



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. H. v Minister of Employment and Social Development*, 2020 SST 160

Tribunal File Number: AD-19-810

BETWEEN:

M. H.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: February 24, 2020

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

[2] The decision that the General Division should have given is made. The Claimant has a severe and prolonged disability and is entitled to a Canada Pension Plan disability pension.

OVERVIEW

[3] M. H. (Claimant) completed Grade 9 before entering the paid workforce. He has worked in a number of positions, including as a property manager, doing maintenance, snow plowing, farming, truck driving and supervisory work. He had a puncture injury to his right buttock in 1999, which has resulted in ongoing pain, leg weakness and poor balance. The Claimant stopped working when he was laid off from his position with a property management company and 2 subsequent work attempts failed. He applied for a Canada Pension Plan disability pension and claims that he is disabled by his ongoing pain and other limitations.

[4] The Minister of Employment and Social Development refused the application. The Claimant appealed this decision to the Tribunal. The Tribunal's General Division dismissed the appeal because it decided that the Claimant retained some capacity regularly to pursue a substantially gainful occupation.

[5] Leave to appeal this decision to the Tribunal's Appeal Division was granted on the basis that the General Division may have made an error in law by failing to consider the impact of the Claimant's education on his capacity to work, or it may have based its decision on an erroneous finding of fact that the Claimant had not demonstrated that he could not obtain or maintain employment because of his health condition. After considering all of the documents filed with the Tribunal, the recording of the General Division hearing and the parties' submissions I am satisfied that the General Division made an error in law and based its decision on an important factual error regarding the reason that the Claimant stopped working. The appeal is therefore allowed.

[6] The decision that the General Division should have given is made. The Claimant has a severe and prolonged disability. He was disabled in September 2016, when he stopped working. Payment of the disability pension begins in January 2017.

GROUND OF APPEAL

[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. 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

ISSUES

[8] Did the General Division make an error in law when it failed to consider the impact of the Claimant's education on his capacity regularly to pursue any substantially gainful occupation?

[9] Did the General Division base its decision on an important factual error when it found as fact that the Claimant's jobs ended for reasons other than his health?

ANALYSIS

Error in law

[10] One ground of appeal under the DESD Act is that the General Division made an error in law. The Claimant argues that the General Division did so because it failed to examine the impact of his education on this capacity regularly to pursue any substantially gainful occupation.

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

[11] The Federal Court of Appeal teaches that when deciding whether a person is disabled, a decision maker must use a real-world approach.² This means that they must consider the person's medical conditions and their personal characteristics, including their age, language proficiency, education, and work and life experience. This is correctly stated in the General Division decision.³ Regarding the Claimant's education, the decision states

The Claimant completed Grade 9 and had no other formal training. The Representative suggested a learning disability could be an issue. The Claimant did not state he has any language or learning impediments and there is no evidence on file to show his efforts to retrain or pursue other employment would be affected by a language or learning impediment.⁴

The decision makes no other reference to the Claimant's education. It failed to consider the impact of the Claimant's limited formal education on his capacity to work.⁵ This is an error in law. The appeal is allowed on this basis.

Important factual error

[12] Another ground of appeal that the Appeal Division can consider is whether the General Division based its decision on an important factual error that it was likely that the Claimant's work ended for reasons other than his health. To succeed on appeal on this basis, the Claimant must prove three things:

- a) that this finding of fact was made in error;
- b) that the finding was made perversely, capriciously, or without regard for the material that was before the General Division; and
- c) that the decision was based on this finding of fact.⁶

²*Villani v. Canada (Attorney General)*, 2001 FCA 248

³ General Division decision at para. 7

⁴ General Division decision at para. 8

⁵ *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211

⁶ *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319

The General Division decision states, “The Claimant’s jobs likely ended for reasons other than his health conditions.”⁷ The decision also states that the Claimant testified that he would not have been able to continue with the property management job if he hadn’t been laid off but that there was no evidence to support this.⁸ However, the Claimant testified about his difficulties in this job, including ongoing pain that made it difficult to sit, that he needed something “more active” so that he could move around to accommodate his pain,⁹ and that he had some vehicle accidents while at work. This evidence supports the Claimant’s contention that he would not have been able to continue at this job had he not been let go.

[13] The General Division did not consider this evidence in this context. Therefore, the finding of fact that the Claimant was let go from work for reasons other than his health was made in error, and without regard for all of the evidence that was before it. The decision was based, at least in part, on this finding of fact. Therefore, the General Division based its decision on an important factual error. The Appeal Division must intervene on this basis also.

[14] The Minister refers to the family doctor’s statement in 2018. It states that at that time the Claimant continued to experience debilitating right sciatic neuropathy and was not fit for any time of meaningful employment.¹⁰ This letter does not refer to the Claimant’s condition at the time he stopped working, so does not assist me.

REMEDY

[15] The DESD Act sets out what remedies the Appeal Division can give when an appeal is allowed. It is appropriate for the Appeal Division to give the decision that the General Division should have given for the following reasons:

- a) The record before the Appeal Division is complete;
- b) Both parties requested that the Appeal Division give the decision that the General Division should have given if it intervened;

⁷ General Division decision at para. 20

⁸ General Division decision at para. 19

⁹ General Division hearing recording at approximate minute 31:15

¹⁰ GD3-21

- c) There are no gaps in the evidence, or any need for additional evidence;
- d) The DESD Act says that the Tribunal may decide any issues of fact or law necessary to dispose of an application;¹¹ and
- e) The *Social Security Tribunal Regulations* require that appeals be concluded as quickly and efficiently as the circumstances and considerations of fairness and natural justice permit.¹²

Analysis

[16] In order to be disabled under the *Canada Pension Plan* a person must have a disability that is both severe and prolonged by the end of their minimum qualifying period (MQP). The Claimant's MQP is December 31, 2018.

[17] A disability is severe if it renders a person incapable regularly of pursuing any substantially gainful occupation. It is prolonged if it is long continued and of indefinite duration.¹³

a) The disability is severe

[18] The Claimant testified in an honest and straightforward manner. His testimony was internally consistent and consistent with the written evidence. He answered some questions in a way that was against his interest. For example, he candidly explained that he was initially opposed to Dr. Salsman's recommendations¹⁴ because he had expected the appointment with her to be about something else. He also admitted to having had vehicle accidents at work. He is credible. I place a lot of weight on his testimony.

[19] The Claimant was injured in 1999 when a piece of glass punctured his right buttock and hip. He has had ongoing pain, and worsening right leg weakness since the injury. This persists despite treatment.

¹¹ DESD Act s. 64(1)

¹² *Social Security Tribunal Regulations* s. 3(1)

¹³ *Canada Pension Plan* s. 42(2)

¹⁴ GD8-2

[20] The Claimant worked in construction in spite of his injury until 2006. He then worked for a property management company. When he began with this company he worked in snow removal, then changed jobs and became a supervisor. He testified that his supervisory duties included driving around the buildings, organizing workers, ordering supplies, filling out lease forms, and showing apartments. He had at least one motor vehicle accident and a workplace injury from a fall while at this job. The Claimant also testified that when he worked in the supervisory position, which was more sedentary, he was “suffering all the time” because he needed to be “more active” to manage his back and leg pain.¹⁵

[21] The Claimant’s worked with the property management company until he was let go in 2015, although he was struggling to complete that job. I accept that he would not have been able to continue with this job had he not been let go.

[22] The Claimant then tried to work at a mink farm but only stayed there for one day due to the pain this caused. Through an employment assistance program, the Claimant then tried to run his own moving business. His wife did most of the paperwork, he had trouble with the physical tasks, and injured his ankle at this job. He sold the business less than one year after it began. The Claimant did not earn a substantially gainful amount at either of these positions.

[23] The Federal Court of Appeal teaches that when there is evidence of work capacity a claimant must demonstrate that they could not obtain or maintain employment because of their health condition. The Claimant made no attempts to obtain work after September 2016 when he says that he was disabled. However, this does not disqualify him from getting the disability pension because he had no work capacity at that time. He had been let go from the property management company, could not work at the mink farm or run his own business. He would be unable to attend a retraining program or complete sedentary work because of his medical conditions which cause sleep difficulties and problems concentrating. He also has reading comprehension limitations.

[24] I must consider the Claimant`s personal characteristics as well as his medical conditions. The Claimant was 42 at the MQP. Despite this young age, he is unable to work in any physically

¹⁵ General Division hearing recording at approximate minute 31:15

demanding position. The Claimant's Grade 9 education would make it hard for him to obtain a sedentary job even though he has some experience with some sedentary work tasks. He is fluent in English, but has trouble understanding some written words, and had his wife complete most of the paperwork for his business.¹⁶ He would have great difficulty in a sedentary job, or attending any retraining program because of his pain, difficulties with concentration¹⁷ and reading comprehension.

[25] I accept and adopt the General Division's reasons to find that the Claimant followed treatment recommendations.

[26] For these reasons, I find that the Claimant's disability is severe under the *Canada Pension Plan*. The Claimant was incapable regularly of pursuing any substantially gainful occupation when he last worked in September 2016.

b) The disability is prolonged

[27] The Claimant's disability is also prolonged. He was initially injured in 1999, and continues to have ongoing pain and limitations despite treatment and medication. Although Dr. Salsman has recently made some new treatment recommendations, they are to help manage the Claimant's pain and assist with balance. The treatment is not meant to resolve the Claimant's condition. Therefore, his disability is long continued and of indefinite duration.

CONCLUSION

[28] The appeal is allowed.

[29] The decision that the General Division should have given is made: The Claimant was disabled when he stopped working and sold his business in September 2016.

[30] Under the Canada Pension Plan disability pension payments start four months after a person is disabled.¹⁸ Payments will start January 2017.

¹⁶ *Ibid.* at approximate minute 37:18

¹⁷ *Ibid.* at approximate minute 40:00

¹⁸ *Canada Pension Plan* s. 69

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	February 18, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. H., Appellant David Brannen, Counsel for the Appellant Hilary Perry, Counsel for the Respondent