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

Citation: *T. M. v Minister of Employment and Social Development*, 2019 SST 1472

Tribunal File Number: AD-19-421

BETWEEN:

T. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: December 30, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

[2] The appeal is referred back to the General Division for reconsideration.

OVERVIEW

[3] T. M. (Claimant) completed Grade 10 and obtained a certificate in carpentry. He has a spotty work history. He last worked cleaning the yard at a X store from 2007 to 2009. Before that he had not worked for many years. The Claimant was diagnosed with retinitis pigmentosa as a child. This causes vision loss. He applied for a Canada Pension Plan disability pension and claimed that he was disabled as a result of this condition.

[4] The Minister of Employment and Social Development refused the application. The Claimant's appeal from this decision to the Office of the Commissioner of Review Tribunal was dismissed in 2011. The Review Tribunal decided that the Claimant was not disabled before the end of July 1985.

[5] The Claimant applied again for the disability pension in November 2017. The Minister of Employment and Social Development again refused the application. The Claimant appealed this decision to the Tribunal. The Tribunal's General Division found that the Claimant's minimum qualifying period (MQP – the date by which a claimant must be found to be disabled in order to receive the disability pension) ended on October 31, 1985, so it had to decide whether the Claimant became disabled between August 1, 1985, and October 31, 1985.

[6] The General Division dismissed the appeal. It decided that because the Claimant worked for approximately two years after his minimum qualifying period (2007 to 2009), he did not have a disability that was both severe and prolonged by the end of the MQP.

[7] I 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 made an error

in law when it failed to consider whether the Claimant was disabled in 1985 and instead based its decision on his capacity to work from 2007 to 2009.

PRELIMINARY MATTERS

[8] After the oral hearing of the appeal, the Appeal Division sent written questions to the parties regarding whether the General Division had failed to

a) observe a principle of natural justice (given the parties a fair process),

b) failed to consider whether X was a benevolent employer, or

c) failed to consider whether the Claimant's work at X was a substantially gainful occupation

[9] The parties' responses to these questions were considered in making the decision in this appeal.

GROUNDS OF APPEAL

[10] 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. Instead, I must decide whether the General Division:

a) failed to provide a fair process;

b) failed to decide an issue that it should have, or decided an issue that it should not have;

c) made an error in law; or

d) based its decision on an important factual error.[1]

[1] This paraphrases the grounds of appeal set out in s. 58(1) of the DESD Act

ISSUES

[11] Did the General Division fail to provide a fair process when it refused the Claimant's request for an adjournment?

[12] Did the General Division make any of the following errors in law?

a) It failed to consider whether the Claimant was disabled in 1985;

b) It failed to consider whether the Claimant's work from 2007 to 2009 was a substantially gainful occupation; or

c) It failed to consider whether the Claimant's employer was a benevolent employer.

ANALYSIS

Failure to grant an adjournment

[13] The Claimant's current application for the disability pension was made in 2017. He filed the appeal with the General Division on November 14, 2018. In February 2019 he filed a Notice of Readiness with the General Division and indicated that he had no further documents to file for the appeal.[2] The General Division hearing was held on June 7, 2019. At the hearing the Claimant asked for more time to find and file medical documents to support his claim.

[14] The General Division denied this request for an adjournment. The decision states that it did so because further evidence would not be relevant to his analysis.

[15] The Claimant argues that the General Division member failed to provide a fair process because it refused his adjournment request. The principles regarding a fair process are concerned with ensuring that all parties to an appeal have the opportunity to present their legal case to the Tribunal, to know and answer the other party's legal case and to have the decision made by an independent decision maker based on the law and the facts.

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[2] GD3-1

[16] The General Division's refusal to grant an adjournment at the hearing did not violate these principles. The Claimant had plenty of time before the hearing to obtain evidence and present it to the Tribunal. He had already told the Tribunal that he had no more evidence to present. In addition, he was not prevented from presenting oral evidence at the hearing, which could have included what his doctors had said to him and recommended for treatment.

[17] The Claimant also says that the General Division was biased. This is a serious allegation, which must be supported by evidence.[3] The Claimant provided no evidence of bias apart from his statement. Nothing in the material before me points to any bias by the General Division member.

[18] Therefore, the appeal fails on the basis that the General Division failed to provide a fair process to the parties.

Failure to consider the Claimant's condition in 1985

[19] To receive the disability pension, the Claimant had to prove that he became disabled between August 1, 1985, and October 31, 1985 (his MQP). A person is disabled if they have a disability that is both severe and prolonged. A disability is prolonged if it is long continued and of indefinite duration or likely to result in death.[4]

[20] The General Division decided that because the Claimant was able to work for approximately two years from 2007 to 2009, his disability could not be prolonged, and therefore he was not disabled. However, the General Division made an error in law. It failed to consider whether, at the MQP, his condition met the legal test for prolonged – long continued and of indefinite duration.

[21] The disability pension is not ordinarily granted for closed periods of time.[5] However, the Federal Court of Appeal teaches that when, prior to treatment, medical opinion is that treatment would improve a person's condition and enable them to work, the disability could not be

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[3] *Arthur v Canada (Attorney General)*, 2001 FCA 223
[4] *Canada Pension Plan* s. 42(2)(a)(ii)
[5] See for example, *Minister of Employment and Social Development v D. Z.*, 2015 SSTAD 1194

prolonged.[6] It follows from this that if the medical evidence before the MQP does not demonstrate that treatment would improve the person's condition so that they could work, the disability could be prolonged. The Pension Appeals Board (the Appeals Division replaced this tribunal) granted a disability pension for a closed period of time in some cases on this basis.[7]

[22] The General Division failed to consider this. It did not refer to any of the medical evidence, including that in 2010 the Claimant's doctor wrote that there was no treatment for the Claimant's condition and that it had left him with severe vision loss.[8]

[23] There is also no indication that the General Division turned its mind to whether the Claimant's condition changed between August and October 1985.

[24] The General Division erred in law. The appeal must be allowed on this basis.

Substantially gainful occupation

[25] To receive the pension, a claimant must have a disability that is both severe and prolonged. A disability is severe if as a result they are incapable regularly of pursuing any substantially gainful occupation.[9] The Claimant was not working at his MQP, and did not work for a number of years after this. The General Division did not consider this.

[26] In addition, the General Division did not consider whether his employment from 2007 to 2009 was a substantially gainful occupation. The decision states that the Claimant earned $10 per hour and that he worked full-time.[10] However, the record of earnings filed with the Tribunal shows that the Claimant earned less than the minimum amount to make Canada Pension Plan contributions in 2007, 2008 and 2009.[11] This indicates that the Claimant's employment may not have been a substantially gainful occupation.

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[6] *Canada (Minister of Human Resources Development) v. Henderson*, 2005 FCA 309
[7] *Swalwell v. Minister of Human Resources Development*, (October 25, 2001) CP11228, *Minister of Human Resources Development v. Upshaw* (January 6, 200) CP7832
[8] GD2-74
[9] *Canada Pension Plan* s. 42(2)(*a*)(i)
[10] General Division decision at para. 11
[11] GD2-160

[27] The General Division erred in law by failing to consider this. The appeal is allowed on this basis also.

Benevolent employer

[28] The Federal Court of Appeal teaches that a claimant may work and still be disabled if they work for a benevolent employer. A benevolent employer is one who modifies the work expectations, duties, pay or other conditions of employment beyond what is expected in the marketplace for a person.[12] The General Division considered this and concluded that the Claimant had no reduction in his work duties, and worked full-time. Therefore, the employer was not a benevolent employer.[13]

[29] The General Division applied the law to the facts on this issue. It made no error in law in doing so. It is not for the Appeal Division to reweigh the evidence to reach a different conclusion. Therefore, the appeal fails on this basis.

REMEDY

[30] The DESD Act sets out what remedies the Appeal Division can give when an appeal is allowed.[14] It is appropriate to refer this matter back to the General Division for reconsideration. The record before me is incomplete. The General Division did not identify relevant legal issues, or apply the evidence to the law in this regard.

CONCLUSION

[31] The appeal is allowed because the General Division erred in law when it failed to consider the Claimant's condition at the MQP and it failed to consider whether his work from 2007 to 2009 was a substantially gainful occupation.

[32] The appeal is referred back to the General Division for reconsideration.

Valerie Hazlett Parker
Member, Appeal Division

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[12] *Atkinson v. Canada (Attorney General)*, 2014 FCA 187
[13] General Division decision at para. 12
[14] DESD Act s. 59(1)

HEARD ON:	November 12, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	T. M., Appellant Tiffany Glover, Counsel for the Respondent