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

Citation: *Minister of Employment and Social Development v B. H.*, 2019 SST 1039

Tribunal File Number: AD-19-480

BETWEEN:

Minister of Employment and Social Development

Appellant

and

B. H.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: October 17, 2019

Canada

DECISION AND REASONS

DECISION

[1] Although the General Division based its decision on erroneous findings of fact, the appeal is dismissed, The Claimant is disabled under the *Canada Pension Plan*.

OVERVIEW

[2] B. H. (Claimant) obtained a high school equivalent diploma and certificates in welding and MVR mechanical. He has worked as a fisher, pig farmer, bar tender and a doorman. In 2016, the Claimant applied for a Canada Pension Plan disability pension and claimed that he was disabled by a number of conditions, including two heart attacks, diabetic neuropathy in his feet, limitations in his left arm and ongoing pain.

[3] The Minister of Employment and Social Development refused the application. The Claimant appealed this decision to the Tribunal. The Tribunal's General Division held a hearing and allowed the appeal. It decided that the Claimant was disabled and that a disability pension should begin to be paid to him in April 2015.

[4] The Minister was granted leave to appeal this decision to the Tribunal's Appeal Division because the appeal had a reasonable chance of success on the basis that the General Division based its decision on at least one erroneous finding of fact. After considering the parties' written and oral submissions, the General Division decision, the written record and the recording of the General Division hearing I find that the General Division based its decision on erroneous findings of fact regarding the Claimant's chest pain, and that he had cognitive functional limitations. Despite these errors, the appeal is dismissed because the Claimant is disabled.

ISSUES

[5] Did the General Division base its decision on an erroneous finding of fact under the DESD Act as follows:

a) When it stated that the Claimant had experienced Class III angina, and failed to consider that his chest pain is not caused by a cardiac condition;

b) When it failed to consider that the Claimant's doctor said that his heart is in better condition than a 40-year-old man's;

c) When it found as fact that the Claimant has cognitive functional limitations;

d) When it found as fact that the Claimant did not have any residual capacity regularly to pursue any substantially gainful occupation;

e) When it inadequately considered the Claimant's personal characteristics in making its decision;

f) When it failed to consider that the Claimant was not prescribed cannabis until after the minimum qualifying period (MQP), so this would have had no impact on his capacity to work at the relevant time;

[6] Did the General Division make an error in law when it decided that the Claimant did not need to demonstrate that he could not obtain or maintain employment because of his health condition?

ANALYSIS

[7] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It provides rules for appeals to the Appeal Division. An appeal is not a re-hearing of the original claim, but a determination of whether the General Division made an error under the DESD Act. The Act also states that there are only three kinds of errors that can be considered. They are that that the General Division failed to observe a principle of natural justice, made an error 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 before it.[1] If one of these errors was made, the Appeal Division can intervene. The Minister's grounds of appeal are considered below in this context

[1] DESD Act s. 58(1)

Issue 1: Erroneous finding of fact

[8] The Minister argues that the appeal should be allowed because the General Division based its decision on a number of erroneous findings of fact under the DESD Act. To succeed on appeal on this basis, the Minister must prove three things: that a finding of fact was erroneous (in error); that the finding was made perversely, capriciously, or without regard for the material that was before the General Division; and that the decision was based on this finding of fact.[2] The DESD Act does not define the terms "perverse" or "capricious." However, *the Federal Courts Act*, has the same wording. In that context, perverse means "willfully going contrary to the evidence." Capricious has been defined as being "so irregular as to appear to be ungoverned by law." Finally, a finding of fact for which there is no evidence before the Tribunal will be set aside because it is made without regard for the material before it. I accept that these definitions apply when considering the DESD Act.

A) The Claimant's heart

[9] The first finding of fact that the Minister says is erroneous is the General Division decision statement that the Claimant had experienced a class III angina.[3] The Minister argues that this is erroneous because the Claimant never had a class III angina; rather the medical evidence was that the Claimant had class II – III angina/ischemic heart disease,[4] and that he underwent an angioplasty procedure because of class II angina.[5] The Minister is correct that the medical evidence states that the Claimant had class II – III or class II angina. Therefore, this finding of fact is erroneous.

[10] This finding of fact was made perversely because it is contrary to the evidence that was presented to the General Division in the medical reports.

[11] The General Division decision states that the evidence that the Claimant had experienced angina was most relevant in relation to his impairments,[6] so I am satisfied that the decision was

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[2] *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319
[3] General Division decision at para. 5b)
[4] GD2-126
[5] GD2-114
[6] General Division decision at para. 5

based, at least in part, on this finding of fact. The Appeal Division must therefore intervene because the decision was based on this erroneous finding of fact under the DESD Act.

[12] In addition, the General Division failed to consider that the Claimant's heart condition was adequately treated with the angioplasty and ongoing medication. After this procedure was completed, there is no evidence of any ongoing heart issues. While the Claimant continues to have chest pain, it is not caused by any cardiac condition. This is also an error in the General Division decision.

[13] The Claimant testified that his heart is "better than a 40-year-old man".[7] The General Division decision does not refer to this evidence. However, it is not necessary for a decision to refer to each and every piece of information that was presented at a hearing.[8] The failure to mention this evidence, when the written record contains the doctor's opinion about the Claimant's heart and other medical conditions is not significant. The General Division's decision would not have changed if this evidence had been summarized in the decision. Therefore, the General Division made no error when it failed to specifically mention this evidence.

B) Cognitive functional limitations

[14] The second finding of fact that the Minister argues is erroneous is the General Division decision statement that "the Claimant's physical and cognitive functional limitations prevented him from performing any substantially gainful occupation as of December 31, 2015".[9] The Minister argues that this is an erroneous finding of fact because there was no evidence that the Claimant had cognitive limitations. I have examined the written record and listened to the recording of the General Division hearing. There is no documentary evidence of any cognitive limitations. The Claimant testified that he has difficulty with concentration and focus because he takes medical marijuana. However, this was prescribed in 2016, after the MQP so the associated cognitive issues would not have been present at the time that the Claimant had to establish that he was disabled.

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[7] General Division hearing recording at approximate minute 30.
[8] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.
[9] *Ibid*. at para. 9

[15] The Claimant's counsel argues that any person who has fibromyalgia or chronic pain syndrome has cognitive limitations. Unfortunately, the Tribunal cannot assume this without some evidence to support it. This statement on appeal also does not assist in determining the impact of any such limitation on the Claimant's capacity regularly to pursue any substantially gainful occupation.

[16] Lastly on this, I note that the Claimant was able to obtain a high school diploma and welding and mechanic's certificates. There is no indication that he had any cognitive or learning issues that had to be accommodated for educational reasons. Therefore, the finding of fact that the Claimant had cognitive functional limitations is erroneous. It was made perversely because there was no evidence on which to base this finding of fact. The decision was based, at least in part, on the finding of fact. Therefore, the General Division made an error under the DESD Act and the Appeal Division must intervene on this basis also.

C) Residual capacity for work and personal characteristics

[17] Next, the Minister argues that the General Division based its decision on an erroneous finding of fact that the Claimant had no residual capacity for work. Counsel argues that when the Claimant's heart condition and cognitive limitations are eliminated as limiting conditions, what was before the General Division was a 46-year-old man with high school and post-secondary certificates, varied manual work experience, who has pain, and has limitations in one arm and his feet. Based on this, counsel argues, that the General Division's finding of fact that the Claimant did not have any residual work capacity was erroneous.

[18] However, with this argument, the Minister is really asking the Appeal Division to reweigh the evidence to reach a different conclusion. That is not the Appeal Division's job. The Appeal Division must first decide whether the General Division based its decision on an erroneous finding of fact. The finding of fact that the Claimant did not have residual work capacity was not erroneous. There was an evidentiary basis for it, including that the Claimant has ongoing unexplained chest pain, ongoing left arm pain and limitations which impact his ability to lift, carry and perform other physical tasks, fibromyalgia/chronic pain symptoms, diabetic neuropathy in his feet which limits his ability to stand, or walk, and limitations sitting. While his work experience may be characterized as varied, all of it is in positions that require manual

labour (e.g. farming, fishing, bar tending, welding). Having this work experience does not assist him to obtain a sedentary job. The finding of fact that the Claimant had no residual work capacity was not erroneous. The appeal fails on this basis.

D) Medical cannabis

[19] The last finding of fact that the Minister says was erroneous is the statement in the General Division decision that the Claimant stated that he does not believe that he can work while under the influence of cannabis.[10] However, the General Division makes no finding of fact regarding this. It simply summarizes the Claimant's testimony in this regard. Therefore, the General Division made no error, and the appeal fails on this basis.

Issue 2: Error in law

[20] Another ground of appeal that I can consider is whether the General Division made an error in law. Minister's counsel argues that the General Division's erroneous finding of fact that the Claimant had no residual capacity to work led to an error in law. The Federal Court of Appeal instructs that when a disability pension claimant has some residual capacity to work they must demonstrate that efforts to obtain or maintain employment were unsuccessful because of their health in order to be found disabled.[11] Minister's counsel argues that because the General Division erred in finding that the Claimant had no residual capacity to work, it made an error in law when it failed to consider whether he had made efforts to obtain or maintain employment within his restrictions.

[21] However, for the reasons set out above, the General Division did not make an error when it decided that the Claimant had no residual capacity for work. Therefore, it also correctly stated that it was not necessary to consider whether the Claimant had demonstrated that his efforts to

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[10] General Division decision at para. 7
[11] *Inclima v. Canada (Attorney General)*, 2003 FCA 117

obtain or maintain work were unsuccessful because of his health.[12] Therefore, the General Division made no error in law.

REMEDY

[22] Because the General Division based its decision on two erroneous findings of fact, the Appeal Division must intervene. The DESD Act sets out what remedies the Appeal Division can give. Counsel for the Minister asks that I give the decision that the General Division should have given. Counsel for the Claimant asks that I refer the matter back to the General Division for reconsideration so that the Claimant can attend a new hearing with counsel, which he had not retained before.

[23] The DESD Act also says that the Tribunal can decide any question of law or fact that is necessary to dispose of an appeal.[13] The *Social Security Tribunal Regulations* require that the Tribunal conclude appeals as quickly as the circumstances, and the considerations of fairness and natural justice permit.[14] The Claimant applied for the disability pension in 2016, some three years ago. There would be further delay if the matter were referred back to the General Division. In addition, the record before me is complete. Although the Claimant may now prefer to have counsel represent him at the hearing, he could have retained counsel earlier in the appeal process. His case was not hampered by the fact that he was unrepresented. There is no suggestion that he was not able to fully present his legal case to the General Division. Therefore, it is appropriate that I give the decision that the General Division should have given.

[24] The undisputed facts are as follows:

a) The MQP is December 31, 2015;

b) The Claimant obtained a high school equivalent diploma, and certificates in two trades;

[12] General Division decision at para. 10
[13] DESD Act s. 64(1), *Nelson v Canada (Attorney General)*, 2019 FCA 222
[14] *Social Security Tribunal Regulations* s. 2

c) The Claimant has worked in a number of physically demanding jobs, including as a welder, a farmer, a bar tender, a doorman, and his last job as a commercial fisher;

d) The Claimant had two heart attacks while working;

e) The Claimant underwent angioplasty. The Claimant continues to have unexplained chest pain which is exacerbated with exertion;

f) The Claimant injured his left arm while working. He had surgery to correct this but it was unsuccessful. The Claimant testified that he has no real use of this arm.

g) The Claimant is also diabetic. He has diabetic neuropathy in his feet. It causes ongoing pain. It affects his balance and ability to walk. In 2015 he had walking, standing, sitting, lifting and bending limitations;[15]

h) The Claimant's pain condition has been described as fibromyalgia and chronic pain;

i) The Claimant's evidence is that his is often unable to complete household chores, and that when he does so, he must take breaks.

[25] To be disabled under the *Canada Pension Plan* a claimant must have a disability that is both severe and prolonged. A disability is severe if it renders the claimant unable regularly to pursue any substantially gainful occupation. It is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.[16] The Claimant has a disability that meets this legal test. He has significant physical limitations. He cannot use his left arm for most things (he testified that he cannot lift it beyond 90 degrees[17]). Although the Claimant had surgery to correct the injury to this arm, the surgery was not successful. It has left the Claimant with ongoing pain.

[26] The Claimant has also unexplained chest pain that is made worse with any exertion. The Claimant testified that rising from a chair can cause pain. He has been compliant with treatment for this, taking a number of medications that were not helpful.

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[15] GD1-1
[16] *Canada Pension Plan* s. 42(2)(*a*)
[17] General Division hearing recording approx.. min 23:10

[27] In addition, the Claimant is limited by diabetic neuropathy in his feet. He cannot walk for any significant distance, has trouble with balance, and has ongoing pain from this as well.

[28] The Federal Court of Appeal instructs that when deciding whether a claimant is disabled, their personal characteristics must also be considered.[18] Although the Claimant was relatively young and educated at the MQP, all of his training and work experience is in physically demanding positions. He has no skills for sedentary work. He has significant physical limitations that would restrict the Claimant's ability to retrain. In the real world, when all of the Claimant's medical conditions and his personal characteristics are considered, I find that he is incapable regularly of performing any substantially gainful occupation. His disability is therefore severe.

[29] The Claimant's disability is also prolonged. He has had diabetes and chronic pain for a number of years. His heart condition is stable, but nothing suggests that it or the Claimant's other conditions will improve. They have not improved in spite of surgery, medication and other treatments.

[30] I find that the Claimant was disabled in December 2014 when he stopped working. Payment of the disability pension starts four months after the date of disability. This is April 2015.

CONCLUSION

[31] The appeal is dismissed. The Claimant is disabled, and the disability pension payments start April 2015.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	September 26, 2019
METHOD OF PROCEEDING:	Teleconference

[18] Villani v. Canada (Attorney General), 2001 FCA 248

APPEARANCES:	B. H., Appellant Lesley Tough, Counsel for the Appellant Sandra Doucette, Counsel for the Respondent