



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *F. M. v. Minister of Employment and Social Development*, 2018 SST 1152

Tribunal File Number: AD-18-223

BETWEEN:

**F. M.**

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: Valerie Hazlett Parker

DATE OF DECISION: November 15, 2018

## **DECISION AND REASONS**

### **DECISION**

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

### **OVERVIEW**

[2] F. M. (Claimant) began to receive a Canada Pension Plan disability pension based on his depression and related conditions. He returned to work in the fall of 2014. In March 2015 the Minister of Employment and Social Development stopped paying the disability pension to the Claimant on the basis that he ceased to be disabled in March.

[3] The Claimant applied for and began to receive a Canada Pension Plan retirement pension in January 2016. In July 2016, he applied for reinstatement of his disability pension. The Minister refused this application because it found that the Claimant was not disabled before he began to receive the retirement pension. The Claimant appealed this decision to the Tribunal, but the Tribunal's General Division dismissed his appeal for the same reason.

[4] The Claimant appeals this decision and argues that the General Division decision was based on an erroneous finding of fact, that the General Division erred in law, and that the decision is unjust. The appeal is allowed because the General Division erred in law when it failed to consider whether the Claimant's work in 2015 was a substantially gainful occupation.

### **PRELIMINARY MATTER**

[5] The Claimant attended the hearing with his representative, John Duncan. There is no written authorization for Mr. Duncan to represent the Claimant in the hearing file. The Claimant orally authorized Mr. Duncan to represent him, and the hearing proceeded on this basis.

### **ISSUES**

[6] Did the General Division make an error in law when it failed to consider whether the Claimant's work in 2015 was a substantially gainful occupation?

[7] Did the General Division fail to observe a principle of natural justice when it failed to consider that the Claimant did not know why his disability pension stopped?

[8] Is the General Division decision unjust?

## **ANALYSIS**

[9] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It sets out only three grounds of appeal that can be considered. They are that the General Division failed to observe a principle of natural justice or made a jurisdictional error, made an error in law, or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.<sup>1</sup> The Claimant's grounds of appeal that the General Division erred in law, failed to observe a principle of natural justice, and made an unjust decision are considered below in this context.

### **Issue 1: Error in law**

[10] To be disabled under the *Canada Pension Plan* (CPP) a claimant must have a disability that is both severe and prolonged. A disability is severe if it renders that person incapable regularly of pursuing any substantially gainful occupation.<sup>2</sup> The Claimant was found to be disabled. In 2014, he returned to work as a contractor. The General Division found as fact that the Claimant stopped working again in June 2016 because that is what he wrote in his application for reinstatement of the disability pension and said in a telephone call with the Minister's staff.<sup>3</sup> The General Division concluded that the Claimant's disability pension could not be reinstated because he was not disabled before he began to receive the retirement pension in January 2016.<sup>4</sup>

[11] The Claimant argues that, in 2014, he attempted to return to work as part of his treatment and that this work was not substantially gainful. The Record of Earnings shows that, while the Claimant earned over \$40,000 each year from 2004 to 2012, he earned only \$13,645 in 2015 and had no earnings in 2014. This indicates that the Claimant's work may not have been substantially gainful. Under the CPP, a claimant may be disabled if they are capable of work that is not

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<sup>1</sup> DESD Act, s 58(1).

<sup>2</sup> CPP, s 42(2)(a).

<sup>3</sup> General Division decision para 26.

<sup>4</sup> *Ibid.*

substantially gainful. Whether work is substantially gainful depends on a number of things, including the income earned, work conditions and accommodations, and expectations regarding productivity.<sup>5</sup> The General Division did not consider this; it accepted that the fact that the Claimant had returned to work established that his work was substantially gainful. This is an error in law, and the appeal must be allowed on this basis.

## **Issue 2: Natural Justice**

[12] The principles of natural justice are concerned with ensuring that parties to an appeal have the opportunity to present their case to the Tribunal, to know and answer the legal case against them, and to have a decision made by an impartial decision maker based on the law and the facts. In this case, the Claimant argues that he was not able to fully answer the case against him because he did not receive the letter that explained why his disability pension had stopped until after he had applied for reinstatement of that pension in 2016. Therefore, he could not dispute the Minister's finding that he was no longer disabled in March 2015.

[13] The General Division decision states that the Minister informed the Claimant in a letter dated April 8, 2015, that the disability pension would no longer be payable because he was no longer disabled.<sup>6</sup> While the Claimant now argues that he did not receive this letter, when he requested reconsideration of the Minister's decision not to reinstate the disability pension, he wrote that he had forgotten about this letter.<sup>7</sup> The General Division did not explore this argument at the hearing. However, I cannot find any fault in its failure to do so, because the Claimant's written evidence was that he forgot about the letter. I am not persuaded that the General Division failed to observe a principle of natural justice because it failed to explore this issue. The appeal fails on this basis.

## **Issue 3: Unjust decision**

[14] Finally, the Claimant argues that the process and requirements to have his disability pension reinstated are confusing and stressful. He contends that he should be encouraged to

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<sup>5</sup> *Atkinson v Canada (Attorney General)*, 2014 FCA 187.

<sup>6</sup> General Division decision para 25.

<sup>7</sup> GD2-8.

attempt to work and not penalized for doing so for a period of time. Accordingly, he finds the General Division decision to be unjust and believes it should be overturned.

[15] I congratulate the Claimant for his perseverance and attempting to work and overcome significant health barriers. The DESD Act, however, does not permit the Tribunal to make decisions based on compassion, extenuating circumstances, or a claimant's efforts to overcome adversity. While the outcome of the appeal at the General Division is harsh, this alone is not a reason for it to be overturned. The Appeal Division can only intervene if a ground of appeal under the DESD Act is made out. The appeal therefore cannot be allowed based on this argument.

### **CONCLUSION**

[16] The appeal is allowed because the General Division erred in law when it failed to consider whether the Claimant's work was a substantially gainful occupation.

[17] The DESD Act sets out what remedies the Appeal Division can grant on an appeal, including referring the matter back to the General Division for reconsideration.<sup>8</sup> The appeal is referred back to the General Division because the record is incomplete. Evidence is required on the issue of whether the Claimant's work was a substantially gainful occupation.

Valerie Hazlett Parker  
Member, Appeal Division

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| HEARD ON:             | November 7, 2018  |
| METHOD OF PROCEEDING: | Teleconference  |
| APPEARANCES:          | F. M., Appellant<br><br>John Duncan, Representative for the Appellant<br><br>Viola Herbert, Representative for the Respondent |

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<sup>8</sup> DESD Act, s 59(1).