not until August 2015, when his family physician, Dr. Nolan wrote, "[h]e has a level of anxiety that is closely related to his pain and dysfunction and that also impacts on his sleep".[18] There is no medical evidence relating to his anxiety near or on his MQP date.

[22] The Appellant testified that he was never referred to a psychiatrist or psychologist. He testified that, as part of the routine assessment of whether he could undergo the eradication treatment for his hepatitis, he was required to see a mental health counsellor to assess whether he was mentally able to undergo the treatment. This was the only mental health person the Appellant saw. The mental health counsellor gave the go-ahead for him to proceed with the hepatitis eradication treatment. She did not flag any issues. This would have been sometime between late 2014 when the hepatitis started to bother him, and April 2015 when Dr. Mahoney prescribed medication to treat the hepatitis.

Conclusion on error of law

[23] In her severity analysis, the General Division member considered the Appellant's left hip pain, groin pain, right shoulder pain and right knee pain. She canvassed the medical evidence and noted that in May 2014, Dr. Sohmer, orthopaedic surgeon, stated the Appellant would be unable

[13] Recording of General Division hearing, at 55:42.
[14] GD2-91.
[15] GD2-167.
[16] GD2-91.
[17] GD2-94, GD2-95.
[18] GD9-14.

to return to his previous employment. He stated the Appellant was unable to perform a physically demanding job, however, a sedentary job with light duties would be acceptable.[19] The General Division member concluded, based in part on this report, that the Appellant retained a residual capacity to work. However, this finding was made with respect only to his left hip pain, groin pain, right shoulder pain and right knee pain. Despite the evidence that the Appellant was experiencing insomnia and anxiety, no mention was made in the member's severity analysis of the impact of insomnia and anxiety.

[24] Therefore, I agree with the Appellant that the General Division member erred in law in her severity analysis by not considering his anxiety and insomnia as contributing to the totality of his medical condition, as she was required to do in accordance with *Bungay*. It is not sufficient to simply recite the evidence without analyzing it.[20]

Disposition

[25] Under s. 59 of the DESDA, the Appeal Division may give the decision the General Division should have given. Furthermore, under s. 64 of the DESDA, the Appeal Division may decide any question of law or fact that is necessary for the disposition of any application made under the DESDA.

[26] In *Villani*, the Court confirmed that not "everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a 'serious and prolonged disability' that renders them 'incapable regularly of pursuing any substantially gainful occupation'. Medical evidence will still be needed as will evidence of employment efforts and possibilities."

[27] The General Division member concluded that the Appellant retained a capacity to work within his limitations based on her consideration of the evidence in relation only to his primary complaint of his left hip pain, groin pain, right shoulder pain and right knee pain. With respect to these aspects of his medical condition, I have not identified any error that would justify interfering with this finding.

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[19] GD2-186.
[20] *Garcia v. Canada (Attorney General)*, 2001 FCA 200.

[28] When all of the evidence relating to the Appellant's insomnia and anxiety is factored into the member's analysis, such evidence falls far short, in my view, of negating the member's conclusion that he retained residual work capacity.

[29] There were only two brief references to the Appellant's difficulty sleeping before the MQP (in 2011 and 2012) and none around or near his MQP date. The Appellant gave no testimony about his insomnia at or around the MQP date. There was never a referral to a sleep specialist. As to the Appellant's anxiety, there were two brief references to anxiety and adjustment disorder in documentation in 2011. The next reference to anxiety, also brief, is in August 2015. He provided no testimony as to his anxiety at or around the MQP date. He was never referred to a psychological specialist, other than the mental health counsellor who saw him as part of the customary routine that was followed to assess whether he was fit to proceed with hepatitis eradication in late 2014 or 2015. It is noteworthy that the counsellor gave the go-ahead for the treatment and made no recommendation that he should see a psychological specialist.

[30] Based on the evidence that was before the General Division, I conclude that, when factored into the severity analysis with his primary medical condition relating to back, shoulder, knee and groin pain, the evidence of the Appellant's insomnia and anxiety does not undermine the General Division member's conclusion that he retained residual work capacity at his MQP date.

[31] The evidence before the General Division was that the Appellant had made no effort to find work because he did not believe he could work. The General Division concluded the Appellant had not met the test set out in *Inclima v. Canada (Attorney General)* that, where there is evidence of work capacity, a claimant must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition.[21] In my view, despite her legal error, the member's ultimate conclusion on this point was correct.

[32] Although I have concluded the General Division member erred in law by not considering the Appellant's insomnia and anxiety in her severity analysis, exercising my authority under ss. 59 and 64 of the DESDA and bearing in mind that the burden of proving on a balance of probabilities that his disability is severe and prolonged rests with the Appellant, I conclude that,

[21] 2003 FCA 117.

even when the evidence concerning his insomnia and anxiety is factored into the totality of his medical condition, this does not negate the member's conclusion that his disability was not severe on or before the MQP date.

[33] Accordingly, I conclude that the appeal does not succeed.

CONCLUSION

[34] The appeal is dismissed.

Nancy Brooks
Member, Appeal Division

HEARD ON:	March 12, 2018
METHOD OF PROCEEDING:	Teleconference
PARTIES AND REPRESENTATIVES:	T. M., Appellant Nicole Jule-Thimm, Representative for the Appellant Minister of Employment and Social Development, Respondent Nathalie Pruneau, Representative for the Respondent