



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. D. v Minister of Employment and Social Development*, 2019 SST 1509

Tribunal File Number: GP-18-790

BETWEEN:

D. D.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Brian Rodenhurst

Claimant represented by: Bozena Kordasiewicz

Date of decision: June 10, 2019

DECISION

[1] The Claimant is not entitled to a Canada Pension Plan (CPP) disability pension.

OVERVIEW

[2] The Minister received the Claimant's application for the disability pension on February 20, 2014. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] The appeal was heard on June 13, 2016 and the General Division decision was dated June 22, 2016. The Applicant sought leave to appeal the General Division decision. Leave to appeal was granted on September 27, 2017.

[4] The Appeal Division granted the appeal on March 27, 2018 on the basis the General Division did not consider the totality of his medical condition when determining whether his disability was severe.

[5] The Appeal Division noted the General Division mentioned all facets of the Appellant's medical condition in the summary of evidence, comprising skeletal injuries, PTSD, anxiety and depression. However, in the Analysis portion of the decision only the skeletal injuries and the PTSD were analysed. The depression and anxiety was not explicitly considered. The Appeal Division therefore concluded the General Division erred in law as all aspects of a claimant's condition must be considered. The other grounds of appeal by the Appellant were dismissed.

[6] The Appeal Division found that the General Division did not otherwise commit any error falling within the scope of s. 58(1) of the DESDA and specifically did not otherwise err in law or base its decision on erroneous findings of fact. I will therefore restrict my decision to reconsideration of the totality of the Appellant's medical condition in the assessment of severity. The Appeal Division referred the matter back to the General Division for reconsideration on that basis. I must therefore restrict my reconsideration to the issue of totality of conditions as the totality of the conditions were noted in the summary of evidence but not specifically considered in the Analysis section.

[7] The Appeal Division found I appropriately considered the Appellant's background factors. The Appeal Division confirmed there was not an error in applying *Inclima* and in the application of *Villani*. The Appeal Division found that my analysis of his oral evidence and his conviction by the Ontario Court of Justice was not an error. I therefore base my reconsideration on the basis there were no errors other than the totality of medical conditions in the assessment of severity.

[8] To qualify for a CPP disability pension, the Claimant must meet the requirements that are set out in the CPP. More specifically, the Claimant must be found disabled as defined in the CPP on or before the end of the minimum qualifying period (MQP). The calculation of the MQP is based on the Claimant's contributions to the CPP. I find the Claimant's MQP to be December 31, 2002.

ISSUE(S)

ANALYSIS

Form of Hearing

[9] The Appeal Division issued a decision granting Leave to Appeal. The Applicant made submissions to request, in the event leave to appeal was granted, that the hearing of the appeal proceed by personal appearance¹. The same Member of the Appeal Division heard the appeal on the merits and referred the matter back to the General Division for reconsideration. Subsequently after the Appeal Decision, the Claimant filed a letter submitting that in order to preserve natural justice and to avoid any apprehension of bias it is imperative to allow a hearing de novo in front of a different Member of the General Division. The Appeal Division did not indicate in its decision that the reconsideration should be heard by a different Member.

[10] In essence the Claimant is seeking the Appeal Division to change its decision. I do not have that authority. The Appeal Division referred the matter back to General Division for reconsideration to consider the totality of the Appellant's medical condition in the assessment of severity and rejected the other grounds of appeal. If the Claimant does not agree with the

¹ Paragraph 10. SST Appeal Division, September 27, 2017

decision of the Appeal Division his remedy is not with the General Division. I am following the directions of the Appeal Division as required. The Appeal division may refer the matter back to the General Division for redetermination with directions, and did so.

[11] I decided to proceed on the record. I have heard the oral evidence of the Claimant and oral submissions of his lawyer. I assessed his evidence and there is no need to re-hear his testimony. I as directed shall consider the totality of the Appellant's medical condition in the assessment of severity. The other grounds of appeal were rejected. There is no need in rehearing the oral evidence. The Tribunal is to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit. Certainly, it is quicker to decide a matter based on a review of the evidence than to have all the parties attend and repeat their evidence. A complete rehearing of the Appeal would not be the most expeditious and least expensive determination. Natural justice is not offended. The Appellant has had a full in person oral hearing with representation by Counsel. Therefore, I proceeded on the record.

[12] I note the Claimant's Representative has filed letters requesting a de novo hearing with a different Member. I do not have the authority to change the decision of the Appeal Division. The Appeal Division has not responded to the Claimant therefore I have proceeded with the reconsideration as directed.

Totality of Medical Conditions/Impairments

[13] I must assess the Claimant's condition in its totality, which means I must consider all of the possible impairments, not just the biggest impairments or the main impairment². The Appeal Division determined that I did not consider the totality of the Appellant's medical condition. I considered only the skeletal injuries and the PTSD.³ I did not explicitly consider the Appellant's depression and anxiety. The analysis will proceed with inclusion of all impairments including depression and anxiety.

[14] The Appeal Division directed that the General Division erred in not considering the totality of the Claimant's medical condition in the assessment of severity. I did not otherwise err

² *Bungay v. Canada (A.G.)*, 2011 FCA 47

³ Appeal Division Decision pg. 7

or base my decision on erroneous findings of fact.⁴ I have reconsidered my decision taking into account all impairments.

[15] The MQP is December 31, 2002. Dr. Tahlan, Consulting Psychiatrist, issued a Consultation Report in June 2012. She noted his condition has worsened since 2009 and experienced poor concentration, insomnia, indecisiveness, feels sad and depressed, unable to function. The Medical Report dated June 1, 2009 diagnosed Post-Traumatic Stress Disorder, Major Depressive Disorder (moderate to severe) Generalized Anxiety Disorder (moderate to severe). Based on her diagnoses in 2009 and 2012 she concluded the Claimant's condition was chronic, severe and prolonged. The Reports are well after the MQP and although Dr. Tahlan noted she first start treating the Claimant in 2002. She does not relate her opinion to the MQP. The Reports are informative of his condition in 2009 and her opinion his condition was worse in 2012. The Reports do not relate findings to the MQP.

[16] Dr. Tahlan authored a Report that was a month prior to the MQP. She diagnosed major affective disorder – depression as moderate and generalized anxiety disorder as moderate.

[17] The Claimant was approved for 10-12 counselling sessions with Dr. McKillop, Ph.D., Clinical Psychologist. The Claimant attended with Dr. McKillop in April 2009. Dr. McKillop issued a consultation report. He diagnosed Post-Traumatic Stress Disorder, *Axis II* no diagnosis and *Axis IV Psychological and Environmental Problems* – loss of employment, sleep disturbance. Of note Dr. McKillop a few months prior to the MQP did not indicate a diagnosis of Major Depressive Disorder, Depression and Anxiety. Dr. McKillop noted the Claimant received counselling from Dr. Wendling, his primary health care provider. He was of the opinion if Dr. Wendling wished she could refer the Claimant for additional treatment if she felt her treatment of the Claimant was sufficient that decision should be respected. Dr. Thomas, Psychiatrist, in May 2003, diagnosed the Claimant with Post-traumatic Stress Disorder. She noted the Claimant stated he felt depressed, and completed a survey that screened positive for depression but notably there is not a diagnosis of depression.

⁴ AD decision p. 15-16

[18] The key question in these cases is not the nature or name of the medical condition, but its functional effect on the claimant's ability to work⁵. The functional effect must relate to the date of the MQP as well as continuously since. Dr. Tahlan on November 27, 2002 wrote the Claimant was prevented from driving a truck and his PTSD, depression and anxiety disorders were of moderate intensity. She noted she discussed with the Claimant regarding re-entry into the workforce and that it was in his best interest to look at what he could be retrained for. She was of the opinion this would be of help in distracting him from his ongoing litigation. Dr. Tahlan if she could be of any help she would be glad to see him again. This did not occur for 7 years. Dr. Wendling on November 27, 2002 was of the opinion it was not safe for him to return to his previous employment as a truck driver.

[19] Dr. Thomas completed a psychological state assessment on May 23, 2003. She concluded that the overall Disability, integrating: activities of daily living, social functioning, concentration, adaptation as moderate impairment.

[20] A Psycho-Vocational Assessment Report was completed in February 2003. The Report concluded the Claimant was a friendly, direct, matter-of-fact individual who enjoys being helpful to others. He has a good work ethic and is planful and systematic. He has some anxiety and some lingering symptoms of PTSD. A period of counselling may be useful in helping reduce his anxiety and give him a different perspective. He has good intellectual skills and has the potential to do training if needed. The Report noted he liked jobs that bring him into contact with a cross-section of the public. It was observed that his personality profile suggested he was generally friendly and outgoing. The author also noted the Claimant worked in a steady, focused manner, without breaks.

[21] Two years after the MQP a Traumatic Stress Service Workplace Program was finalized. The Assessment noted his major depression was moderate. It was recommended he engage in individual cognitive behavior therapy and anger management. The evidence indicates he did not follow through with the recommendations. He was treated by the family physician with on consultation with Dr. Thomas in 2003. There was a gap of seven years between appointments with Dr. Tahlan. The Assessors were of the opinion his prognosis to return to work if given

⁵ *Ferreira v. AGC* 2013 FCA 81

sufficient therapy. He could probably at the time of the assessment do some part-time work on his own.

[22] A review of the pertinent medical information and assessments that pertain to the MQP does not establish the Claimant was incapable regularly of pursuing any substantially gainful occupation when assessing the totality of impairments. His depression was found to be moderate. He has not engaged in regular treatment with a mental health specialist. Dr. Wendling treated the Claimant conservatively with medication. It was suggested that Dr. Wendling could arrange further psychotherapy if appropriate. She did not until 2009. He has good intellectual skills and had the potential to retrain if needed.

[23] I have considered the totality of impairments. Upon Reconsideration I find the conclusion in paragraph 52 of the original decision is confirmed upon the assessment of the totality of impairments and the effect on the Claimant's capability regularly of pursuing any substantially gainful occupation. Paragraph 52 concluded: This analysis of the Appellant's capabilities indicated he had the ability to retrain and his functioning was not severely compromised to the point he was incapable of pursuing any substantially gainful occupation. The totality of impairments and consideration of all medical conditions does not necessitate repeating the findings in the original decision as confirmed by the Appeal Division as there was only an error in one aspect of my decision. The inclusion of all medical conditions/impairments does not change the functional limitations of the Claimant. I will therefore not repeat the Villani factors and the findings with regards to WSIB, retraining, criminal conviction, my preference for the specialists opinions instead of the family doctor and other matters as they were not in error.

CONCLUSION

[24] Upon reconsideration the appeal is dismissed.

Brian Rodenhurst
Member, General Division - Income Security

