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

Citation: *B. M. v Minister of Employment and Social Development*, 2018 SST 932

Tribunal File Number: AD-18-489

BETWEEN:

B. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: December 31, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, B. M., was born in 1964 and attended school up to Grade 8, although he later obtained a high school equivalency diploma. He worked as a marine mechanic for more than 20 years and, more recently, was employed as a heavy equipment operator. He stopped working in January 2014 because of increasing pain in his neck and back. He received a left shoulder replacement in November 2014 and has since been diagnosed with chronic pain disorder.

[3] In July 2016, the Appellant applied for a disability pension under the *Canada Pension Plan* (CPP). The Respondent, the Minister of Employment and Social Development (Minister), refused the application because it found that the Appellant's disability was not "severe and prolonged," as defined by the CPP, during the minimum qualifying period (MQP), which it determined would end on December 31, 2016.

[4] The Appellant appealed the Minister's refusal to the General Division of the Social Security Tribunal. The General Division held a hearing by teleconference and dismissed the appeal in a decision dated July 1, 2018, finding insufficient evidence, on balance, that the Appellant was incapable of substantially gainful employment as of the MQP. In particular, the General Division found that the Appellant had a "relatively diverse skill set"[1] that would not significantly restrict his employment options. The General Division also based its decision on a finding that the Appellant had failed to make reasonable efforts to follow his physicians' treatment recommendations.

[5] On August 7, 2018, the Appellant requested leave to appeal from the Tribunal's Appeal Division for the following reasons:

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[1] General Division decision, para. 7.

- The General Division found, in reviewing the Appellant's work history, that he had experience in airport management, confusing his career with his late father's.
- The General Division found that the Appellant refused massage, acupuncture, and mental health counselling, but it ignored the fact that his family doctor was skeptical that any of these treatments would make him more employable.
- The General Division disregarded medical reports clearly stating that the Appellant cannot bend over, sit, or stand for extended periods, or lift anything more than 20 pounds.

[6] In my decision dated August 29, 2018, I allowed leave to appeal because I saw an arguable case that the General Division had based its decision on an erroneous finding that the Appellant had experience in airport management. I did not consider the Appellant's other grounds of appeal at that time and made it clear that they would be adjudicated on their merits later.

[7] In written submissions dated October 12, 2018, the Minister agreed that the General Division erred in finding that the Appellant had worked as an airport manger. It also conceded that this error,

> coupled with its conclusion that the Appellant has a relatively diverse skill set, logically influenced its consideration of the factors outlined in the *Villani* case to his circumstances. In turn, this may have contributed to the General Division's finding that the Appellant was not disabled under the CPP.[2]

Despite the error, the Minister maintained that the General Division's decision should still stand because it was largely based on a defensible finding that the Appellant failed to follow treatment recommendations.

[8] Having now reviewed the parties' oral and written submissions, I am satisfied that the General Division's decision was based on a factual error; however, I must disagree with the Minister's suggestion that the error was immaterial or that it was the only one that the General Division made in rendering its decision. For these reasons, I have decided to allow the appeal

[2] Minister's submissions, AD2-8, at para 19.

and do what the General Division should have done: grant the Appellant a Canada Pension Plan disability pension.

ISSUES

[9] According to section 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.

[10] I must decide the following questions:

Issue 1: Did the General Division base its decision on an erroneous finding that the Appellant had experience in airport management?

Issue 2: Did the General Division ignore Dr. Walton's opinion that some of the treatments recommended for the Appellant would do little to make him more employable?

Issue 3: Did the General Division disregard medical reports documenting the Appellant's functional limitations?

ANALYSIS

Issue 1: Did the General Division base its decision on an erroneous finding that the Appellant had experience in airport management?

[11] I will not dwell on this issue since the parties now agree that the General Division mischaracterized the Appellant's work experience. However, it remains unclear whether the Minister believes this error was material to the outcome of the General Division's decision. I share the Appellant's view that it was. In paragraph 7 of its written reasons, the General Division wrote:

> I must also assess the severe part of the test in a real-world context. This means that when deciding whether his disability is severe, I must keep in mind factors such as age, level of education, language proficiency, and

> past work and life experience. In this case, the [Appellant] was 52 years old at his MQP date and speaks English fluently. Although he originally left school at age 13, he eventually obtained his high school diploma and attended a mechanic apprenticeship program at college. **His work history included management work at an airport**, working on a cruise ship, washing dishes, and operating heavy equipment. At the hearing, he said he worked as a marine mechanic for 24 years. His most recent position was as a heavy-equipment operator at X. **Given his relatively diverse skill set, I do not find that his background or personal characteristics place significant limitations on his employment options.** While his main occupation of marine mechanic had heavy physical demands, he was clearly able to do less physically demanding work as well. [Emphasis added]

[12] I have reviewed the record, including the audio recording of the hearing before the General Division, and neither saw nor heard anything to indicate that the Appellant had managerial experience, whether at an airport or anywhere else. In the above passage, the General Division applied the principles of *Villani v Canada*,[3] a leading case from the Federal Court of Appeal that requires a claimant's work experience to be considered when assessing the severity of their claimed disability. The General Division found that, despite his physical limitations, the Appellant remained employable thanks to his "relatively diverse skill set." In doing so, the General Division based its decision on a finding—unsupported by anything on the record—that the Appellant was adaptable enough to pursue an alternative occupation.

Issue 2: Did the General Division ignore Dr. Walton's opinion that some of the treatments recommended for the Appellant would do little to make him more employable?

[13] The Appellant objects to the General Division's finding that he ignored treatment recommendations and insists that he did his best to follow his physicians' advice. He alleges that the General Division disregarded evidence that he had good reason to decline massage, acupuncture, and mental health counselling.

[14] Having carefully considered the parties' submissions on this point, I have concluded that the General Division committed an error, although I find it was one of law, rather than of fact. There is no question that the General Division's decision turned, in part, on a finding that the

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

Appellant was negligent in how he managed his pain. Citing *Lalonde v Canada*,[4] the General Division wrote:

> An applicant [for Canada Pension Plan disability benefits] is obligated to follow treatment recommendations, but the treatment must be affordable, available, and recommended. In the "real-world context", I must also consider whether a refusal to undergo treatment is unreasonable. Finally, I must consider the impact of the refusal on the applicant's disability status.[5]

[15] This passage fairly summarizes the prevailing law, which imposes a duty on disability claimants to mitigate their impairments by taking reasonable steps to pursue treatment. However, I do not think that the General Division actually followed *Lalonde* when it considered the Appellant's circumstances.

[16] In paragraph 11 of its decision, the General Division found a "recurring pattern" of failing to follow treatment recommendations, specifically those of Dr. Broad, Dr. Walton, and Dr. Sobolev. It then devoted the remainder of its decision to an analysis of what these three treatment providers told the Appellant to do and whether the Appellant complied with their advice.

- In a report dated June 16, 2015, Dr. Broad, who is a neurosurgeon, recommended that, in addition to taking non-steroidal anti-inflammatory drugs, the Appellant was to take physiotherapy, massage, and acupuncture to control his mechanical neck pain. The General Division expressed skepticism about the Appellant's reasons for not pursuing these therapies but ultimately found that they would not have significantly helped his condition "The treatments were conservative in nature and their impact would likely have been relatively transient: the root cause of [the Appellant's] symptoms was not being addressed."[6]

- Clinical notes and reports by Dr. Walton, the Appellant's family physician, indicate that she diagnosed the Appellant with chronic pain syndrome (CPS) not long after she began seeing him in June 2014. The General Division noted that Dr. Walton,

[4] *Lalonde v Canada (Minister of Human Resources and Development)*, 2002 FCA 211.
[5] General Division decision at para 10.
[6] General Division decision at para 16.

made multiple recommendations for cognitive behavioural therapy (CBT) but the Appellant was reluctant to attend mental health counselling because he felt his mood was fine. The General Division found that, since CPS and mental health are often intertwined, the Appellant would have likely benefitted from CBT, but there was no indication he pursued it even though it was affordable and available.

- In a report dated April 25, 2017, Dr. Sobolev, a pain specialist, recommended facet joint injections in the Appellant's lower back. On June 29, 2017, the Appellant received a single round of injections, which he later reported provided him with two weeks of relief. He said that he never had another injection because he did not hear from the pain clinic again and, in the meantime, had lost his family doctor. The General Division faulted the Appellant for not following up, finding that he had not fulfilled his responsibility to manage his own care and make a reasonable effort to get better.

First, I am not sure if these episodes represent a "recurring pattern" of non-compliance as the General Division would have it, particularly when one considers the Appellant's entire medical history, which includes his willingness to submit to shoulder replacement surgery, his several weeks of physiotherapy following that surgery,[7] and his many subsequent trials of medications, including Butrans, OxyNEO, gabapentin, Effexor, Lyrica, Cymbalta, amitriptyline, and nortriptyline.[8] More to the point, since the General Division found Dr. Broad's recommendations immaterial, its finding of non-compliance came down to the Appellant's supposed failure to pursue CBT or to seek further facet joint injections.

[17] In the hearing before the General Division, the Appellant testified that he lives in a small northern Alberta community, which he said is a considerable distance from the nearest town and an even greater distance to the nearest city. He told the General Division that driving such distances aggravated his pain, requiring him to schedule at least two additional hours of driving time to accommodate rest breaks. Despite this, the General Division found that CBT was "available."

[7] Dr. Wiens' consultation report, GD2-92.
[8] Dr. Walton's April 4, 2016, office note, GD2-54.

[18] The Appellant also testified repeatedly that he was at loose ends when his family physician, Dr. Walton, left town in mid 2017, and he cited her departure for his failure to follow up with Dr. Sobolev for more injections. The General Division chose to emphasize the fact that the Appellant did not return to Dr. Sobolev for injections, rather than the fact that he submitted to them in the first place. The Appellant acknowledged that the injections relieved his pain but only for two weeks—far shorter than the three months that he was told was within the realm of possibility. Despite this, the General Division penalized the Appellant for not seeking more injections, even though it had earlier dismissed physiotherapy, massage, and acupuncture because they produced only temporary benefits. However, the same might be said for Dr. Sobolev's injections, which did not address the root causes of the Appellant's pain either.

[19] This was not a case of a claimant consistently and without reason refusing to follow doctor's orders. The evidence shows that the Appellant was generally willing to do what his treatment providers advised—and he offered defensible reasons for the instances in which he did not. If the General Division chose to base its decision, even in part, on the Appellant's failure to pursue CBT and seek additional facet joint injections, it had a duty to give due consideration to his stated reasons for doing so. I see no indication, from its decision, that the General Division fulfilled this obligation.

[20] In my view, the General Division departed from the prevailing jurisprudence by ignoring the Appellant's evidence that he was subject to extenuating circumstances that made it difficult for him to follow recommended treatment.

Issue 3: Did the General Division disregard medical reports documenting the Appellant's functional limitations?

[21] The Appellant insists that, contrary to the General Division's conclusion, he is disabled, and he points to medical reports that support his claim, including Dr. Walton's June 2016 report that said that he was unable to lift more than 20 pounds or tolerate prolonged sitting or standing.

[22] I fail to see merit in this proposed ground of appeal, which is based on the premise that a physician should have the final word in disability claims. It must be remembered that disability under the CPP is a legal question as much as it is a medical one. While Dr. Walton's Canada

Pension Plan medical report supported the Appellant's claim for disability benefits, it was only one factor among many that the General Division was obliged to consider.

[23] In any event, it is settled law that an administrative tribunal charged with finding fact is presumed to have considered all the evidence before it and need not discuss each and every element of a party's submissions.[9] 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 how much weight to assign each item. I can only assume that the General Division chose to give lesser weight to Dr. Walton's assessment; in doing so, it acted within its authority.

REMEDY

[24] The DESDA sets out the Appeal Division's powers to remedy errors by the General Division. Under section 59(1), I may give the decision that the General Division should have given; refer the matter back to the General Division for reconsideration in accordance with directions; or confirm, rescind, or vary the General Division's decision. Furthermore, under section 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.

[25] In oral submissions, both parties agreed that, in the event I found errors in the General Division's decision, the appropriate remedy would be to give the decision the General Division should have given. Of course, the parties disagreed about what that decision should be, with the Appellant arguing that the available evidence proved disability and the Minister arguing the opposite.

[26] The Federal Court of Appeal has stated that a decision-maker should consider the delay in bringing a disability claim to conclusion. The Appellant applied for a disability pension more than three years ago. If this matter were referred back to the General Division, it would lead only to further delay. In addition, the Tribunal is required to conduct proceedings as quickly as the circumstances and the considerations of fairness and natural justice allow. I doubt that the Appellant's evidence would be materially different if the matter were reheard.

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

[27] I am satisfied that the record before me is complete. The Appellant has filed numerous medical reports with the Tribunal, and I have considerable information about his background and employment history. The General Division conducted a full oral hearing and heard the Appellant's testimony about his impairments and their effect on his work capacity. There was a robust discussion about the treatments that were recommended to him and the treatments that he actually received.

[28] As a result, I am in a position to assess the evidence that was on the record before the General Division and to give the decision that it would have given, had it not erred. In my view, if the General Division had (i) accurately assessed the Appellant's work experience and (ii) correctly interpreted the jurisprudence surrounding treatment mitigation, then it would have come to a different conclusion. My own assessment of the record satisfies me that the Appellant had a severe and prolonged disability as of December 31, 2016.

Does the Appellant have a severe disability?

[29] To be found disabled, a claimant must prove, on a balance of probabilities, that they had a severe and prolonged disability at or before the end of the MQP. A disability is severe if a person is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is "likely to be long continued and of indefinite duration or is likely to result in death."[10]

[30] The Appellant has been diagnosed with CPS, but this is not a case where the claimant's pain was unaccompanied by objective physiological injuries. The Appellant was first treated for a left shoulder injury more than 20 years ago,[11] and he later developed arthritis in that joint. After experiencing increasing pain and restriction of movement, he received a total shoulder replacement in November 2014.

[31] The Appellant's shoulder was not his only problem. He also complained of back pain, and the file contains an imaging report showing changes that corresponded to his reported

[10] CPP, s 42(2)(a)(ii).
[11] See Dr. Wiens' report dated July 15, 2014, GD2-93.

symptoms: an MRI of the cervical spine revealed "relatively advanced disc degeneration at C5-6 and C6-7."[12]

[32] Although the shoulder replacement surgery produced some relief, none of the Appellant's treatment providers have said that he would be fit to return to the kinds of physically demanding jobs he previously held. Dr. Broad, the neurosurgeon, cautioned the Appellant against returning to his former work as a heavy equipment operator and heavy duty mechanic. Dr. Walton, the family physician, concluded that the Appellant had a "chronic disability" and that his prognosis was poor.

[33] If physical work is now beyond the Appellant's capacity, is there any type of employment that would be realistically within his capabilities, given his profile and background? In my view, no. The Appellant has limited formal education and was 52 years old at the end of the MQP. He has training as a marine mechanic and heavy equipment operator, but the skills associated with these occupations have little applicability outside their narrow contexts. Although the Minister has argued that the Appellant was capable of performing an alternative occupation, I find it unlikely that he would be able to retrain for a sedentary position or to otherwise secure and maintain substantially gainful employment as, for instance, a clerical worker or customer service representative.

[34] Unlike the General Division, I find that the Appellant took reasonable steps to mitigate his impairments through treatment. As noted, the Appellant has shown a willingness to undergo surgery where recommended and has tried a wide variety of pain medications. It is true that the Appellant did not pursue massage or acupuncture, as Dr. Broad had recommended, but I agree with the General Division that neither of these therapies would have provided anything more than a transient benefit for his mechanical neck and shoulder pain. The same might be said for facet joint injections, which the Appellant said produced only two weeks of relief on the one occasion he tried them.

[35] Even if the injections had produced a longer-lasting effect, they were still relatively inaccessible for a claimant living in a remote community. The Appellant's home is in X, Alberta, a roughly four-hour drive from Edmonton, where Dr. Sobolev's pain management clinic is

[12] MRI report dated June 2, 2015, GD2-84.

located. In his testimony before the General Division, the Appellant referred twice to how difficult it was for him to travel to Edmonton or even to Grand Prairie.[13] I suspect that the Appellant's lack of proximity to medical services was also a factor in the Appellant's failure to follow up on Dr. Walton's recommendation to enroll in CBT. In his testimony, the Appellant was adamant that his problems were purely physical, and he openly expressed skepticism that mental health counselling would have done him any good. Nowhere in her notes did Dr. Walton indicate where she intended to refer the Appellant for CBT, but I doubt that such a specialized service was available near the Appellant. It is likely that, despite his misgivings about it, he would have been more receptive to CBT had it been available within a short drive of his residence.

[36] The Appellant's testimony before the General Division conveyed forthrightness, and his description of his symptoms and their effect on his ability to function in a vocational setting were credible. I also gave weight to the Appellant's lengthy work history, which included many years of employment at high wages. One can reasonably surmise that an individual with his kind of demonstrated work ethic would not have left the labour market unless there was some significant underlying cause.

Does the Appellant have a prolonged disability?

[37] The Appellant's testimony, corroborated by the medical reports, indicates that he has suffered from left shoulder and back pain for several years. Treatment has produced only a limited effect, and the Appellant has become effectively unemployable. It is difficult to see how his health will significantly improve, even if he submits to counselling or additional forms of therapy. In my view, these factors qualify the Appellant's disability as prolonged.

CONCLUSION

[38] I am allowing this appeal. The General Division based its decision on erroneous findings that the Appellant had managerial experience and had failed to comply with his doctors' treatment recommendations. Having decided that there was sufficient evidence on the record to permit me to give the decision that the General Division should have given, I find that the

[13] Recording of General Division hearing at 1:17:45 and 1:26:30.

Appellant has a disability that became severe and prolonged as of January 2014, the last month in which the Appellant said that he was capable of work.[14] Under section 42(2)(b) of the CPP, a person cannot be deemed disabled more than 15 months before the Minister received the application for a disability pension. In this case, the application was received in July 2016; therefore, the Appellant is deemed disabled as of April 2015. According to section 69 of the CPP, payments start four months after the deemed date of disability. The Appellant's disability pension therefore begins as of August 2015.

Member, Appeal Division

HEARD ON:	December 11, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	B. M., Appellant Sandra Doucette, Representative for the Respondent

[14] See Appellant's questionnaire for disability benefits at GD2-97.