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

Citation: *R. C. v Minister of Employment and Social Development*, 2019 SST 1230

Tribunal File Number: AD-19-253

BETWEEN:

R. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: September 23, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The matter is returned to the General Division for a new hearing.

OVERVIEW

[2] The Appellant, R. C., has a high school education and is a trained carpenter. He is currently 29 years old. In May 2016, while playing in a recreational hockey game, an opposing player slashed his face, leaving him with significant injuries that required numerous reparative surgeries. He has not worked since.

[3] In November 2016, the Appellant applied for a Canada Pension Plan disability pension, claiming that he could no longer work because of post-traumatic stress disorder (PTSD), depression and anxiety resulting from his facial injuries. The Respondent, the Minister of Employment and Social Development (Minister), refused the application after determining that his disability was not "severe and prolonged."

[4] The Appellant appealed the Minister's refusal to the General Division of the Social Security Tribunal. On November 8, 2018, the General Division held a hearing by videoconference. In a decision dated January 3, 2019, the General Division dismissed the appeal, finding that the Appellant had failed to demonstrate that he was "incapable regularly of pursuing any substantially gainful occupation" as of the hearing date.[1] In particular, the General Division found nothing in the psychiatric evidence that barred the Appellant from returning to his former job.

[5] On April 8, 2019, the Appellant requested leave to appeal from the Tribunal's Appeal Division, alleging that, in coming to its decision, the General Division committed the following factual errors:

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[1] The General Division, like the Minister, found that the Appellant's minimum qualifying period (MQP) was to end on December 31, 2018.

- The General Division found that the Appellant's back pain predated his assault and did not prevent him from working. The Appellant claims that, in doing so, the General Division failed to recognize that his facial injuries aggravated his back condition.
- The General Division found that, although the Appellant suffered severe facial injuries, surgery was "successful and left him without deformity." In fact, says the Appellant, he has a deviated septum, which obstructs his breathing, and severe nerve damage, which causes facial pain. Elsewhere, the General Division focused on Dr. Henry's finding that he had "excellent airway through the nose," ignoring the fact that all of his doctors have found that his air passage is constricted, making it difficult for him to breathe.
- The General Division found that the Appellant's dental work is complete. In fact, says the Appellant, he continues to experience oral pain and numbness and has numerous dental appointments scheduled.
- The General Division relied on Dr. Henry's prognosis, which foresaw a recovery for the Appellant. In doing so, claims the Appellant, the General Division ignored the fact that he has not seen Dr. Henry for two years and that his current treatment providers—including Csanadi and Dr. Santher—described his condition as chronic, permanent, indefinite, and severe.
- The General Division said that Dr. Santher had encouraged the Appellant to "visualize a return to work date at the earliest possible date." However, the Appellant notes that, elsewhere in the file, Dr. Santher found that he had severe PTSD and was unable to work indefinitely due to the severity of his conditions.
- The General Division found that the Appellant had failed to follow a recommendation to attend a pain clinic. The Appellant insists he told the General Division at the hearing that he was awaiting an appointment at a pain clinic. He has since attended one session and has another scheduled.

- The General Division found that the Appellant's pain is managed by medication. The Appellant denies his pain is under control and claims that he testified to this effect at the hearing.
- The General Division found that the Appellant reported no limitations with sitting, standing, walking or remembering. The Appellant insists that he that he has limitations with all these functions.
- The General Division found that the Appellant had not engaged in regular attendance with his medical providers. The Appellant insists that he is compliant with medical treatment and always rebooks and attends medical appointments if he misses them.
- The General Division found no indication of cognitive impairment. In fact, says the Appellant, all of his doctors have acknowledged that he experiences such symptoms daily.
- The General Division found that the Appellant had not followed up with Dr. Santher. The Appellant calls this statement false and maintains that the evidence shows regular visits with the psychiatrist.

[6] In a decision dated May 16, 2019, I granted leave to appeal because I saw an arguable case for at least three of the Appellant's reasons for appealing.

[7] In written submissions dated June 28, 2019,[2] the Minister defended the General Division's decision, arguing that the presiding General Division member had weighed the available evidence and come to the defensible conclusion that the Appellant's facial injuries, and the psychological trauma resulting from those injuries, did not prevent him from attempting work outside his field.

[8] Having reviewed the parties' oral and written submissions, I find that the General Division based its decision on two erroneous findings of fact. Since the record is missing evidence that, in my view, is essential to make a reasoned decision, I have concluded that the appropriate remedy is to return this matter to the General Division for a new hearing.

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[2] AD2.

PRELIMINARY MATTER

[9] During the teleconference hearing, it became evident that the Appellant's legal counsel was working from a set of documents that did not correspond to the official record. Since our respective files were different and did not appear to have any page numbers in common, I was not always able to find specific documents to which counsel referred in his submissions. I cautioned him that I would not be considering any material that was not also before the General Division.

[10] However, I did take note of dates and key words related to the clinical notes and medical reports upon which counsel was relying. After the hearing, I was able to cross-reference counsel's information with the material that was before me. Having done so, I am satisfied that counsel did not refer to any evidence that was not already on the record.

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] During the teleconference hearing earlier this month, the parties and I discussed the following issues:

Issue 1: Did the General Division err when it found that the Appellant's back pain predated his assault and did not prevent him from working?

Issue 2: Did the General Division err when it found that the Appellant's surgery was "successful and left him without deformity"?

Issue 3: Did the General Division err when it found that the Appellant's dental work is complete?

Issue 4: Did the General Division err by relying on Dr. Henry's prognosis, which foresaw a recovery for the Appellant?

Issue 5: Did the General Division err by selectively relying on Dr. Santher's conclusions about the Appellant's work capacity?

Issue 6: Did the General Division err when it found that the Appellant had failed to follow a recommendation to attend a pain clinic?

Issue 7: Did the General Division err when it found the Appellant's pain is managed by medication?

Issue 8: Did the General Division err when it found that the Appellant reported no limitations with sitting, standing, walking or remembering?

Issue 9: Did the General Division err when it found that the Appellant had not engaged in regular attendance with his medical providers?

Issue 10: Did the General Division err when it found no indication of cognitive impairment?

Issue 11: Did the General Division err when it found that the Appellant had not followed up with Dr. Santher?

[13] Having considered all the Appellant's submissions, I see merit in Issues 5 and 11. Since the General Division's decision falls for these reasons alone, I see no need to address the remaining issues in this decision.

ANALYSIS

Issue 5: Did the General Division err by selectively relying on Dr. Santher's conclusions about the Appellant's work capacity?

[14] In its written reasons for its decision to dismiss the Appellant's disability claim, the General Division relied heavily on Dr. Santher's October 2016 psychiatric report. In paragraph 17, the General Division wrote:

> Dr. Santher, Psychiatrist, noted back in October 2016 that the [Appellant] was not fit to go back to work at that time. He was of the opinion the longer the [Appellant] waited the more difficult it would become, and urged him to visualize going back to work at the earliest possible date. The [Appellant] has missed multiple appointments with

> his medical providers and has not followed up with Dr. Santher with any diligence.

[15] The General Division did not mention that Dr. Santher's report was prepared immediately after an initial consultation, when the psychiatrist was just getting to know the Appellant. This is significant because the file strongly indicates that Dr. Santher's position evolved as he became more familiar with his patient. The General Division found that the Appellant did not follow up with Dr. Santher, but the record shows that he saw the psychiatrist at least eight more times over the following year, missing only one appointment.[3] Dr. Santher extensively documented those sessions in handwritten notes, but the General Division's decision largely ignored this material, even though it contained repeated declarations of the Appellant's disability resulting from anxiety and chronic pain. On September 5, 2017, to take one example, Dr. Santher wrote that the Appellant was "not fit to work indefinitely" because he was "scared to commit to a job." Dr. Santher's most recent report, prepared pursuant to a claim with the Ontario Criminal Injuries Compensation Board in May 2018,[4] categorically found the Appellant unfit for work and described his prognosis as "poor." Despite its obvious relevance, this report was not discussed in the General Division's decision.

[16] I find that the General Division erred when it relied on Dr. Santher's qualified finding of disability in his initial consultation report without considering the psychiatrist's subsequent opinions that the Appellant was unfit for any form of work.

Issue 11: Did the General Division err when it found that the Appellant had not followed up with Dr. Santher?

[17] Another major reason for the General Division's dismissal was its finding that the Appellant had not complied with medical advice.[5] In its decision, the General Division appears to have drawn a negative inference from what it found was the Appellant's failure to attend a pain management clinic. In paragraph 14, the General Division wrote: "He [the Appellant] has

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[3] In addition to the initial consultation on October 12, 2016, Dr. Santher's office notes document appointments on November 7, 2016, December 13, 2016, February 7, 2017, April 20, 2017, May 30, 2017, July 10, 2017, September 5, 2017, and October 31, 2017. See GD4-33 to GD4-37 and GD4-42 to GD4-51.
[4] GD4-24.
[5] General Division decision, para 11.

not followed up with Dr. Santher. The Doctor noted the [Appellant] needed cognitive behavioural therapy (CBT). The [Appellant] has not pursued CBT."

[18] The Appellant insists that he has done his best to follow his doctors' treatment recommendations. He alleges that the General Division disregarded his testimony that he had attended 12 group therapy sessions and was awaiting an appointment at a pain clinic at the time of the hearing—one that he subsequently attended.

[19] I have now listened to the audio recording of the General Division hearing, but it ends abruptly, in mid-testimony, after only 20 minutes. It is obvious that a significant portion of the proceedings—likely the largest part—were not recorded. As a result, I have no way to independently confirm the Appellant's account. However, the Appellant testified under oath that, at the hearing on November 8, 2018, he told the General Division that he had received something resembling pain management counselling. I am inclined to believe him, and I am satisfied that the General Division ignored material evidence. I also note that, between October 2016 and October 2017, the Appellant attended nine sessions with Dr. Santher,[6] the psychiatrist, who, in addition to providing psychotherapy and prescribing antidepressants, presumably offered him at least advice on how to cope with chronic pain.

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.

[21] Under section 3 of the *Social Security Tribunal Regulations*, the Appeal Division is required to conduct proceedings as quickly as circumstances and considerations of fairness allow. I would ordinarily be inclined to give the decision that the General Division should have given and decide this matter on its merits, but I do not think that the record is complete enough to

[6] See Dr. Santher's report dated May 14, 2018, GD4-28.

allow me to do so. As I have noted, a significant portion of the General Division hearing went unrecorded and, as a result, I have no way of reviewing much of the Appellant's testimony. Unlike the Appeal Division, the General Division's primary mandate is to weigh evidence and make findings of fact. As such, it is inherently better positioned than I am to hear the Appellant's testimony and to explore whatever avenues of inquiry that may arise from it. In this particular instance, I feel my only option is to refer this matter back to the General Division for rehearing.

CONCLUSION

[22] For the above reasons, I find that the General Division based its decision on two erroneous findings of fact made without regard for the material before it. Because the record is not sufficiently complete to allow me to decide this matter on its merits, I am referring it back to the General Division for a new hearing.

[23] To avoid any possibility of bias, I am directing the General Division to assign this matter to a member other than the one who heard this appeal in November 2018. I am also directing that member to accept oral evidence and to conduct the new hearing by teleconference, videoconference, or personal appearance.

Member, Appeal Division

HEARING DATE	September 13, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. C., the Appellant Roelf Swart, representative for the Appellant Sandra Doucette, representative for the Respondent