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

Citation: *A. M. v Minister of Employment and Social Development*, 2019 SST 706

Tribunal File Number: AD-19-128

BETWEEN:

A. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: August 8, 2019

CORRIGENDUM DATE: August 21, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, A. M., left school after Grade 10 to work as a truck driver in the construction industry. In October 2000, he twisted his lower back while attaching a chute to a cement truck. After six or eight months of modified duties, he returned to his regular job, although he claims that he continued to experience intense pain. In September 2005, he parted ways with his employer. The Appellant then had two short-lived jobs, first as a meat shop clerk then as a car jockey. He has not worked since October 2009.

[3] The Appellant is now 41 years old. In April 2016, he applied for a Canada Pension Plan (CPP) disability pension, claiming that he could no longer work because of his back injury, which limited his range of movement, and because of other conditions such as major depressive disorder and chronic pain disorder. The Respondent, the Minister of Employment and Social Development (Minister), refused the application. It found that the Appellant's disability was not "severe and prolonged," as defined by the *Canada Pension Plan*, during the minimum qualifying period (MQP), which it determined ended on December 31, 2007, or during the prorated period from January 1, 2008 to July 31, 2008.

[4] The Appellant appealed the Minister's decision to the General Division of the Social Security Tribunal. The General Division conducted a hearing by videoconference and, in a decision dated November 19, 2018, found that the Appellant had provided insufficient evidence that he was incapable regularly of performing substantially gainful work during the MQP or prorated period. The General Division found that the Appellant's attempts at alternative work had never included a sedentary occupation that did not involve prolonged sitting or standing and excessive bending or lifting.

[5] On February 19, 2019, the Appellant requested leave to appeal from the Tribunal's Appeal Division, alleging that the General Division

- did not consider all of the available evidence;
- unfairly used the Appellant's age against him;
- mischaracterized the Appellant's job at a meat shop in 2008–09 as evidence of capacity, rather than as what it really was: a work trial that failed because of his impairments;
- disregarded the fact that the Ontario Workplace Safety and Insurance Board (WSIB) compensated the Appellant with a non-economic loss award for a permanent impairment; and
- gave insufficient weight to Dr. Krystyna Prutis's March 2007 report, in which the physiatrist found that the Appellant could not work in any capacity.

[6] In my decision dated March 5, 2019, I allowed leave to appeal because I saw a reasonable chance of success for at least one of the allegations listed above. In doing so, I made it clear that I would not be limiting the Appellant's scope to argue his other reasons for appealing when I considered this matter on its merits.

[7] In written submissions dated April 18, 2019, the Minister defended the General Division's decision, arguing that the presiding member had weighed the available evidence and come to the defensible conclusion that the Appellant's 2008–09 employment indicated capacity during the MQP and prorated period and immediately afterward.

[8] Having reviewed the parties' oral and written submissions, I find that the General Division based its decision on legal and factual errors. I am satisfied that the record is sufficiently complete for me to make my own assessment of the evidence and to find the Appellant disabled as of the MQP.

ISSUES

[9] 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) it erred in law; or (iii) it based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[10] At the hearing, we discussed the following issues:

Issue 1: Did the General Division consider all of the available evidence?

Issue 2: Did the General Division unfairly use the Appellant's age against him?

Issue 3: Did the General Division mischaracterize the Appellant's 2008–09 work?

Issue 4: Did the General Division disregard the Appellant's WSIB award?

Issue 5: Did the General Division give insufficient weight to Dr. Prutis's March 2007 report?

ANALYSIS

[11] Having considered all of the above questions, I am satisfied that the General Division mischaracterized the Appellant's job at a meat shop. Because the General Division's decision falls on this reason alone, I see no need to consider the remaining issues.

Issue 3: Did the General Division mischaracterize the Appellant's 2008–09 work?

[12] My review of the record convinces me that the General Division based its decision on an erroneous finding that the Appellant's post-MQP employment was ill-suited to his physical limitations.

[13] After the Appellant left the construction industry in 2005, he had two jobs, first as a clerk in a meat shop, then as a car jockey for an automotive dealership. The General Division found that neither job was sedentary and that both imposed physical demands that were beyond his capabilities. The first position was a "short stint" in a customer service job that did not involve significant earnings, but the General Division found no evidence that the Appellant had left it because of a medical condition. The second position, which the General Division noted lasted

only a month, was not suitable for the Appellant because it required him to repeatedly get in and out of cars, causing strain on his back.

[14] The meat shop job was a major point of contention. The Minister argued that it demonstrated capacity because it lasted more than a year and came to an end, not because of the Appellant's health condition, but because of a general lay-off. The Appellant responded that the job actually proved his disability and that it lasted as long as it did only because of a family connection. At the hearing before the General Division, the Appellant gave clear evidence that he struggled in his job at the meat shop even though it imposed few physical demands on him:

> Mom pulled some strings, kept it on the down-low that I had a problem with my neck and my back … I was there, but inevitably I just couldn't do it … I'd go on a computer and they'd show me something a million times, how to, you know, give people their cash and their change—no chance. So they told me to go stand in the corner with the plastic bags and just put the boxes in … I felt horrible, in a coma [after working 15 to 20 hours per week].[1]
>
> [At the meat shop] I was unfocused, broken. They put me there, I couldn't sit, stand … When you have this problem, with your spine … I don't sleep. I'm on sleep medication. I was sitting by the freezer. I bend down to pick up one box and I'm in pain.[2]
>
> My job at the meat shop ended when the ownership was transferred. They got rid of all the employees. I really wasn't able to handle the position.[3]

[15] The General Division summarized this testimony as follows:

> The [Appellant] testified that his mother was a district manager at a meat store and helped get him a part-time customer service job for a few months. The [Appellant] testified that he could not focus or sit or stand for long periods of time at this job. He stated that his employer felt bad for him. He was not really able to handle this job. He worked 15 to 20 hours per week and felt horrible while working. He stated that a new franchisee bought the store and he was let go along with all the other employees.[4]

---

[1] Hearing recording, part two, 42:30.
[2] Hearing recording, part two, 9:15.
[3] Hearing recording, part two, 48:45.
[4] General Division decision at para 14.

[16] This, in my view, is a fair and accurate account of what the Appellant said. However, the General Division placed more weight on a letter from the manager of the meat shop, which suggested that the Appellant, despite his impairments, was able to fulfill the requirements of the job:

> The Tribunal file also indicates that the [Appellant] began working at a meat store in May 2008. **He was working part-time at a job that did not involve lifting, moving or bending in a customer service role**. His attendance was noted to be excellent and his employer was happy with his performance. [Emphasis added][5]

[17] According to *Inclima v Canada*,[6] disability claimants with at least some work capacity must show that their efforts to obtain and maintain employment were unsuccessful because of their health condition. In this case, the General Division found that the Appellant had failed to meet this requirement. The General Division found that, despite the light physical demands of his job, the Appellant did not fulfill his obligation to mitigate his impairment by attempting suitable work:

> What troubles me is that **the [Appellant] never worked at a sedentary occupation that did not involve prolonged sitting or standing and excessive bending or lifting**. […] Although the [Appellant's] stint working in customer service in a meat store was a short one that did not involve significant earnings, there is no evidence that the [Appellant] failed to retain this job because of a medical condition. I find that the [Appellant] had work capacity at the time of his MQP and prorated MQP. In fact, he was working at the meat store at the time of his prorated MQP. [Emphasis added][7]

I have concluded the General Division failed to properly assess the nature and extent of the Appellant's duties at the meat shop. That failure is apparent in the passages highlighted above, which are inconsistent with the evidence and with one another.

[18] In the first passage, the General Division relied on evidence that the Appellant took on a customer service role that did not involve lifting, moving, or bending. This implies that the job must have required the Appellant to do little more than sit and stand during his shifts. Yet, a few

---

[5] General Division decision at para 35.
[6] *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[7] General Division decision at para 38.

paragraphs later, the General Division found that the Appellant had never attempted a purely sedentary position. According to Appellant's own testimony, his most strenuous activity was bagging sale items. Nothing in his former supervisor's letter contradicted that evidence.

[19] It is difficult to imagine a less physically demanding job than what the Appellant described in his uncontradicted and corroborated testimony. Despite this, the General Division found that the Appellant had never tried a sedentary occupation. There is also the fact—again, uncontradicted—that the Appellant secured, and presumably maintained, the job through his mother's influence. While the General Division was obviously aware of this fact, I see no indication that it made a serious attempt to consider the logical implication from it—that the meat shop was a benevolent employer that held the Appellant to a less than commercial standard of performance.

REMEDY

[20] 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.

Is the record complete?

[21] In oral submissions, the parties disagreed about the appropriate remedy if I were to find errors in the General Division's decision. The Minister, while maintaining that the General Division had not erred, submitted that the record was sufficiently complete to permit me to make my own assessment of the Appellant's disability and to give the decision the General Division should have given. By contrast, the Appellant argued that the record was incomplete because the General Division had switched formats early in the hearing. He noted that the General Division had originally scheduled the hearing to be held by videoconference, but technical problems prompted the presiding member to halt the hearing and quickly reconvene by teleconference.

[22] I must disagree with the Appellant that the record is incomplete. The Appellant seems to be suggesting that he received something less than a full hearing with the change in format, but he has never previously made this allegation and, in any event, the recording of the hearing indicates that neither he nor his legal counsel objected to the change. Moreover, a voice recorder is used to document hearings as a matter of practice, whatever the format. Even if the Appellant's hearing had continued by videoconference, I would not have had access to anything other than an audio recording of the proceedings.

[23] None of the errors that the General Division was alleged to have committed hindered or prevented the admission of relevant evidence. The Appellant has had an adequate opportunity to submit medical documents, and there is considerable information on file about his employment history and his efforts to retrain and pursue alternative work. There is an audio recording of the hearing, and I have listened to all of it. It reveals that the General Division conducted a full oral hearing and heard the Appellant's testimony about his impairments and their effect on his functionality.

[24] 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 I were to refer this matter back to the General Division, it would only add further delay to what is already a protracted proceeding. The Tribunal is obliged to conduct its affairs as quickly as considerations of fairness and natural justice allow, and I doubt that the evidence would be materially different if the General Division were to rehear the matter.

[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 should have given, had it not erred. In my view, if the General Division had properly assessed the evidence, it would have accurately characterized the Appellant's meat shop job as a failed work trial and arrived at a different result than the one it did. My own assessment of the record satisfies me that the Appellant had a severe and prolonged disability during his MQP and continuously after.

Does the Appellant have a severe disability?

[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] I have no doubt that the Appellant is no longer able to perform the kind of physical work that he used to do as a cement truck driver. The evidence shows that he sustained a work-related back injury in 2000. Following six to eight months on modified duties, he returned to his regular job, only to find that driving on uneven terrain aggravated his neck and back pain. He asked for a job as a dispatcher, but his employer would not accommodate him. He expressed interest in a data entry batching job but had second thoughts when he discovered that it would have required him to give up his union benefits. He quit his job in September 2005.

[28] If the Appellant is no longer capable of manual labour, the question remains whether he was capable of sedentary or low impact employment as of the MQP or the prorated period. For the following reasons, I do not think so.

(i) The Appellant's neck and back condition is significant and well documented

[29] When the Appellant applied for CPP disability benefits in April 2016, his eligibility period was nearly eight years in the past. In his application, he reported numerous functional limitations, most prominently restricted and painful range of movement of his back. He said that he was prevented from lifting, carrying, bending and reaching, or sitting or standing for more than 10 minutes at a time. He said that his pain had impaired his memory and ability to concentrate. He said that he lived with his mother and that she performed all household maintenance tasks for him.

[30] The Appellant's complaints of neck and back pain coincide with organic changes to his spine, indicated by a July 2002 MRI of the lumbar spine, which showed degenerative disc

[8] *Canada Pension Plan*, s 42(2)(a)(ii).

disease with disc desiccation and diffusely bulging annulus with an annular tear at L5-S1.[9] An August 2007 MRI of the cervical spine indicated mild bulging of C4-5 causing mild narrowing of the central canal, with evidence of early cervical spondylosis and the persistence of disc herniation at C7-T1.[10]

[31] In the medical report accompanying the Appellant's application, Dr. Lorne Sokol listed diagnoses of mechanical low back strain, dysthymia, chronic pain disorder, and major depressive disorder. Dr. Sokol, the Appellant's longtime family physician, endorsed his patient's claim that he was severely disabled.[11] Over the years, Dr. Krystyna Prutis, a physiatrist, issued several reports indicating that the Appellant was unable to perform heavy lifting, pushing, pulling, repetitive flexion and extension of the neck and back. She also found that he could not sit or stand for a prolonged period of time.[12]

[32] Dr. Prutis has also offered varying opinions about the Appellant's work capabilities. In March 2007, Dr. Prutis said that he cold not work in any capacity.[13] In August 2007, she declared the Appellant unable to return to construction. In June 2011, she wrote that he was unable to return to gainful employment. In October 2013, she said that he was "unable to return to gainful employment at full hours" and "unable to tolerate more than three to four hours daily due to his severe pain and limitations in range of motion in the cervical and lumbar spine."[14]

[33] However, Dr. Prutis has been consistent in her view that the Appellant is incapable of performing work that has a significant physical component. In her most recent report, she left open the possibility that the Appellant could manage part-time work of a presumably sedentary nature, but she had nothing to say about whether that work would be "substantially gainful" according to *Canada Pension Plan* criteria.

---

[9] Relayed in Dr. Krystyna Prutis's physiatry report dated August 29, 2002 (GD2-2111) and Dr. Bernard Schacter's neurology consultation report dated December 11, 2003 (GD2-826).
[10] Relayed in Dr. Prutis's report dated August 14, 2007, GD2-97.
[11] CPP Medical report by Dr. Lorne Sokol, family physician, dated April 21, 2016, GD2-138.
[12] GD2-809.
[13] GD2-803.
[14] GD2-762.

[34] In my view, the Appellant may still be capable of marginal jobs that offer, at best, token pay. However, in light of his post-MQP history, I do not think that he is capable of anything more substantial, nor do I see him as a suitable candidate to retrain for a desk job.

(ii) The Appellant's background and personal characteristics limited his employability

[35] According to *Villani v Canada*,[15] the severe criterion must be assessed in a real world context with regard to a claimant's particular circumstances, including his or her age, education level, language proficiency, and past work and life experience.

[36] The Appellant left school after Grade 9, and has spent all of his working life in low-skilled factory or construction jobs. Although the Appellant was only 30 years old at the end of his MQP and is fluent in English, he has demonstrated little capacity to adapt and learn. In October 2010, he underwent psycho-vocational testing to poor results. He was found to possess "exceptionally weak" sentence comprehension, word reading, and spelling skills. Given his "very high emotional reactivity and very low agreeableness rating," he would not be able to successfully work in a setting requiring extensive interaction with people on a daily basis—for example, sales or customer service. Based on his "very weak" test scores, which fell in the "lower extreme range," he was deemed in need of literacy and numeracy training to improve his functional language and math skills to a grade 6 level.[16]

[37] Despite these results, the Appellant was enrolled in a WSIB-sponsored labour market re-entry program, which comprised eight weeks of computer training, 12 weeks of essential skills training, four weeks of job search training, and 10 weeks of employment training. Throughout the program, the Appellant registered multiple absences from his classes, which he attributed to ongoing pain.

[38] These assessments suggest to me that the Appellant, even when he was in good health, was always limited by his intelligence, temperament, and aptitude to a relatively small subset of potential jobs. The Appellant's innate personal characteristics, when combined with his

---

[15] *Villani v Canada (Attorney General)*, 2001 FCA 248.
[16] Psycho-Vocational Evaluation Report dated October 13, 2010 by Ali Murton, psychometrist, GD2-277.

documented physical problems, rendered him effectively unemployable as of the MQP and prorated period. Subsequent events have only confirmed this conclusion, as seen by the Appellant's struggles in a benevolent work environment and his inability to sustain a relatively low impact driving job.

(iii) The Appellant's testimony was credible

[39] 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. The Appellant described in convincing detail the circumstances that led to his being hired at the meat shop and the difficulties that he faced in carrying out his duties as a "product consultant." He added, "The only reason they kept me there was because of my mom—they felt bad for me. If it was anybody else, any other job, they would have let me go, just like the other ones."[17] He also vehemently denied any suggestion in the WSIB psycho-vocational reports that he had expressed an interest in working as a security guard: "I suggested that? No, no, no. They were trying to put me there. How the hell could I do that? If somebody comes … I'm disabled! … A security guard? You gotta be alert, aware, you gotta be strong."[18]

(iv) The Appellant's attempts to return to work were unsuccessful by reason of his disability

[40] Unlike the General Division, I find that the Appellant took reasonable steps to remain in the labour market. I also find, as demanded by the *Inclima* case, that his failure to remain in the labour market was tied to his impairments.

[41] The evidence shows that, after the Appellant initially injured his back in 2000, he returned to modified, and eventually, full duties, carrying on with them for another five years. In increasing pain, he asked his employer to retrain him for something less strenuous, but they refused to do so. In 2006, he applied for a salaried computer batching job at the same employer, hoping that, if he were hired, he would not have to drop out of his union.[19] This hope was

[17] Recording of General Division hearing, Part 2, 49:15.
[18] Recording of General Division hearing, Part 2, 48:40.
[19] Letter by Francis Woodroffe dated February 27, 2006, GD2-1192.

perhaps naïve and, in any case, it is not clear that the Appellant could have ever managed such a job, but even so, it indicated his good faith willingness to work.

[42] After several years of unemployment, the Appellant, with the help of his mother, found part-time employment at a meat shop. However, this job also proved to be beyond the Appellant's capabilities, even though (i) he worked only 15 to 20 hours per week; (ii) he was permitted various allowances and accommodations by virtue of his mother's position in the company; and (iii) it was a customer service job with minimal physical demands other than prolonged sitting and standing. The Appellant held this job between May 2008 and October 2009, earning only marginal amounts over this period.[20] In sum, I do not think that the Appellant's performance in this job suggested anything approaching capacity; in fact, I think it suggested the opposite.

[43] Later, the Appellant asked the WSIB to retrain him for lighter work. This did not go well either, with the Appellant displaying little aptitude for anything except entry-level minimum wage jobs. He lasted only a month as a driver for a car dealership, a relatively low-impact position that nonetheless aggravated his neck and back pain. I am satisfied that the Appellant fulfilled his obligation to make a reasonable effort to retrain or find work better suited to his limitations. His ill-fated efforts to remain employed were enough to convince me that he was physically and mentally precluded from participating in any sector of the labour market.

Does the Appellant have a prolonged disability?

[44] The medical evidence indicates that the Appellant has suffered from debilitating back and neck pain since 2000. Treatment has produced only a limited effect, and the Appellant has been effectively unemployable for many years. It is difficult to see how his health will significantly improve, even if he submits additional forms of therapy. In my view, these factors qualify the Appellant's disability as prolonged.

[20] According to the Appellant's income tax returns, he earned $2,766 in 2008 (GD2-105) and $2,394 in 2009 (GD2-105).

CONCLUSION

[45] I am allowing this appeal.

[46] The General Division erroneously characterized the Appellant's job at a meat ship in 2008–09 as evidence of capacity, rather than as a failed work trial. 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 Appellant has a disability that became severe and prolonged as of September 2005, the month he left his job as a cement truck driver. Under section 42(2)(b) of the *Canada Pension Plan*, a person cannot be deemed disabled more than 15 months before the Minister received the application for a disability pension. In this case, the Minister received the application in April 2016; therefore, the Appellant is deemed disabled as of ~~May~~January 2015. According to section 69 of the *Canada Pension Plan*, payments start four months after the deemed date of disability. The Appellant's disability pension therefore begins as of ~~September~~May 2015.

Member, Appeal Division

HEARD ON:	July 10, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. M., Appellant Franco DiLena, Representative for the Appellant Tiffany Glover, Representative for the Respondent