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

Citation: *J. P. v Minister of Employment and Social Development*, 2019 SST 680

Tribunal File Number: AD-19-450

BETWEEN:

J. P.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: July 25, 2019

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] In 2009, the Applicant, J. P., was laid off from his job as an engineering production labourer at a sawmill. In 2010, he was diagnosed with lymphoma. He was treated with chemotherapy, which produced various side effects, including collapsed vertebrae and deep vein thrombosis. The following year, the Respondent, the Minster of Employment and Social Development (Minister) approved his application for a Canada Pension Plan (CPP) disability pension.

[3] Between 2012 and 2014, the Applicant reported three attempts to return to work, although none met with long-term success. On each occasion, the Minister suspended his disability payments, only to reinstate them later. In the following years, the Applicant continued to work, taking jobs with at least three different employers and collecting regular Employment Insurance benefits between jobs. The Applicant did not notify the Minister of this work.

[4] In November 2016, the Applicant stopped working because he was experiencing breathlessness, which he attributed to congestive heart failure caused by his having undergone intensive chemotherapy. He has not worked since.

[5] Following an investigation, the Minister determined that, based on his work activity, the Applicant was no longer disabled. In June 2017, the Minister terminated the Applicant's pension and ultimately demanded repayment of more than $42,000 of the money that he had received over the previous three years.

[6] The Applicant appealed the Minister's decision to the General Division of the Social Security Tribunal. The General Division held a hearing by teleconference and, in a decision dated May 8, 2019, dismissed the appeal, finding that the Applicant had failed to demonstrate that he was disabled, according to the *Canada Pension Plan*, in the period after June 2014. In

particular, the General Division found that the Applicant's earnings of $21,993 in 2014, $22,713 in 2015, and $35,238 in 2016 indicated a capacity to perform substantially gainful employment.

[7] On July 3, 2019, the Applicant requested leave to appeal from the Tribunal's Appeal Division, alleging errors on the part of the General Division. The Applicant made the following points:

- The General Division failed to consider all the medical evidence, in particular Dr. MacEoin's report dated February 26, 2018,[1] which said that the Applicant's condition was severe and prolonged. The Applicant said that he was fighting cancer for a second time and had had two heart attacks in recent years.
- The General Division ignored evidence that the Applicant had a previously undiagnosed heart condition (discovered after second heart attack) that could have contributed to his fatigue, lack of stamina, and shortness of breath in 2014.
- The General Division held the Applicant's several attempts to return to work against him, ignoring the fact that he was never able to sustain a job for any length of time.

I have reviewed the General Division's decision against the record and concluded that the Applicant has not advanced any grounds that would have a reasonable chance of success on appeal.

ISSUES

[8] 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 failed to observe a principle of natural justice, erred 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.

[9] An appeal may be brought only if the Appeal Division first grants leave to appeal.[2] To grant leave to appeal, the Appeal Division must be satisfied that the appeal has a reasonable

[1] GD1-3.
[2] DESDA, ss 56(1) and 58(3).

chance of success.[3] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[4]

[10] I must determine whether the Applicant has an arguable case on the following issues:

Issue 1: Did the General Division fail to consider any of the medical evidence?

Issue 2: Did the General Division ignore evidence that the Applicant had a previously undiagnosed heart condition?

Issue 3: Did the General Division err by finding that the Applicant's attempts to work were evidence of capacity, rather than incapacity?

ANALYSIS

Issue 1: Did the General Division fail to consider any of the medical evidence?

[11] According to the Applicant, the General Division failed to consider his family physician's evidence, in particular a February 2018 letter in which Dr. MacEoin strongly supported his claim of ongoing disability.

[12] I do not see an arguable case for this allegation.

[13] Although the General Division did not refer to any of Dr. MacEoin's reports in its decision, that does not necessarily mean it ignored them. I have reviewed the audio recording of the April 8, 2019 hearing, and I note that the presiding General Division member mentioned Dr. MacEoin's name on at least one occasion.[5] I do not think it can be fairly said that the General Division disregarded his evidence.

[14] 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 does not need to discuss each and every element of a party's submissions in its reasons.[6] While the Applicant may not agree with

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[3] DESDA, s 58(2).
[4] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[5] Hearing recording at 10:55.
[6] *Simpson v Canada (Attorney General)*, 2012 FCA 82.

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.

[15] Dr. MacEoin wrote that, in his view, the Applicant's disability was severe and prolonged, but the family doctor's evidence was only one factor, among many, that the General Division had to consider. The General Division was within its authority to focus on the Applicant's work activity and to give more weight to the opinions of specialists such as Dr. Rubin, the oncologist who declared the Applicant's cancer in remission, with few side effects from treatment.[7]

[16] Assessing disability under the *Canada Pension Plan* is a legal question as much as it is a medical one, and a single physician's opinion does not necessarily decide the matter.

Issue 2: Did the General Division ignore evidence that the Applicant had a previously undiagnosed heart condition?

[17] The Applicant claims that he suffered a heart attack on April 13, 2019, four days after the General Division hearing. He says that subsequent investigations revealed that he had had a previously undiscovered cardiac incident—one that might have happened between 2014 and 2016—the period in which the Minister claimed he had capacity to work.

[18] I do not see an arguable case here either.

[19] First, the Applicant might well have had a heart attack at some point between 2014 and 2016, but the General Division cannot be expected to have taken it into consideration if it was not detected until after the hearing.

[20] Second, under the *Canada Pension Plan*, the severity of a disability depends, not on the diagnosis of an applicant's disease, but on his capacity to work.[8] Even if the Applicant did have a heart attack in 2014-16, it did not prevent him working during that period. It was that work—and not his diagnosed health conditions—on which the General Division largely based its decision.

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[7] Report dated May 12, 2014 by Dr. Peter Rubin, oncologist, GD2-146, referred to by the General Division in paragraph 15 of its decision.
[8] *Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33.

[21] Finally, the record already contains evidence that the Applicant had, if not a heart attack, then certainly a heart condition, during the relevant period. Moreover, the General Division was clearly aware of it. In paragraph 4 of its decision, the General Division noted that the Applicant stopped working in November 2016 because of breathing difficulties due to congestive heart failure. In paragraph 15, the General Division referred to Dr. Fibich's April 2017 report, in which the dermatologist documented the Applicant's "severe heart failure as late side effect of intensive chemotherapy."

Issue 3: Did the General Division err by finding that the Applicant's attempts to work were evidence of capacity, rather than incapacity?

[22] The Applicant objects to the General Division's finding that his work from 2014 to 2016 indicated a capacity to regularly perform substantial gainful employment. He argues that he should not have been punished for having made good faith efforts to regain his financial independence.

[23] Here, the Applicant is alleging factual error, but the wording of section 58(1)(c) of the DESDA suggests that the threshold for finding such an error is high: The decision must be *based* on the allegedly erroneous finding, and the finding must have been made in a "perverse or capricious manner or without regard for the material." In other words, a factual error by itself cannot be the basis for overturning a decision; it must also be material *and* egregious.

[24] With that in mind, I do not see a reasonable chance of success for this argument. The Applicant correctly notes that the law requires disability claimant to demonstrate that they have attempted to return to work. However, he neglects to mention the second part of that obligation: they must also demonstrate that any such attempts to return to work have failed by reason of their disability.[9] In this case, the General Division found that the Applicant had not failed, but succeeded, in regularly pursuing substantially gainful employment during the relevant period. I do not think it defies logic to infer capacity from a series jobs—some of them with physical demands—in which the Applicant earned significant wages in three consecutive years, well above the statutory threshold set out in section 68.1 of the *Canada Pension Plan Regulations*. As

[9] *Inclima v Canada (Attorney General)*, 2003 FCA 117.

the General Division noted, two of these jobs ended, not because of the Applicant's health condition, but for reasons related to production curtailment.

[25] The Minister, applying section 42(2)(a) of the *Canada Pension Plan*, found that the Applicant met the CPP's definition of disability when it approved his pension in 2011. The General Division concluded that, when the Applicant registered substantially gainful earnings in 2014, 2015, and 2016, his impairment ceased to be severe and prolonged. In the absence of an error that falls under one of the categories set out in section 58(1) of the DESDA, I see no reason to interfere with this finding. The Applicant's condition may have later deteriorated but, as the General Division noted, this did not detract from his having been capable regularly of pursuing substantially gainful employment from May 2014 to November 2016.

CONCLUSION

[26] Since the Applicant has not identified any grounds of appeal that would have a reasonable chance of success on appeal, the application for leave to appeal is refused.

Member, Appeal Division

REPRESENTATIVE	J. P., self-represented