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

Citation: *F. C. v. Minister of Employment and Social Development*, 2018 SST 584

Tribunal File Number: AD-16-886

BETWEEN:

**F. C.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

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DECISION BY: Jennifer Cleversey-Moffitt

DATE OF DECISION: May 31, 2018

Canada

## DECISION AND REASONS

### DECISION

[1] The appeal is dismissed.

### OVERVIEW

[2] The Appellant, F. C., submits that he qualifies for a disability pension because he has multiple conditions, particularly chronic dizziness and breathing problems related to asbestos exposure, a right inguinal hernia, and a brain concussion experienced in 2011.

[3] He worked for a resident care home from 1992 to June 6, 2012, when he stopped working because of what he describes as "lingering dizziness, falling when walking or exercising, decrease hearing, brain concussion"

[4] The Respondent, the Minister of Employment and Social Development, denied the Appellant's application for a disability pension under the *Canada Pension Plan* (CPP) initially and upon reconsideration. The Appellant appealed to the Tribunal's General Division. The General Division determined, based on the evidence, that the Appellant did not have a severe and prolonged disability as of his minimum qualifying period (MQP) date of March 31, 2013.

[5] The Appellant appealed to the Tribunal's Appeal Division, and the appeal was allowed in a decision dated March 2, 2016. The file was remitted to a different member of the Tribunal's General Division for a *de novo* hearing. On June 20, 2016, the General Division again determined that a disability pension was not payable. The Appellant filed an application for leave to appeal with the Tribunal's Appeal Division, which received the application on July 5, 2016. In a decision dated November 29, 2017, leave to appeal was granted.

[6] For the reasons outlined below, the appeal is dismissed.

### PRELIMINARY MATTER

[7] The Tribunal received submissions from the Appellant on April 11, 2017, May 3, 2017, and February 28, 2018. These submissions contained new medical information/reports. Generally, new evidence cannot be considered by the Appeal Division because the Appeal

Division does not conduct *de novo* hearings. The introduction of new evidence is not an independent ground of appeal.[1]

[8] As a result, I cannot accept the Appellant's submissions of new evidence and have not considered them.

**ISSUES**

[9] The Appellant advanced numerous arguments. After reviewing the submissions, I have determined that they can be addressed through the following main issues:

Issue 1: Did the General Division err in law when it determined that the MQP date was March 31, 2013?

Issue 2: Did the General Division base its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it by failing to consider the evidence in its totality?

Issue 3: Did the General Division fail to observe a principle of natural justice or otherwise act beyond or refuse to exercise its jurisdiction in its treatment of the Appellant's post-hearing submissions and evidence filed on May 25, 2016?

Issue 4: Did the General Division base its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it when it did the following?

a) relied on a report from Life Mark that indicated the Appellant had declined to participate in the Gradual Return to Work (GRTW) program; and

b) relied on Dr. Mackie's conclusion that "vestibular therapy" was not attempted.

Issue 5: Did the General Division base 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 by using the wrong post-retirement earnings amount for 2015?

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[1] *Marcia v. Canada (Attorney General)*, 2016 FC 1367.

**ANALYSIS**

[10] In considering the appeal, the Appeal Division has a limited mandate. It has no authority to conduct a rehearing. The Appeal Division does not consider new evidence. The Appeal Division's jurisdiction is restricted to determining whether the General Division committed an error under ss. 58(1)(*a*) through (*c*) of the *Department of Employment and Social Development Act* (DESDA).[2]

[11] According to s. 58(1) of the DESDA, 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.

[12] For the purposes of determining whether there is an error of law or a breach of natural justice, *Huruglica*[3] suggests that the words of s. 58(1) show that Parliament intended no deference to be owed to the General Division. However, with regard to questions of fact, the test contains specific language to guide the Appeal Division—"made in a perverse or capricious manner or without regard for the material before it." This would suggest that the Appeal Division is to intervene only when there is an erroneous finding of fact; when the finding was made perversely, capriciously, or without regard for the material; and when the decision has been based on that finding of fact.

[13] 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).

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[2] *Parchment v. Canada (Attorney General)*, 2017 FC 354.
[3] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93.

**Issue 1: Did the General Division err in law when it determined that the MQP date was March 31, 2013?**

[14] The General Division correctly determined that the MQP date was March 31, 2013.

[15] An individual can cancel a retirement pension in favour of a disability pension only if the individual is deemed to be disabled before the month the retirement pension became payable. Section 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an appellant must:

a) be under 65 years of age;

b) not be in receipt of the CPP retirement pension;

c) be disabled; and

d) have made valid contributions to the CPP for not less than the minimum qualifying period.

[16] Subsection 70(3) of the CPP states that once a beneficiary starts to receive a CPP retirement pension, that beneficiary cannot apply or re-apply, at any time, for a disability pension except as provided in ss. 66.1. Subsection 66.1(1.1) of the CPP permits an individual to cancel a retirement pension in favour of a disability pension only if the individual is deemed disabled before the month the retirement pension became payable. Section 42(2)(*b*) of the CPP states that in no case may a person be deemed to be disabled earlier than 15 months before the disability application was made.

[17] The Appellant submits to the Appeal Division that the MQP date should have been March of 2012.

[18] The Appellant began receiving early retirement benefits in April 2013, at the age of 64. Prior to receiving these benefits, the Appellant had applied for a disability pension under the CPP. The Appellant's application for a CPP disability pension was date stamped by the Respondent on October 29, 2012. He was assessed and it was determined he was not disabled as of December 31, 2013 (his former MQP date before he began to receive his retirement benefits).

[19] Because the Appellant began receiving a CPP retirement pension in April 2013, in accordance with s. 66.1(1.1) of the CPP, he must establish that he was disabled, within the meaning of the CPP, by March 2013.

[20] The General Division did not err in law when it determined the MQP date to be March 31, 2013.

**Issue 2: Did the General Division base its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it by failing to consider the evidence in its totality?**

[21] The General Division member did not base her decision on an erroneous finding of fact made perversely, capriciously, or without regard for the material with respect to considering the evidence in its totality.

[22] The Appellant argues that the General Division failed to assess all of his impairments with respect to his capacity to work. The Appellant submits that the General Division member disregarded his right indirect inguinal hernia as a contributing factor to his disability being severe and prolonged. The submissions do not provide any further argument on this issue.

[23] The Respondent submits that disability is not based on an appellant's inability to perform their regular job, but rather any substantially gainful occupation. The Respondent further submits that the main question is whether the Appellant has proven that he had a severe and prolonged disability by the expiry of his MQP and continuously thereafter. The Respondent submits that the evidence did not show that the Appellant's conditions met the test for a severe disability.

[24] The General Division decision does consider the hernia. In paragraph 36, the General Division member references the medical evidence that details the hernia. In addition, this paragraph also takes into account the Appellant's oral testimony with respect to his subjective reports of pain.

[25] Paragraphs 41 and 47 of the General Division decision also note that the Appellant's submissions request that the member consider the medical evidence related to the chronic groin pain caused by a hernia.

[26] The decision specifically mentions this condition as part of the analysis in determining whether the Appellant's disability is severe and prolonged. Paragraph 47 identifies the hernia as one of the other conditions that may have contributed to a finding of disability. However, in paragraph 53 of the General Division decision, the member does conclude that there was no evidence that the "groin pain" existed at the relevant time. This paragraph notes:

> With respect to the Appellant's groin pain, there is no evidence that this pain existed or was disabling at any relevant time. He did not report any symptoms until September 2015. He claims that he did not do so because he was unsure of the cause. The Tribunal does not accept this evidence as credible. The Appellant has undergone multiple investigations over the years. If he had groin or other pain that interfered with his ability to perform his job, that would have been evident at some point in the twenty years between his vasectomy operation and the end of his MQP. He did not mention this issue to anybody until well after that date.

[27] I agree with the Respondent's submissions—the General Division reviewed the evidence and found that the Appellant had capacity to work prior to his MQP and after it. The Appellant failed to show that he could not pursue any substantially gainful occupation because of his health condition(s).[4]

[28] The General Division member did consider the Appellant's groin pain caused by the hernia, but noted that there was no evidence indicating it was a contributing factor at the relevant time. The General Division did not base its decision on an erroneous finding of fact that it made perversely, capriciously, or without regard for the material.

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

**Issue 3: Did the General Division fail to observe a principle of natural justice or otherwise act beyond or refuse to exercise its jurisdiction in its treatment of the Appellant's post-hearing reply filed on May 25, 2016?**

[29] The issue of the post-hearing reply was dealt with in the General Division decision's opening paragraphs. The General Division did not fail to observe a principle of natural justice or otherwise act beyond or refuse to exercise its jurisdiction in its treatment of the Appellant's post-hearing reply filed on May 25, 2016. Under "preliminary matters," the decision notes:

> [1] The Notice of Hearing for this appeal set out filing and response dates of April 27, 2016, and May 11, 2016. The Appellant filed material during the filing period. The Respondent submitted GDR7, which contained an addendum to its submission as well as further evidence, in the response period. GDR7 was received by the Social Security Tribunal (Tribunal) on May 11, 2016, and was mailed to the Appellant on May 13, 2016. He had not received it by the day of the hearing.
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> [2] In spite of that, the Appellant advised the Tribunal that he wished to proceed with the hearing. The Tribunal noted that the evidence contained in GDR7 was already known to the Appellant. GDR7 also contained written submissions commenting on that evidence, which might have been made orally by the Respondent had it attended the hearing.
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> [3] The Tribunal considered the contents of GDR7 and determined that the interests of fairness and natural justice would be met by adjourning the hearing after oral evidence and submissions were made, and giving the Appellant an opportunity to respond in writing to GDR7 when he received it.
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> [4] Several days after the hearing, the Appellant advised Tribunal staff that he had still not received GDR7. A new copy was sent to him, and he filed a written reply on May 25, 2016.

[30] In reading the reply filed on May 25, 2016, I note that there appear to be both submissions and evidence. The first item in the post-hearing reply appears to be the same argument that was included in the leave to appeal application—that the Appellant believed his MQP date was March 2012.

[31] The General Division decision adequately explains how the MQP date was determined, citing the correct legislation. As noted above, the General Division did not err in law in its determination of the MQP date.

[32] The post-hearing reply also references evidence that was contained in the file at the time of the hearing. No new evidence was introduced.

[33] After listening to the recording of hearing, I find that it is evident that the submissions raised in the post-hearing reply mirror those raised at the hearing by way of oral evidence.

[34] Ultimately, a tribunal need not refer in its reasons to each and every piece of evidence before it; rather, it is presumed to have considered all the evidence.[5] Reasons do not have to include all the arguments or details that were presented to the decision-maker, and the decision-maker is not required to make an explicit finding on each element in coming to a conclusion. The General Division member carried out a comprehensive review and analysis of the medical evidence and submissions, and provided an explanation for her decision, as she was required to do.[6] Again, since the Appellant has simply asserted that the General Division did not consider the evidence, without specifying where a specific error occurred, I am unable to find where the General Division failed to observe a principle of natural justice or otherwise act beyond or refuse to exercise its jurisdiction in its treatment of the Appellant's post-hearing reply filed on May 25, 2016.

**Issue 4: Did the General Division base its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it when it did the following?**

**a) relied on a report from Life Mark that indicated the Appellant had declined to participate in the GRTW program; and**

**b) relied on Dr. Mackie's conclusion that "vestibular therapy" was not attempted.**

<u>The Life Mark Report</u>

[5] *Simpson v. Canada (Attorney General)*, 2012 FCA 82, at para. 10.
[6] *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, at para. 13.

[35] The General Division member did not base her decision on an erroneous finding of fact made perversely, capriciously, or without regard for the material with respect to evidence concerning the Life Mark report.

[36] The Appellant submits that he participated in the GRTW program from February 25, 2012 to May 15, 2012.

[37] The report prepared by the team at Life Mark Health Centre was for the purposes of "Head Injury Assessment and Treatment Services." In this report, the writer notes as a conclusion, "As [Appellant] has declined to participate in a GRTW, he has been discharged from the Head Injury Assessment and Treatment Services program. It was anticipated that had he participated in the recommended GRTW, he would have been fit to return to work without limitations at completion."[7]

[38] Paragraph 22 of the General Division decision references this report. The decision further notes, "The Life Mark assessment recommended that the Appellant participate in a four week gradual return to work (GRTW); however, he indicated on February 17, 2012, that he did not feel ready to do so. He cited dizziness, right shoulder and arm pain, depression and slowed reaction speed as barriers."

[39] Paragraph 24 of the General Division decision does acknowledge his participation in the GRTW program beginning on March 23, 2012.

[40] The Appellant has urged me to review his "pay stub" or "statement of earnings and deductions," which he argues shows that he did in fact attend the GRTW program starting on February 25, 2012. The benefits calculations provided in the file do not have a statement for the period that would encompass February 25, 2012.[8]

[41] However, upon listening to the recording of hearing, I note that the General Division member did ask about the Appellant's GRTW efforts. The Appellant clearly stated that in February of 2012, there was no GRTW.

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[7] GD4-103.
[8] GD1C.

[42] In another Life Mark report dated March 12, 2012, the psychologist states:

> [The Appellant] asserted that ongoing pain, dizziness and depression were the three significant barriers preventing him from attempting a graduated return to work.
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> […]
>
> In summary, [the Appellant] does not appear to be currently experiencing any psychological symptoms or conditions that constitute a significant barrier to a return to work. Notwithstanding other Issues, it is recommended that he engage in a graduated return to work as soon as possible.[9]

[43] It appears from the March 12, 2012, report that the Appellant still had not attempted a GRTW program at that time.

[44] There is no evidence that the Appellant's GRTW program began on February 25, 2012. Based on the objective and oral evidence at the hearing, the General Division determined that the GRTW program began on March 23, 2012, and appropriately considered this evidence when determining whether the Appellant was incapable of regularly pursuing any substantially gainful occupation by March 31, 2013. The General Division did not base its decision on an erroneous finding of fact.

Vestibular Therapy

[45] Leave to appeal was granted on this issue.

[46] The General Division member did not base her decision on an erroneous finding of fact made perversely, capriciously, or without regard for the material with respect to the consideration of the evidence regarding vestibular therapy.

[47] In his submissions to the Appeal Division, the Appellant claims he did in fact pursue vestibular therapy in 2012 while in treatment with Life Mark between February 2, 2012, and February 12, 2012.

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[9] GD4-21.

[48] In paragraph 58 of the General Division decision, the member notes that failure to pursue vestibular therapy was a consideration in determining that the Appellant may not have made the effort to follow his medical treatment. That paragraph reads:

> Having finally seen a specialist for his dizziness and falling issues, the Appellant has not followed the recommended treatment. There is no evidence that attempting vestibular therapy poses a risk to him, or that there are financial barriers to doing so. The Appellant's opinion that Dr. Mackie is not competent – formed after consulting the internet – is not a reasonable excuse for failing to pursue this treatment option.

[49] The General Division cannot make findings in the absence of medical evidence. Objective medical evidence is required in determining disability under the CPP.

[50] The General Division member concluded that the Appellant's lack of effort to obtain treatment meant that she could not conclude that his condition was severe—he had not fulfilled his obligation to seek out ways to improve his situation. [10] In the leave to appeal decision, I noted that given the amount of weight the General Division placed on the Appellant's failure to pursue medical treatment, if the Appellant had actually pursued vestibular therapy, the decision may have been based on an erroneous finding of fact.

[51] The Respondent submits that a factual error alone is not a ground of appeal. Instead, the erroneous finding of fact must be made in a perverse or capricious manner or without regard for the material. [11]

[52] The Respondent further submits that the General Division considered the medical and other evidence, including the Appellant's oral testimony. The medical evidence submitted shows that the Appellant underwent some rehabilitation in February 2012 with Life Mark, but nowhere does it indicate that this treatment included vestibular therapy.

[53] Dr. Wong's follow-up letter of July 4, 2012, also suggests vestibular physiotherapy and instructs the Appellant to "proceed at his discretion." [12] There is no evidence in the file that the

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[10] General Division decision at para. 58; *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211.
[11] DESDA at s. 58(1)(*c*).
[12] GD4-97.

Appellant ever attempted vestibular therapy. Additionally, at paragraph 38 of the General Division decision, it is noted that the Appellant provided oral evidence at the hearing that he did not want to have vestibular therapy because there was no guarantee it would work. In listening to the recording of the hearing, I note that the General Division member asked about the recommendation for vestibular therapy, and the Appellant's oral evidence was that he was not planning on beginning that treatment until the future—possibly August 2016. His oral evidence was that he had not attempted it, nor had he set up an appointment to pursue the treatment.

[54] The Respondent submits that the General Division did not base its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it. It submits that the General Division member relied on the objective medical evidence on file and listened to the Appellant's oral testimony. The Respondent argues that this is consistent with the General Division's role as trier of fact.[13]

[55] I agree with the Respondent's submissions. None of the evidence with respect to vestibular therapy was conflicting. No evidence in the detailed reports from Life Mark indicates that vestibular therapy occurred during February 2012. Other than asserting in submissions to the Appeal Division that he did have vestibular therapy in February 2012, the Appellant has not pointed to any evidence in the record that would indicate he participated in this therapy in February 2012. Asserting that he did attend the therapy is not enough. The General Division did not base 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.

**Issue 5: Did the General Division base 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 by using the wrong post-retirement earnings amount for 2015?**

[56] The Appellant submits that the post-retirement income for 2015 was incorrect and that the General Division member relied on that incorrect information.

[57] The General Division did not base 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 by using the wrong post-retirement earnings amount for 2015.

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[13] *Housen v. Nikolaisen*, 2002 SCC 33, at paras. 10–18.

[58] Initially, it was determined that the Appellant's post-retirement income was $45,362.00 for 2015, but then an assessment was conducted and the amount was determined to be $34,536.00. The Appellant submits that the General Division made an erroneous finding of fact by relying on the first determination of $45,362.00.

[59] In listening to the recording of hearing, I note that this issue was raised by the Appellant. The General Division member and the Respondent's representative discussed the issue of the assessment amount being lower. The General Division member accepted that the assessment amount of $34,536.00 was the correct post-retirement income for 2015. In fact, the General Division member took the time to determine where the income had come from, asking questions about possible employment and payments from Great-West Life.

[60] Ultimately, the purpose of the investigation into the post-retirement earnings for 2015 was to establish whether the Appellant had made attempts to work. The Appellant noted at the hearing that his post-retirement earnings for 2015 included no income from employment. The General Division decision does not specifically cite the post-retirement earnings for 2015; however, it does conclude, based on the evidence, that no attempts to find suitable employment were made.

[61] In paragraph 56 of the General Division decision, the member writes:

> Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117). The Appellant made two attempts to find a job - one for a driving position likely unsuited to someone who had episodes of dizziness, and one for a high-level executive position for which he had no relevant experience. There is no evidence that he was not hired for a suitable position because of his health condition. In 2012 the Appellant was in his mid-fifties, well-educated and with good English language skills. There is no reliable evidence that he could not at least have attempted some type of work, or indeed have attempted a return to light duties at his previous job.

[62] After listening to the recording of the hearing, I find that it was clear that the General Division member considered the discrepancy in the amounts and accepted the assessment

amount. She further questioned the Appellant on the origins of those earnings and drew the conclusion that none of the amount was from employment.

[63] The General Division member did not base her decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before her.

**CONCLUSION**

[64] Ultimately, much of the Appellant's submissions amounted to a request to re-examine the evidence and come to a different conclusion. The Appeal Division does not have the jurisdiction to conduct a *de novo* hearing. An appellant's disagreement with the General Division decision does not constitute a breach of natural justice or an error in law or fact.[14]

[65] The appeal is dismissed.

Jennifer Cleversey-Moffitt
Member, Appeal Division

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| METHOD OF PROCEEDING: | On the record |
| PARTIES AND REPRESENTATIVES: | F. C., Appellant<br><br>Minister of Employment and Social Development, Respondent<br><br>Christian Malciw, Representative for the Respondent |

[14] *Parchment v. Canada (Attorney General)*, 2017 FC 354.