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

Citation: *A. R. v. Minister of Employment and Social Development*, 2018 SST 583

Tribunal File Number: AD-18-269

BETWEEN:

A. R.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: May 31, 2018

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] The Applicant, A. R., was born in 1985 and attended school up to Grade 8. He has training as a drywaller and worked for several years installing windows and doors at residential construction sites. At the same time, he carried on a part-time business making and selling handcrafted jewellery. In October 2010, the Applicant was involved in a motor vehicle accident (MVA), in which he sustained injuries to his head, neck, and back. After two months of recovery, he attempted to return to full-time work. As a crew leader, he was not supposed to do heavy lifting, but he felt ongoing pressure to perform physically demanding tasks. He claims that after more than a year of increasing pain, he was forced to give up his job. In 2012, he also ended his jewellery venture—which he claims never made any money—and he has not worked since.

[3] In May 2014, the Applicant applied for a disability pension under the *Canada Pension Plan* (CPP), claiming to be disabled due to a number of medical conditions, including neck and back disc herniation, post-traumatic stress disorder, anxiety, depression, agoraphobia, panic attacks, chronic obstructive pulmonary disease, asthma, and stomach problems. The Respondent, the Minister of Employment and Social Development (Minister), refused the application on the ground that the Applicant's disability was not severe, as defined by the CPP, as of his minimum qualifying period (MQP), which ended on December 31, 2011.

[4] The Applicant appealed the Minister's refusal to the General Division of the Social Security Tribunal. At the Applicant's request, the General Division agreed to receive the Applicant's evidence by means of written questions and answers, and it also heard oral testimony by teleconference from his common-law partner. In a decision dated January 18, 2018, the General Division dismissed the appeal, finding insufficient evidence that the Applicant was disabled from performing suitable work as of the MQP.

[5] On April 27, 2018, the Applicant's representative requested leave to appeal from the Tribunal's Appeal Division, alleging various errors on the part of the General Division:

- The General Division failed to solicit information from the Applicant about his condition at the time of the MQP. Given the Applicant's mental disability, which prevented his full participation in the hearing, the General Division had an obligation to ensure that he put his best foot forward.
- The General Division failed to consider important evidence that the Applicant was disabled, including his written answers to its questions. The General Division found that the Applicant had work capacity, even though it had no issues with his credibility.
- The General Division failed to consider the jurisprudence around what constitutes a substantially gainful occupation, finding that the Applicant had work capacity despite his limited education and severe physical and psychological impairments.
- The General Division penalized the Applicant for not having early and consistent contact with healthcare practitioners during the period between his October 2010 MVA and the end of the MQP. In doing so, it failed to consider the impact of his impairments on his ability to seek timely medical help.
- The General Division inappropriately focused on when the Applicant was diagnosed with his various medical conditions and wrongly concluded that post-2011 medical reports were irrelevant his impairment at the time of the MQP.
- The General Division gave weight to the fact that the Applicant had applied for educational programs after the MQP, despite evidence that his attempt to obtain a GED was a "disaster."
- The General Division concluded that the Applicant might have been able to continue making jewellery, even though the evidence showed that he was never able to earn a profit from this activity.

[6] Having reviewed the General Division's decision against the record, I have concluded that the Applicant has not advanced any grounds that would have a reasonable chance of success on appeal.

ISSUES

[7] According to s. 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 made in a perverse or capricious manner or without regard for the material. An appeal may be brought only if the Appeal Division grants leave to appeal,[1] but the Appeal Division must first be satisfied that the appeal has a reasonable chance of success.[2] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[3]

[8] I must decide whether the Applicant has presented an arguable case for the following questions:

Issue 1: Should the General Division have solicited information from the Applicant about his condition at the time of the MQP?

Issue 2: Did the General Division disregard evidence that the Applicant was disabled?

Issue 3: Did the General Division misapply the jurisprudence surrounding "substantially gainful"?

Issue 4: Did the General Division penalize the Applicant for not receiving medical attention between October 2010 and December 31, 2011?

Issue 5: Did the General Division conclude that the Applicant's post-MQP medical evidence were irrelevant assessing impairment?

Issue 6: Did the General Division discount evidence that the Applicant's attempt to obtain a GED was a "disaster"?

Issue 7: Did the General Division ignore evidence that the Applicant's jewellery business was never profitable?

ANALYSIS

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[1] DESDA at ss. 56(1) and 58(3).
[2] *Ibid*. at s. 58(2).
[3] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

Issue 1: Should the General Division have solicited information from the Applicant about his condition at the time of the MQP?

[9] The record shows that the Applicant initially requested a hearing by personal appearance but later asked that it be held by teleconference because he was anxious and prone to panic attacks. On the hearing date, the Applicant declined to appear and asked to proceed instead by way of written questions and answers. The General Division agreed to this approach and submitted 10 questions to the Applicant, who replied four weeks later.

[10] The Applicant now suggests that the General Division acted unfairly by neglecting to ask him specifically about his condition around the time of the MQP.

[11] I do not see an arguable case on this ground. First, the burden of proof lies with the Applicant to prove, on a balance of probabilities, that he is disabled, rather than with the Respondent or the Tribunal to prove otherwise.[4] The Tribunal does not have a duty to solicit evidence, as indicated by s. 68(1) of the *Canada Pension Plan Regulations*, which states that an applicant for benefits "*shall* supply the Minister" [my emphasis] with documents relating to their disability.

[4] *Dhillon v. Minister of Human Resources Development* (November 16, 1998), CP 5834 (PAB).

[12] Second, contrary to the Applicant's submission, the General Division's questions[5] did relate to the period in and around the MQP, specifically:

> 3. Why did you stop working at X?[6]
>
> 4. Have you looked for or attempted to do any other work since you stopped working at X? If not, please explain why not.
>
> […]
>
> 6. When did a change in your ability to function begin and describe the progression?
>
> 7. What treatments have you tried and what effect, if any, did they have?
>
> […]
>
> 10. Is there anything else that you think is relevant to your appeal?

[13] Third, the law makes it clear that a claimant for CPP disability benefits is required to demonstrate that they are disabled as of the end of the MQP and continuously thereafter. It was open to the Applicant and his legal representative to present evidence to this effect, and my review of the record shows that they did just that, submitting medical reports that documented the Applicant's progress during the most relevant period in and around 2011–12.

Issue 2: Did the General Division disregard evidence that the Applicant was disabled?

[14] The Applicant alleges that the General Division failed to consider his written answers to its questions, as well as the testimony of his common-law spouse.

[15] I see no arguable case for this submission. It is settled law that an administrative tribunal charged with fact finding is presumed to have considered all the evidence before it and need not discuss each and every element of a party's submissions.[7] That said, I have reviewed the General Division's decision and have found no indication that it ignored, or gave inadequate consideration to, any significant aspect of the evidence. Paragraphs 20 to 32 summarize his common-law partner's testimony, and paragraphs 34 to 41 summarize the Applicant's written responses to the General Division's questions. The General Division referred to both in its analysis.

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[5] GD0D.
[6] The Applicant indicated in the questionnaire accompanying his CPP disability application that he had stopped working at X in September 2011—four months before the end of the MQP.
[7] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

[16] The Applicant also suggests that since the General Division had no issues with his credibility, it should have accepted his claim that he is disabled. I do not see a reasonable chance of success for this submission, because an assessment of disability may depend on factors other than a claimant's subjective view of their functionality, such as medical evidence, treatment received, and effort to perform alternative work. It is open to a finder of fact to consider such evidence, but it cannot be the final word on disability, which, in this context, has medical and legal dimensions—not just personal ones.

Issue 3: Did the General Division misapply the jurisprudence surrounding "substantially gainful"?

[17] The Applicant alleges that the General Division failed to consider the jurisprudence surrounding "substantially gainful occupation," as set out in s. 42(2)(*a*) of the CPP.

[18] I am not satisfied that this submission would have a reasonable chance of success on appeal. The General Division referred to the applicable legislative provision in paragraph 64 of its decision and cited several of the leading cases that explain what it means for a disability to be "severe," among them *Klabouch v. Canada*, *Inclima v. Canada*, and *Bungay v. Canada*.[8]

[19] In particular, the Applicant submits that the General Division did not take into account his limited education, which, he submits, in combination with his impairments, compounds his lack of employability. Again, I do not see an arguable case on this point. In paragraph 65, the General Division, citing *Villani v. Canada*,[9] noted that, in assessing severity, a decision-maker must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. Regarding the Applicant, the General Division wrote:

> In this case, although the Appellant has only a grade 8 education, he is very young (26 years old as of the MQP) with work experience in both physical and sedentary occupations, including construction and an online business. He is fluent in the English language.

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[8] *Klabouch v. Canada (Social Development)*, 2008 FCA 33; *Inclima v. Canada (Attorney General)*, 2003 FCA 117; *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

[9] *Villani v. Canada (Attorney General)*, 2001 FCA 248.

[20] Later, in paragraph 72, the General Division returned to the subject of the Applicant's education:

> The Appellant also submitted that he has a very limited education and cannot be re-educated for lighter work due to his psychological conditions. However, there is no indication that this was the case prior to, at or around the time of the MQP. In fact, there is a post-MQP note from Dr. Leung on March 2, 2012 indicating that he was considering going back to school without any indication that he would be precluded from this due to his health conditions.

[21] In my view, the General Division fulfilled its obligation to keep the Applicant's personal factors in mind when it assessed the severity of his claimed disability. It found that his background, in combination with his impairments, did not preclude him from securing and maintaining a less physically strenuous form of employment than construction.

Issue 4: Did the General Division penalize the Applicant for not receiving medical attention between October 2010 and December 31, 2011?

[22] My review of the General Division's decision confirms that it drew an adverse inference from the relative absence of medical documentation after the Applicant's MVA and in the year leading up to the end of his MQP. In paragraph 68, it wrote:

> In this case, while the Tribunal acknowledged the Appellant's multiple diagnoses, it also considered that there are very few medical reports or records dated prior to, at, or around the MQP and those that are on file indicate evidence of work capacity.

I do not see an arguable case that the General Division erred in this instance. It is open to the General Division, as trier of fact, to weigh the evidence as it sees fit within the confines of s. 58(1)(*c*) of the DESDA. It is not perverse, capricious, or without regard for the material to suppose that there is a correlation between the severity of a claimant's condition and the number and frequency of their medical interventions.

[23] The Applicant submits that the General Division failed to consider the impact of his impairments on his ability to seek timely medical help, but the record shows that he did, in fact, see his family physician during the period in question. However, the General Division found that Dr. Leung's clinical notes suggested something less than a severe impairment:

> Dr. Leung's clinical notes indicate on October 2, 2010 that he had low back sprain/strain, whiplash, cervicogenic/post traumatic headaches and PTSD and, on December 2, 2010, that his condition worsened after returning to work, which was a physically-demanding type of work. Dr. Leung's noted on January 31, 2012, which is just after the MQP, that he has pain in his lower back, neck and headaches as well as PTSD. However, there is no indication at that time that he was precluded from attempting an alternate type of work. Furthermore, it is not until March 16, 2012 that Dr. Leung indicated that he is incapable of physical labour. While his inability to return to his usual, heavy, physical type of work is acknowledged, his inability to do physical labour would not preclude him from attempting alternate types of work within his limitations.

[24] As the General Division notes, the Applicant was not referred to any specialists, following his MVA-related injuries, until 2014—more than two years after his MQP. I see no reason to interfere with this finding or with the General Division's inference from it that the Applicant's condition deteriorated after his period of eligibility.

Issue 5: Did the General Division conclude that the Applicant's post-MQP medical evidence were irrelevant in assessing impairment?

[25] The Applicant suggests that the General Division was fixated on the dates of his diagnoses and erred by refusing to infer that they related to symptoms that predated December 31, 2011.

[26] I do not see an arguable case for this submission, which is, again, based on the premise that the General Division improperly weighed the evidence. While the Applicant may not agree with the General Division's conclusions, it is open to an administrative tribunal to sift through the relevant facts, assess the quality of the evidence, and decide on its weight.[10]

[10] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

[27] In this case, I see no indication that the General Division disregarded the Applicant's post-MQP medical evidence or that it denied, implicitly or explicitly, the possibility of retrospective assessment. Indeed, the General Division's decision contains detailed summaries of all significant medical reports—even those dated well after the MQP—and the General Division addressed many of them in its analysis. It is true that the General Division discounted some of these reports because of their distance from the MQP, but that is not the same thing as giving them no weight at all. I see nothing unreasonable—or contrary to the law—in preferring pre-MQP medical evidence. In my view, there is a rational basis for doing so, grounded in the reality that a contemporaneous account of a claimant's condition during the MQP will usually be more accurate and relevant than an account made after it.

Issue 6: Did the General Division discount evidence that the Applicant's attempt to obtain a GED was a "disaster"?

[28] The Applicant objects to the General Division's decision to give weight to his pursuit of educational programs after the MQP. He alleges that the General Division ignored the fact that he was ultimately unsuccessful in achieving high school equivalency.

[29] I do not see an arguable case on this point. In November 2017, one of the written questions that the General Division asked the Applicant was as follows: "You indicated in your CPP application that your highest level of education is grade 8. Have you attended any other classes or training since then? If so, provide details including what type of classes/training and when?" The Applicant replied in part: "I attempted to take classes with the GED correspondents program [*sic*]. It took months to mail material back and forth, cost a lot, and I need 32 credits, so this ended up being a bad idea."

[30] In its decision, the General Division accurately relayed this response, in which the Applicant notably did not attribute his failure to complete the GED program to his impairments, but to extraneous factors such as time and cost. Later, in paragraph 72, the General Division referred to the Applicant's attempts to upgrade his education:

> In fact, there is a post-MQP note from Dr. Leung on March 2, 2012 indicating that he was considering going back to school without any indication that he would be precluded from this due to his health conditions. The Appellant has made somewhat limited attempts to upgrade his education since then, including a GED correspondence program and an application to Athabasca University Faculty of Business in August 2012.

[31] This passage is part of a larger discussion in which the General Division found that the Applicant had considerable capacity prior to December 31, 2011, even if the medical evidence pointed to deterioration in his condition later. The General Division ascribed capacity to the Applicant's expressed desire to go back to school, and I do not see how this inference constituted an error. It is not unreasonable to suppose the Applicant would not have made the attempt had he not, at some level, felt that he was capable of it.

Issue 7: Did the General Division disregard evidence that the Applicant's jewellery business was never profitable?

[32] Finally, I see no argument that the General Division ignored the fact that the Applicant's jewellery business was never financially viable. Again, a tribunal is presumed to have considered all the evidence before it, but even so, the General Division explicitly referred to the Applicant's venture at paragraph 12, noting, "He attempted to sell custom rings, but the only custom ring he sold was refunded due to poor quality. As a whole, this business venture only lost money." I also note that the General Division's analysis did not place any significance on the fact that the venture continued past the MQP.

CONCLUSION

[33] Since the Applicant has not identified any grounds of appeal under s. 58(1) of the DESDA that would have a reasonable chance of success on appeal, the application for leave to appeal is refused.

Member, Appeal Division

REPRESENTATIVE:	Angela James, for the Applicant