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

Citation: *C. J. v. Minister of Employment and Social Development*, 2018 SST 895

Tribunal File Number: AD-18-100

BETWEEN:

C. J.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Nancy Brooks

DATE OF DECISION: September 11, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed and the matter is returned to the General Division for reconsideration.

OVERVIEW

[2] The Appellant, C. J., applied for a *Canada Pension Plan* (CPP) disability pension on March 29, 2016. The Appellant's minimum qualifying period (MQP) date is December 31, 2017. He was 45 years old on his MQP date. The Respondent, the Minister of Employment and Social Development, denied the application initially and upon reconsideration.

[3] The Appellant appealed to the Social Security Tribunal's General Division, which dismissed his appeal on November 10, 2017. The General Division member concluded that the Appellant had residual work capacity. She concluded that the Appellant's disability was not severe because he had not actively considered some other type of employment or retraining, despite medical recommendations that he do so and no medical restriction on his activity level.

[4] The Appellant sought and obtained leave to appeal to the Appeal Division. On the appeal, he submits that the General Division made errors of law and based its decision on erroneous findings of fact.

[5] After considering the evidence and the submissions of both sides, I find that there is no basis to conclude the General Division committed an error of law falling within the scope of s. 58(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA). However, I find the General Division committed an error of fact falling within the scope of s. 58(1)(*c*) and, therefore, the appeal should be allowed.

ISSUES

[6] The following issues are to be determined on this appeal:

Issue 1: Did the General Division commit errors of law in its approach to determining whether the Appellant had a severe disability?

Issue 2: Did the General Division base its decision on errors of fact regarding the Appellant's medical condition?

ANALYSIS

[7] Both sides filed written submissions on the appeal. In her submissions, the Minister's representative stated she was satisfied the appeal could proceed in writing. Counsel for the Appellant did not state a preference as to the method of proceeding. I proceeded with the appeal on the basis of the documentary and oral evidence that was before the General Division in light of the parties' submissions; the fact that the relevant underlying facts are not in dispute; and the legislative direction that the Tribunal must proceed as informally and quickly as circumstances, fairness and natural justice permit.[1]

[8] 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.

[9] In order to allow the appeal, I must be satisfied that the Appellant has proven on a balance of probabilities that the General Division committed an error falling within the scope of s. 58(1). Thus, the appeal presents a different and appreciably higher hurdle than the one to be met at the leave to appeal stage, where an applicant need only demonstrate that the proposed appeal has a reasonable chance of success.

[10] The Federal Court of Appeal recently confirmed that in order to succeed, an appellant must prove that the General Division committed an error falling under a category expressly stated in s. 58(1).[2] The Court has also confirmed that the Appeal Division's jurisdiction does not

[1] *Social Security Tribunal Regulations*, s. 3(*a*).
[2] *Quadir v. Canada (Attorney General)*, 2018 FCA 21.

extend to considering questions of mixed fact and law as a ground of appeal where the alleged error merely involves a disagreement on the application of settled law to the facts.[3] An allegation that the General Division erred in its application of settled legal principles to the facts is a question of mixed fact and law that falls outside the jurisdiction of the Appeal Division.

Issue 1: Did the General Division commit errors of law in its approach to determining whether the Appellant had a severe disability?

[11] Appellant's counsel submits that the General Division committed two errors of law in its analysis of whether the Appellant's disability was severe in that it: (i) failed to apply the non-binding approach articulated by the Pension Appeals Board in *MNHW v. Densmore*[4] and the binding principles expressed by the Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v. Martin* and *Nova Scotia (Workers' Compensation Board) v. Laseur*;[5] and (ii) failed to apply the legal principles set out in *Bungay v. Canada (Attorney General).*[6]

Failure to apply the principles in *Densmore* and *Martin*

[12] Appellant's counsel objects that the General Division member did not make any finding concerning the Appellant's credibility. He asserts that this is fatal to her conclusion that the Appellant's disability was not severe. In support of this submission, he relies on the following statement from *Densmore*:

> The issue is difficult because its resolution depends upon the view which the Board ultimately takes of the genuineness of what are strictly subjective symptoms. In effect, the judgment call, made generally without the assistance of objective clinical signs, will be one of credibility on a case by case basis, as to the severity of the pain complained of. [7]

[13] *Densmore* is not binding on the Tribunal, but in any event, I find the decision is of no assistance to the Appellant.

---

[3] *Ibid*., at paras. 7–9; *Garvey v. Canada (Attorney General)*, 2018 FCA 118 at paras. 5 and 9 [*Garvey*].
[4] *Minister of National Health and Welfare v. Densmore*, June 9, 1993, CP 2389 (PAB) [*Densmore*].
[5] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board v. Laseur)* [2003] 2 S.C.R. 504 [*Martin*].
[6] *Bungay v. Canada (Attorney General)*, 2011 FCA 47.
[7] *Densmore* at p. 4.

[14] The General Division member took into account the Appellant's opinion and his subjective evidence that he could not retrain or find alternate work because of his limitations,[8] but she also considered the medical evidence filed. She noted that Dr. Chan, neurosurgeon, stated the Appellant could not return to his work as a forklift operator, but he could retrain.[9] Dr. Mann, neurologist, advised him to regularly perform back strengthening exercises and encouraged him to stay physically active and exercise regularly".[10] His family physician, Dr. Kahlon, supported his application for CPP disability benefits, but also stated that he encouraged the Appellant to find an occupation to complement his income.[11]After weighing the evidence, the member determined that the Appellant had residual work capacity on his MQP date. She did not reject the Appellant's testimony or question his credibility. Rather, she weighed his evidence together with the other evidence before her to support the conclusion that he had capacity to work. While the member did not express any view on the Appellant's credibility, it was open to her to prefer the documentary and medical evidence before her to his oral testimony.[12]

[15] Appellant's counsel submits that in *Martin*, the Supreme Court of Canada "found that individuals suffering from chronic pain have a real disability, even where there is a lack of objective findings" and "although not specifically articulated by the Court, the implication of this decision is that chronic pain, which is not always objectively assessable, may need to be assessed with reference to subjective evidence."[13]

[16] *Martin* does not stand for the propositions that the Appellant advances. Proof that a claimant experiences chronic pain does not automatically mean that the claimant "has a real disability" in the sense that he or she is automatically entitled to disability benefits under the CPP or that the lack of medical evidence to support a claimed disability must be disregarded.[14] Indeed, the Court recognized that chronic pain may result in partial incapacitation, and persons who have partial incapacitation due to chronic pain should be encouraged to rejoin the

---

[8] General Division Decision, paras. 41 and 48.
[9] General Division Decision, para. 42; GD11-4.
[10] GD8-8.
[11] GD11-2.
[12] See *Michaud v. Canada (Attorney General)*, 2011 FCA 126 at para. 5, where the Federal Court of Appeal endorsed this approach.
[13] AD3-3.
[14] *Garvey* at para. 12.

workforce.[15] The Pension Appeals Board recognized this as well, stating in *Densmore* that it is not sufficient for chronic pain syndrome to be found to exist, but the pain must be such as to prevent the claimant regularly from pursuing any substantially gainful occupation.[16] Furthermore, *Martin* contains no direction on how evidence of chronic pain is to be evaluated and, in particular, says nothing about the role of subjective evidence in assessing the seriousness of the disability.

[17] In the CPP context, entitlement to disability benefits depends on whether a claimant meets the definition set out in s. 42 of the CPP. The General Division recognized this as the controlling principle.

[18] I conclude the General Division did not commit an error of law due to any failure to follow the principles laid out in *Martin* or *Densmore*.

Failure to apply the principles in *Bungay*

[19] Appellant's counsel also submits that the General Division member erred by failing to apply the legal principles in *Bungay*.[17] In that case, the Federal Court of Appeal confirmed that employability is to be assessed in light of all the circumstances, including the claimant's background and medical condition. All of the possible impairments that affect employability are to be considered, not just the biggest impairments or the main impairment.

[20] I see no basis to find that the General Division member did not consider the totality of the Appellant's medical condition. In her recitation of the evidence, she noted that the Appellant testified that he experienced back pain and pain in his left leg and right hip, numbness in his left leg down to the ankle, left arm pain, chest pain and head pain. She noted that he also experienced trouble sleeping, deteriorating eyesight, and constipation and urinary problems related to his back pain. In her reasons at para. 48, the member stated that she had considered the Appellant's subjective assessment of his condition in addition to the medical evidence. In my view, although she did not expressly refer to the *Bungay* decision in her analysis, she considered the totality of his medical condition. However, as discussed in the next section, because her analysis of his

[15] *Martin* at para. 98.
[16] *Densmore* at p. 3.
[17] AD3-4.

overall medical condition discounted certain conditions without consideration of all of the evidentiary material before her, I find she committed a reviewable error of fact falling within the scope of s. 58(1)(*c*) of the DESDA.

Conclusion on alleged legal errors

[21] In summary, I find the General Division member applied the correct legal principles in her analysis regarding whether the Appellant's disability was severe, and there is no basis to conclude she committed an error of law falling within the scope of s. 58(1)(*b*) of the DESDA.

[22] Appellant's counsel states it was an error of mixed fact and law for the General Division member to conclude the Appellant retained a capacity to work and he takes issue with the weight that the member gave to certain medical evidence. To the extent that Appellant's counsel is disputing the manner in which the member weighed the evidence in her analysis of whether the Appellant's disability was severe, this is a question of mixed fact and law that falls outside the jurisdiction of the Appeal Division.

Issue 2: Did the General Division base its decision on errors of fact regarding the Appellant's medical condition?

[23] Paragraph 58(1)(*c*) of the DESDA directs the Appeal Division to intervene if the General Division based its decision on an erroneous finding of fact that it made "in a perverse or capricious manner" or "without regard to the material before it". Where a tribunal makes a factual finding that squarely contradicts or is unsupported by the evidence, its determination may be said to be made in a perverse or capricious manner or without regard to the evidence.[18]

[24] Appellant's counsel submits that the General Division member made an error falling within the scope of s. 58(1)(*c*) when she stated that the Appellant had several complaints beyond his back pain, but that these were not a "significant concern" to the Appellant or his doctors. He submits that this was an erroneous finding of fact that failed to take into account the evidence before her. In his submissions, he argues that this erroneous finding was "a material error that clearly impacted the subsequent finding of residual work capacity, which was solely premised on the perceived severity of [the Appellant's] low back pain".

[18] *Garvey* at para. 6.

[25] I agree that the General Division made erroneous findings of fact when she concluded that the Appellant's "other complaints" were not of significant concern to the Appellant or his doctors, that they were "barely mentioned, if at all", and that they had not "been investigated or treated to any great extent", ultimately leading to her conclusion that "the Tribunal cannot find that they continue to contribute to an inability to pursue substantially gainful work".[19]

[26] The member did not take into account the evidence before her. For example, the member included the numbness of the Appellant's lower extremities in the "other conditions" she described as not significant because they did not appear to be a significant concern to the Appellant or his doctors. However, the evidence does not support this conclusion. The Appellant reported his lower extremity numbness to Dr. Gupta on January 13, 2016;[20] Dr. Chan on November 24, 2016,[21] Dr. Mann on March 22, 2017,[22] and June 16, 2017;[23] and Dr. Parhar on February 17, 2017.[24] The Appellant also testified about the extent of his conditions, including the numbness, in his oral testimony.[25]

[27] I find that the member made an erroneous finding of fact because she did not take into account all of the material before her when she determined that the Appellant's only significant complaint for purposes of the severity analysis was back pain. Her conclusion that the Appellant had a capacity to work and her decision that his disability was not severe were both based on this erroneous finding of fact. Accordingly, the General Division committed an error of fact falling within the scope of s. 58(1)(*c*) of the DESDA.

[28] The General Division's reasons did not precisely address each of the Appellant's reported conditions or whether and when these conditions had been brought to the attention of his doctors. Because I have found one example of where the member failed to take into account all of the material evidence before her, which is sufficient to find a reviewable error of fact, I need not review the evidence relating each of the Appellant's medical conditions. This will be the task of the General Division member who reconsiders this matter in the analysis of the evidence relating

---

[19] General Division Decision at para. 44.
[20] GD2-48: January 13, 2016, report of Dr. Meera Gupta (neurologist) to Dr. Kahlon (family physician).
[21] GD11-3 to GD11-4: report of Dr. Chan (neurosurgeon) to Dr. Mann (neurologist).
[22] GD8-3: March 22, 2017, report of Dr. Mann to Dr. Kahlon.
[23] GD8-6: June 16, 2017, report of Dr. Mann to Dr. Kahlon.
[24] GD5-6: March 17, 2017, report of Dr. Parhar (independent medical examiner) to Appellant's counsel.
[25] Recording of General Division hearing, cited by Appellant's counsel in his submissions at AD3-6, footnote 6.

to the totality of the Appellant's medical condition, as part of the determination of whether the Appellant's disability was severe on or before the MQP date.

CONCLUSION

[29] The appeal is allowed. This matter is referred back to the General Division for reconsideration.

Nancy Brooks
Member, Appeal Division

METHOD OF PROCEEDING:	On the Record
APPEARANCES:	C. J., Appellant Sarj Gosal, Counsel for the Appellant Minister of Employment and Social Development, Respondent Viola Herbert, Representative for the Respondent