



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. F. v Minister of Employment and Social Development*, 2020 SST 271

Tribunal File Number: AD-20-55

BETWEEN:

D. F.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: March 30, 2020

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

[2] The General Division made an error in law. The decision that the General Division should have given is made. The Claimant is entitled to a disability pension.

OVERVIEW

[3] D. F. (Claimant) completed Grade 12. He worked for many years in dangerous jobs on oil rigs. He last reported income in 2003.

[4] The Claimant applied for a Canada Pension Plan disability pension in 2012. The Minister of Employment and Social Development refused the application. The Claimant again applied for the disability pension in 2017. He says that he is disabled by liver disease. He has also been in a number of accidents and broken many bones throughout his body.

[5] The Minister refused the 2017 application for disability benefits. The Claimant appealed the Minister's decision to the Tribunal. The Tribunal's General Division dismissed the appeal. It decided that the Claimant maintained capacity to work after the end of the minimum qualifying period (MQP – the date by which a claimant must be found to be disabled to receive the disability pension).

[6] Leave to appeal this decision was granted on the basis that the General Division based its decision on an important factual error by not considering the Claimant's pain. I have considered the documents filed with the Tribunal, the parties' written submissions and the General Division decision. The General Division failed to consider all of the Claimant's personal circumstances. This is an error in law. Therefore the appeal is allowed. The decision that the General Division should have given is made: the Claimant became disabled before the end of the MQP. He is entitled to receive the disability pension.

PRELIMINARY MATTER

[7] When leave to appeal was granted, a date was set for an oral hearing on the appeal. However, the Minister later wrote to the Tribunal and conceded that the General Division had made an error under the *Department of Employment and Social Development Act* (DESD Act), and that the Claimant was disabled before the end of the MQP.

[8] Because the legal issues were no longer disputed, the oral hearing was cancelled. The decision is made on the basis of the documents filed with the Tribunal.

ISSUES

[9] Did the General Division make an error under the DESD Act in at least one of the following ways?

- a) It disregarded the Claimant's evidence about his pain, or his doctor's statement in 2006 that he only had about two years to live;
- b) The General Division Member has insufficient medical training;
- c) It based its decision on the lack of medical evidence around the MQP; or
- d) It based its decision on an important factual error that the Claimant could retrain?

ANALYSIS

[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

The appeal is considered in this context.

Failure to consider the Claimant's pain or personal circumstances

[11] The Federal Court of Appeal teaches that to decide whether a claimant is disabled, the General Division must consider all of their medical conditions not just the biggest one.² The Claimant says that the General Division failed to do this because it failed to consider the impact of his ongoing pain on his capacity regularly to pursue any substantially gainful occupation. In his application for the disability pension the Claimant wrote that he has “jumping arthritis” and that his muscles were so sore that he cried when moving.³ The General Division decision does not refer to the Claimant's arthritis or his pain. Therefore, it failed to consider this condition. This is an error in law upon which the appeal must be allowed.

[12] The Federal Court of Appeal also instructs that to decide if a claimant is disabled the General Division must also consider their personal circumstances including age, education, language skills and work and life experience.⁴ This is set out in the decision and some of the Claimant's personal circumstances are considered.⁵ The General Division considered that the Claimant was 54 at the end of the MQP, completed high school and was trained to be a chemist by his employer. Based on this, the General Division concluded that the Claimant could retrain for work within his limitations.⁶ However, this conclusion is faulty because it is not based on a consideration of all of the Claimant's medical conditions. Since the General Division failed to consider the Claimant's pain, it also failed to consider its impact on the Claimant's capacity to retrain for alternate work. This error also requires that the appeal be allowed.

Other grounds of appeal

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

² *Bungay v. Canada (Attorney General)*, 2011 FCA 47

³ GD2-351

⁴ *Villani v. Canada (Attorney General)*, 2001 FCA 248

⁵ General Division decision at paras. 19, 20

⁶ *Ibid.* at para. 20

[13] The Claimant presented a number of other grounds of appeal. Because I have decided that the appeal must be allowed for the reasons set out above, I need not consider them.

REMEDY

[14] The DESD Act sets out what remedies the Appeal Division can give when an appeal is allowed.⁷ It is appropriate for the Appeal Division to give the decision that the General Division should have given in this case for the following reasons:

- a) The facts are not in dispute;
- b) The written record is complete;
- c) The Claimant says that he became disabled before the end of the MQP and the Minister agrees;
- d) The DESD Act says that the Tribunal can decide questions of law and fact necessary to dispose of an appeal;⁸
- e) The *Social Security Tribunal Regulations* require that appeals be concluded as quickly as the circumstances and considerations of fairness and natural justice permit;⁹
- f) The Claimant applied for the disability pension approximately three years ago, and further delay would be incurred if the matter were referred back to the General Division for reconsideration.

The facts

[15] The facts are not in dispute. They are set out fully in the documents filed with the Tribunal. They are summarized as follows:

⁷ DESD Act s. 59(1)

⁸ *Ibid.* s. 64

⁹ *Social Security Tribunal Regulations* s. 3

- a) The Claimant completed a high school education;
- b) The Claimant worked for many years in dangerous jobs on oil rigs;
- c) The Claimant was seriously injured in an accident at age 19;
- d) The Claimant was also injured a number of times while working, and broke several bones;
- e) The Claimant was diagnosed with Hepatitis C and liver cirrhosis. He has other health conditions that interfere with treatment for Hepatitis C;
- f) The Claimant also has ongoing arthritis pain. He takes narcotic medication to manage his pain;
- g) The Claimant was self-employed when he last worked on oil rigs. He last reported employment income in 2003;
- h) The Claimant's MQP is December 31, 2006;
- i) The Claimant tried to work after December 2006. At most he was able to work one hour per day in exchange for food and lodging;
- j) In October 2010, Dr. Suske reported that the Appellant had severe hepatitis C for four years, severe cirrhosis of the liver and severe arthritis for three years.

Analysis

[16] A claimant is disabled under the *Canada Pension Plan* if they have a disability that is both severe and prolonged. A disability is severe if as a result the claimant is incapable regularly of pursuing any substantially gainful occupation.¹⁰ It is prolonged if it is long continued and of indefinite duration.¹¹

[17] The Claimant's disability is severe. Dr. Suske reported in 2010 that the Claimant had severe Hepatitis C for four years. As a result, he is fatigued and unable to do many things. In addition, he had a number of physical limitations. He was paralyzed at the age of 19. He has broken numerous bones in different accidents. He worked despite ongoing and increasing pain since that time. He required narcotic medication to treat his pain. These conditions were present

¹⁰ *Canada Pension Plan* s. 42(2)(a)

¹¹ *Ibid.*

before the end of the MQP, and impacted the Claimant's capacity regularly to pursue a substantially gainful occupation.

[18] I place weight on the Claimant's testimony that he did not know why he wrote on his application that he could no longer work in 2009 or 2010. I rely on the Record of Earnings. It demonstrates that the Claimant has not earned any substantially gainful income since 2003.¹² This was before the end of the MQP.

[19] I must also consider the Claimant's personal circumstances.¹³ The Claimant was 54 years of age at the end of the MQP. He has a high school education. This would negatively impact his ability to obtain work in a job that is not physically demanding. The Claimant worked for many years on oil rigs. These work skills would not easily transfer to a different job. With his ongoing fatigue and pain, it is not realistic to expect the Claimant to retrain for sedentary work.

[20] The Claimant's disability is also prolonged. Despite medical treatment, the Claimant's condition has not improved since he stopped earning income in 2003. Nothing in the documents filed with the Tribunal suggest that the Claimant's condition will improve.

[21] Therefore, I find that the Claimant was disabled before the end of the MQP.

[22] Under the *Canada Pension Plan* a person cannot be deemed to be disabled more than 15 months before they apply for the disability pension.¹⁴ The Claimant applied for the pension in February 2017. Therefore, he is deemed to be disabled in November 2015.

[23] Payment of the disability pension begins four months after a claimant becomes disabled.¹⁵ Therefore, payment of the disability pension will begin in March 2016.

CONCLUSION

[24] The appeal is allowed.

¹² GD2-95

¹³ *Villani*, above

¹⁴ *Canada Pension Plan* s. 42(2)(b)

¹⁵ *Ibid.* s. 69

[25] The decision that the General Division should have given is made: the Claimant is deemed to be disabled in November 2015, and is entitled to receive the disability pension beginning in March 2016.

Valerie Hazlett Parker
Member, Appeal Division

METHOD OF PROCEEDING:	On the Record
SUBMISSIONS:	D. F., Appellant Viola Herbert, Representative for the Respondent