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

Citation: *L. G. v Minister of Employment and Social Development*, 2019 SST 624

Tribunal File Number: AD-19-53

BETWEEN:

L. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: July 4, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, L. G., is a high school graduate who worked in a foundry for many years. He is now 60 years old. He was working as a self-employed carpenter when, in 2009, he injured his shoulders in a motor vehicle accident (MVA). He has not worked since then, and, in 2015, he was diagnosed with chronic obstructive pulmonary disease (COPD).

[3] In July 2015, the Appellant applied for a disability pension under the *Canada Pension Plan* (CPP), claiming that he could no longer work because he had difficulty breathing and could not raise his arms. 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 ended on December 31, 2011.

[4] The Appellant appealed the Minister's decision to the General Division of the Social Security Tribunal. The General Division conducted a hearing by teleconference and, in a decision dated October 23, 2017, found that the Appellant had provided insufficient evidence that he was incapable regularly of performing substantially gainful work as of the MQP and continuously afterward. The General Division specifically found that, while the Appellant had the capacity to perform light work, he had not attempted to pursue any employment of that nature.

[5] The Appellant requested leave to appeal from the Tribunal's Appeal Division, alleging that the General Division committed various errors in rendering its decision. On April 30, 2018, the Appeal Division agreed with the Appellant that the General Division had failed to consider his lack of computer skills, his difficulty with memory and concentration, and his limited sitting tolerance. The Appeal Division referred the matter back to the General Division for a new hearing.

[6] The same member who presided over the first hearing before the General Division heard the second. In a decision dated October 19, 2018, the member again found that the Appellant was not entitled to a Canada Pension Plan disability pension, finding that he had not faced any barriers to retraining or transitioning to a more suitable occupation as of the MQP date.

[7] The Appellant has now returned to the Appeal Division, alleging that the General Division made the following errors:

- It ignored the Appeal Division's instruction to consider the effect of his limited sitting tolerance and difficulties with memory and concentration on his ability to retrain; and
- It failed to observe a principle of natural justice when it assigned his case to the same member who has heard it previously, which resulted in a reasonable apprehension of bias.

[8] In a decision dated February 12, 2019, I granted leave to appeal because I saw a reasonable chance of success on appeal for the Appellant's submissions.

[9] Since then, the Appellant has filed additional submissions elaborating on his reasons for appealing. The Minister has also filed submissions arguing that, since the General Division did not err, its decision should stand.

[10] Having now reviewed both parties' written and oral submissions, I have concluded that the General Division committed at least one error in rendering its decision. I have decided that the appropriate remedy in this case is make my own assessment of the Appellant's disability claim and give the decision that the General Division should have given. As a result, I am overturning the General Division's decision and substituting it with my own decision not to grant the Appellant a Canada Pension Plan disability pension.

ISSUES

[11] According to section 58 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 before it.

[12] I must answer the following questions:

Issue 1: Did the General Division ignore the effect of the Appellant's limited sitting tolerance and his difficulties with memory and concentration on his ability to retrain?

Issue 2: Did the General Division breach a principle of natural justice when it assigned the Appellant's case to the same member who heard it previously?

ANALYSIS

Issue 1: Did the General Division ignore the effect of the Appellant's limited sitting tolerance and his difficulties with memory and concentration on his ability to retrain?

[13] Here, I have concluded that the General Division perpetuated the errors of its first decision by failing to heed the Appeal Division's instructions.

[14] In its decision of April 30, 2018, the Appeal Division rejected most of the Appellant's claimed grounds of appeal, but it did find the following deficiencies in the General Division's first decision:

> The [General Division's] decision fails to grapple with how a lack of computer skills, difficulty with memory and concentration, or the Claimant's limited sitting tolerance would impact his capacity to learn or retrain on the job.[1]

[15] In allowing the appeal, the Appeal Division precisely described the errors that it found in the General Division's decision. It returned the matter to the General Division and ordered it to reconsider the Appellant's disability claim. The Appeal Division did not define what it meant by "reconsider," but the context in which it used the word suggest that the Appeal Division expected the General Division to correct the errors that it had specified.

---

[1] Appeal Division decision dated April 30, 2018 para 13.

[16] The General Division did not do so. In its second decision, the General Division framed the issue in broad terms:

> Did the Claimant's personal attributes related to age, education level, language proficiency, and past life and work experience present a barrier to re-training for alternate occupation such that he would be incapable regularly of pursuing any substantially gainful occupation by December 31, 2011, and onward?[2]

The General Division did acknowledge that the focus of the second hearing was to address the error identified by the Appeal Division:

> The decision rendered by the General Division on October 23, 2017, assessed the evidence presented by the Claimant. The Appeal Division reviewed the original decision and found the only error was the absence of analysis related to the Claimant's personal attributes and the impact of those attributes on his ability to retrain or transition to more suitable employment, within his limitations, based on a real world context.[3]

This is true in a broad sense, but the General Division did not mention that the Appeal Division listed three specific factors that it felt should have been addressed in its first decision: (i) the Appellant's lack of computer skills; (ii) his difficulties with memory and concentration; and (iii) his limited sitting tolerance. The Appellant has acknowledged that the General Division addressed the first factor but alleges that it continued to ignore the second and third.

[17] The Minister argues that, while the General Division might not have specifically addressed all of the factors cited by the Appeal Division, it was nonetheless aware of them, as indicated by its letter dated June 18, 2018,[4] in which it specifically asked the Appellant for submissions on each one. I agree that this letter shows the General Division was aware of the specifics of the Appeal Division's directive, but it does not cure the deficiencies of the General Division's subsequent decision. The Appellant might not have addressed these points to the General Division's satisfaction, but if that was the case, the General Division should have said so in its decision and made a definite finding about the Appellant's sitting tolerance and his capacity to concentrate. On its face, the General Division's decision ignored a significant

---

[2] General Division decision dated October 19, 2018, para 5.
[3] *Ibid*., para 8.
[4] ADN3-538.

component of the Appeal Division's concerns, and I think it is likely that the General Division simply lost sight of them after issuing its request for submissions.

[18] In the end, the General Division's decision amounted to little more than an analysis, consistent with *Villani v Canada*,[5] of the Appellant's real world employability in the context of his age, education, and life and work experience. However, nowhere in that analysis did the General Division specifically address the Appellant's evidence about memory, concentration, or extended sitting. It is true that the General Division relied heavily on a functional capacity evaluation (FCE) report from December 2011[6]—the same month in which the Appellant's MQP ended. The report found that, although the Appellant could not perform his pre-MVA job as a carpenter, he was capable of physically demanding work at a medium level. On the face of it, the report was highly relevant to the Appellant's eligibility for CPP disability benefits, but it is important to remember that the General Division placed similar weight on the report when it rendered its first decision. Despite that, the Appeal Division found that the FCE report, useful as it was, did not address key aspects of the Appellant's submissions, in particular his claim that he suffered from a form of cognitive impairment that prevented him from all kinds of work. For that reason, the Appeal Division saw fit to order the General Division to reconsider the Appellant's capacity in light of his evidence to that effect.

[19] While the General Division considered whether the Appellant could perform alternative work, it focused on two hypothetical jobs—working in a hardware store and providing carpentry quotes:

> I asked the [Appellant] during the second hearing whether he could engage in more sedentary work such as working in a hardware store or providing quotes for carpentry work. I asked because the [Appellant]'s past work experience demonstrates knowledge in carpentry and building construction that appears transferable to other, less physically demanding work. The [Appellant] responded that he would not be able to work in a hardware store because he would be unable to lift the building supplies into trucks or move the supplies. I asked if he could work in a store such as the Home Depot where he would not be required to lift any supplies. The [Appellant] answered that he would not have

[5] *Villani v Canada (Attorney General)*, 2001 FCA 248.
[6] LifeMark Physiotherapy Functional Capacity Evaluation Summary Report by Gilles Chabot and Steve Christakos dated December 11, 2011, GD2-85.

> been able to do that work. In respect of work providing quotes, he agreed that he would have been able to provide quotes for the types of work he was familiar with, but he would have to do everything manually and he would have to sit down.[7]

The General Division rejected the Appellant's testimony that he would be incapable of these jobs, but it appears that it did so based only on an assessment of his physical tolerances. I see no indication that the General Division considered the impact, if any, of his claimed mental deficits, in particular his inability to focus, which, in theory, would have affected any type of work he tried, whether sedentary or not.

Issue 2: Did the General Division breach a principle of natural justice when it assigned the Appellant's case to the same member who heard it previously?

[20] Since I have found that the General Division erred on the first issue, I see no need to consider whether it breached a principle of natural justice on the second. The General Division's decision cannot stand even if I find that its reconsideration of the Appellant's case did not give rise to real or perceived bias.

REMEDY

[21] 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.

[22] The Federal Court of Appeal has stated that a decision-maker should consider the delay in bringing an application for a disability pension to conclusion. The Appellant applied for a disability pension nearly four years ago. If this matter were referred back to the General Division, it would only lead to further delay. In addition, the Tribunal is required to conduct

[7] General Division decision dated October 19, 2018, para 19.

proceedings as quickly as the circumstances and the considerations of fairness and natural justice allow.

[23] In oral submissions before me, the Appellant and the Minister agreed that, if I were to find an error in the General Division's decision, the appropriate remedy would be for me to give the decision that the General Division should have given and make my own assessment of the substance of the Appellant's disability claim. Of course, the parties had different views on the merits of the Appellant's disability claim. The Appellant argued that, if the General Division had properly addressed his capacity to perform sedentary employment, it would have concluded that he was disabled and ordered a different outcome. The Minister argued that, whatever General Division's errors, the balance of the available evidence still pointed to a finding that the Appellant was capable of some form of substantially gainful employment.

[24] 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 employment and earnings history. The General Division conducted two oral hearings and questioned the Appellant about his impairments, their effect on his work capacity, and his efforts to pursue alternative employment. I doubt that the Appellant's evidence would be materially different if the matter were to be reheard.

[25] 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, if it had not erred. In my view, even if the General Division had properly considered the Appellant's (i) limited sitting tolerance and (ii) difficulties with memory and concentration, its conclusion would have remained the same. My own assessment of the record satisfies me that the Appellant did not have a severe and prolonged disability as of December 31, 2011.

Did the Respondent have a severe disability as of the MQP?

[26] 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."[8]

[27] Having reviewed the record, I am not convinced, on balance, that the Appellant had a severe disability as of the MQP. His orthopedic surgeon's reports indicate that the Appellant had surgeries to repair tears to both his right and left rotator cuffs,[9] and I have no doubt that his 2009 MVA left him with significant shoulder injuries. The evidence indicates that these injuries prevent the Appellant from returning to the kinds of physically demanding work that he used to do as a foundry worker and contractor. However, I am not persuaded that the Appellant was incapable of lighter employment as of December 31, 2011. Like the General Division, I find that the Appellant had residual capacity to pursue alternative forms of work that might have been suited to his limitations. In arriving at this conclusion, I was influenced by the following factors:

The available medical evidence suggests the Appellant had capacity during the MQP

[28] When the Appellant applied for CPP disability benefits in June 2015, he claimed that his major impairments were bilateral shoulder pain, thumb limitations and COPD. However, the medical report that accompanied the application, prepared by the Appellant's family physician, referred only to COPD and offered an overall prognosis of "guarded."[10] In a subsequent letter, Dr. Garrioch referred to the shoulder and thumb impairments, as well as COPD, and concluded that the Appellant was physically limited by a combination of his medical conditions.[11]

[29] Dr. Garrioch's initial omission of the Appellant's shoulder and thumb dysfunction leads me to suspect that these conditions had significantly improved in the years after the MVA. I find support for this view in his orthopedic surgeon's letter, prepared less than a year after the MVA, which said that, with or without treatment, the Appellant would have limitations for impact activity, heavy lifting, overhead activities, climbing and repetitive or forceful use of the shoulder

[8] CPP, s 42(2)(a)(ii).
[9] Reports by Dr. Robin Richards, orthopedic surgeon, dated February 9, 2011 (GD2-102) and May 23, 2013 (GD2-78).
[10] Canada Pension Plan Medical Report, completed by Dr. G.F. Garrioch on June 29, 2015, GD2-129.
[11] Letter by Dr. Garrioch dated November 26, 2015, GD2-38.

against resistance. [12] However, these restrictions, while significant, would not necessarily rule out all forms of work.

[30] The December 2011 FCE report[13] pointed to a similar conclusion. As noted, it found that, while the Appellant was no longer suited to his pre-accident occupation as a carpenter, he was able to perform medium physically demanding levels of work. Two years later, a rehabilitation discharge report[14] documented the Appellant's feeling that he had recovered 75 percent from his MVA injuries. The Appellant continued to have intermittent shoulder pain, which he rated five on a scale of ten.

[31] The evidence also suggests that the Appellant's thumb condition did not significantly contribute to a disability, as defined by the CPP, during the MQP. In November 2013, Dr. Richards, the orthopedic surgeon, noted that the Appellant was reporting finger numbness at night.[15] The following month, the Appellant told his rehabilitation team that he woke up twice every night due to numb hands.[16] In June 2014, Dr. Anthony Graham reported that the Appellant displayed only mild delays of both the left and right median distal motor responses, while his bilateral median sensory responses were normal. The physiatrist detected mild bilateral carpal tunnel syndrome and a pattern of neuropathy in both elbows, symptoms that he attributed to osteoarthritis at the base of the thumbs.[17]

There is not enough evidence that COPD contributed to any disability at the MQP

[32] The Appellant testified that he had symptoms of COPD before 2012, although he was not diagnosed with the condition until 2015. I note that the first mention of COPD in the medical file came in November 2015, when Dr. Garrioch confirmed that, based on testing from earlier in the year, the Appellant suffered from from severe COPD and emphysema.[18]

---

[12] Letter by Dr. Richards dated September 21, 2010, GD2-111.
[13] *Ibid.*
[14] LifeMark Health MVA Treatment Discharge Report by Linda Robodoux dated December 2, 2013, GD2-69.
[15] Progress Report by Dr. Richards dated November 20, 2013, GD2-68.
[16] LifeMark Discharge Report dated December 2, 2013, GD2-69.
[17] Letter by Dr. Anthony Graham, physiatrist, dated June 26, 2014, GD2-63.
[18] Dr. Garrioch's letter dated November 26, 2015, GD2-38.

[33] I also note that the file contains scant mention of weakness, breathlessness, chest pain, or any other symptoms associated with COPD. I accept that the Appellant may have been symptomatic to some degree prior to his diagnosis, but I am not convinced that COPD, alone or in combination with his other impairments, prevented him from undertaking substantially gainful employment during the MQP.

There is not enough evidence that cognitive problems are a significant component of the Appellant's impairment

[34] The Appellant testified that his memory and ability to focus have sharply deteriorated since his MVA, but this claim is not supported by the documentary file. Cognitive problems did not feature prominently in his application and, when asked in his functional limitations questionnaire to comment about his ability to remember and concentrate, the Appellant merely replied "Not the best".[19] His FCE did not disclose significant mental issues.

[35] I acknowledge that the Appellant's intermittent pain may distract him at times, but I think it unlikely that cognitive problems, together with his other medical conditions, have left him without residual capacity.

The Appellant's testimony suggests that he can tolerate extended sitting

[36] At the first General Division hearing, the Appellant testified that he could not walk for more than a couple of blocks or reach above his head. However, he said that he could sit for up to one-and-a-half hours at a time. Once a year, he went on a four- to six-week road trip in his motor home, although he emphasized that he managed to do so only by taking frequent rest breaks. Still, the Appellant testified that he was able to drive his motor home for as much as 200 miles per day, indicating that he was able to remain seated and focused on a task for extended periods. All of this suggests that the Appellant had the capacity to at least attempt a job with comparable physical demands, possibly in the customer service sector.

The Appellant's background was not a significant barrier to his continued employment

[19] GD2-145.

[37] According to *Villani*,[20] disability must be assessed in a real world context, taking to account factors such as a claimant's age, education and past work and life experience.

[38] As of December 31, 2011, the Appellant was 53 years old—no longer young, but some distance from the typical age of retirement. Although he testified that he was a poor student, he nevertheless graduated from high school and has since completed welding courses. He has had a long and varied career, first as a foundry worker, later as a self-employed contractor. He has limited experience with computers, but he has previously demonstrated a capacity to adapt and learn. It is true that most jobs today involve at least some computer use, but it is also true that computers and software applications have never been as user-friendly as they are now.

[39] The December 2011 FCE and December 2013 rehabilitation discharge reports took a "whole person" approach when they assessed the Appellant's employment prospects. Both concluded that, while the Appellant was no longer capable of heavy work, he was not prevented from all forms of employment. As we have seen, the Appellant is subject to some physical restrictions, but I do not see how they, together with his background or personal attributes, would limit his employability or render him unsuitable for retraining.

The Appellant did not make a significant effort to pursue alternative employment

[40] Ultimately, the Appellant's appeal must fail because he has not made a serious attempt to work or retrain since his 2009 MVA, and it is therefore impossible to be certain whether he was incapable regularly of pursuing a substantially gainful occupation as of the MQP. At the first General Division hearing, the Appellant testified that he had passed up job opportunities, not because of his impairments, but because they did not offer pay that was comparable to what he was making before his MVA. The Appellant also testified that he was incapable of low impact work, but I question how he could be sure if he had never tried it.

[41] *Inclima v Canada*[21] requires disability claimants in the Appellant's position to show that **reasonable** attempts to obtain and secure employment have been unsuccessful because of their health condition. Appellants for disability entitlement should demonstrate a good-faith

---

[20] *Ibid.*
[21] *Inclima v Canada (Attorney General)*, 2003 FCA 117.

preparedness to participate in retraining and educational programs that will enable them to find alternative employment.[22] In this case, the Appellant has not done so.

Did the Appellant have a prolonged disability as of the MQP?

[42] Since the Appellant's evidence falls short of the severity threshold, there is no need to consider whether his disability is prolonged.

CONCLUSION

[43] I am dismissing this appeal. While the General Division erred in failing to consider the Appellant's limited sitting tolerance and difficulties with memory and concentration, my own review of the evidence does not persuade me that the Appellant had a severe disability as of December 31, 2011.

Member, Appeal Division

HEARD ON:	June 20, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. G., Appellant Terry Copes, Representative for the Appellant Nathalie Pruneau, Representative for the Respondent

[22] *Lombardo v Minister of Human Resources Development* (July 23, 2001), CP12731 (PAB).