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

Citation: *D. W. v Minister of Employment and Social Development*, 2020 SST 307

Tribunal File Number: AD-19-675

BETWEEN:

D. W.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: April 15, 2020

DECISION AND REASONS

DECISION

[1] I allow the appeal. The General Division made an error. I return the case to the General Division for reconsideration.

OVERVIEW

[2] D. W. (Claimant) was seriously injured in a car accident in 2006. He had liver and kidney lacerations, multiple bone fractures on the left side, and brain swelling. The Claimant applied for a disability pension under the *Canada Pension Plan* (CPP). The Minister denied his application initially and on reconsideration. The Claimant applied again. The Minister denied the second application initially and on reconsideration. The Claimant appealed to this Tribunal. On July 8, 2019, the General Division dismissed the Claimant's appeal, finding that he did not have a severe disability on or before the end of his minimum qualifying period (MQP).

[3] The Claimant appealed to the Appeal Division. I granted permission (leave) to appeal. I decided that the there was an arguable case that the General Division made an error of law.

[4] I have heard the arguments from the Claimant and the Minister. Now I must decide whether I am satisfied that the General Division made an error under *the Department of Employment and Social Development Act* (DESDA). If the General Division did make an error, I must decide how to fix (remedy) that error.

[5] I allow the appeal. The General Division made an error of law. I do not have an audio recording of the hearing at the General Division. Therefore, unfortunately, I do not have what I need to give the decision that the General Division should have given. I return the matter to the General Division for reconsideration.

ISSUE

[6] Did the General Division make an error of law by failing to analyze the evidence and explain why it showed that the Claimant had a capacity to work on or before the end of the MQP?

ANALYSIS

[7] The Appeal Division does not give people a chance to re-argue their case in full at a new hearing. Instead, the Appeal Division reviews the General Division's decision to decide whether there is an error. That review is based on the wording of the DESDA, which sets out the grounds of appeal.[1]

[8] Failing to follow legal tests set out for the General Division in the legislation and by the Federal Court and the Federal Court of Appeal is an error of law. If the General Division makes such an error of law, that is one of the grounds for appeal set out in the DESDA.[2]

Focussing on the minimum qualifying period

[9] Claimants must show that they have a severe and prolonged disability on or before the end of the MQP.[3] The General Division must analyze the evidence that addresses the Claimant's medical condition on or before the end of the MQP.[4] The General Division must provide reasons in support of their findings.[5]

Did the General Division make an error of law?

[10] The General Division made an error of law by failing to analyze, consider and explain what evidence in the record showed that the Claimant had some capacity for work on or before the end of his MQP.

[11] The General Division decision describes briefly the Claimant's accident and resulting injuries in 2006.[6] The decision states that the Claimant was discharged from the hospital in February 2007 and then "confined to a hospital bed at home for one year."[7]

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[1] DESDA, s 58(1).
[2] DESDA, s 58(1)(b).
[3] *Hoffman v Canada (Attorney General)*, 2015 FC 1348, at para 31.
[4] *Tracey v Canada (Attorney General)*, FC 1300, para 39.
[5] *Hoffman v Canada (Attorney General)*, 2015 FC 1348, at para 44; *Marrone v Canada (Attorney General)*, 2008 FCA 216 at paras 1 and 3; and *Quesnelle v Canada (Attorney General)*, 2003 FCA 92 at para 8.
[6] General Division decision, para 8.
[7] General Division decision, para 9.

[12] When the General Division begins to describe the Claimant's functional limitations, it starts by anchoring them in time by stating "since then" which appears to mean since he was in the hospital bed for a year.

[13] The Claimant's MQP ended on December 31, 2008.

[14] The decision goes on to describe the medical evidence after the MQP in some detail. Then under the heading "There is evidence of work capacity" the General Division states:

> There are very few medical reports dated at or around the time of the MQP. The medical reports dated after the MQP indicate that the Claimant had improved significantly. Although he still had some pain and limitations, he was noted to be taking very few medications. Many years after the MQP, his health seems to have deteriorated. I therefore find that there is evidence of work capacity.[8]

[15] It is worth noting that the General Division did not discuss here any evidence other than medical reports (like testimony) about the Claimant's work capacity at the time of the MQP.

[16] The General Division decided that the Claimant's activities and medical reports after the MQP show that he "improved significantly" and therefore he had capacity to work at the time of the MQP. The General Division concludes that the Claimant's condition worsened long after the end of the MQP (after some additional surgery in 2015).

[17] The Claimant argues that the General Division member did not base the decision on the evidence from his MQP. If the General Division focussed on his MQP, he says that it would have been clear that he had a severe and prolonged disability within the CPP definition.

[18] The Minister argues[9] that the General Division has not made an error. It was the Claimant's job to prove he met the test for a severe disability during the MQP. The General Division stated, without error, that the "reports dated after the MQP indicate that the Appellant had improved." Evidence from 2009, 2012, and 2014 and 2015 show that the Claimant improved

[8] General Division decision, para 17.
[9] AD4-9 to 11.

and had some capacity for work. All of that evidence shows that he did not have a severe condition when the MQP ended.

[19] The Minister argues that the General Division did not make an error by focussing on the Claimant's schooling and the work that he did after the end of his MQP. The courts have explained in other cases that attending school shows a capacity to work.[10] The Claimant's participation in school for a year beginning in October 2013 shows that he had capacity for part time, modified or sedentary work. The General Division did not make an error by focusing on the Claimant's post-MQP work, either. This work cannot be considered a failed attempt, because the time in school plus work adds up to more than 2 years. The Federal Court has said that return to work that lasts only a few days would be a failed work attempt, but two years of earnings consistent with what had been earned before cannot be a failed work attempt.[11]

[20] In my view, the General Division made an error of law by failing to focus the analysis and reasons on the Claimant's medical condition on or before the end of the MQP. The Claimant's MQP ended on December 31, 2008. The General Division seems to infer that the capacity that the Claimant had when he was going to school and working, long after the end of the MQP, show that he had capacity to work at the end of the MQP as well. It is equally possible, however, that the Claimant met the test for a severe disability at the time of the MQP, and that his functionality improved, albeit temporarily, by the time he went to school and tried to return to work.

[21] When the claimant has work activities after the MQP, it may be tempting to focus the analysis on those activities, especially if those activities seem to show work capacity after the MQP. However, the **starting point** in this sort of case is always to assess whether the disability was severe on or before the end of the MQP.

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[10] The Claimant relies on *Miceli-Riggins v Canada*, 2013 FCA 158 paras 14-15 and *McDonald v Canada (Human Resources and Skills Development Canada)*, 2009 FC 1084 at para 14 for this idea about the link between capacity to work and attending school.

[11] The Minister relies on the Federal Court's decision in *Monk v Canada (Attorney General)*, 2010 FC 48 for this idea about the impact work activity has on entitlement to a disability pension.

[22] If the evidence does **not** show a severe disability at MQP, then the evidence of work activities after the MQP only reaffirms the findings.

[23] If the evidence shows a severe disability on or before the end of the MQP, then the General Division needs to address the activities after the MQP. It may be that the activities are so insignificant that they do not interfere with the finding of severity. It may be that the work activities were not substantially gainful, or that they were really just failed work attempts. It may be that the activities are so modified that they are not really work (or what is referred to as work for a "benevolent employer").

[24] Regardless, the analysis should always start with the disability at the time of the MQP and then move on to any activities after the end of the MQP. To start the analysis the other way around (by focussing on activities after the end of the MQP first) does not work. The activities after the end of the MQP cannot be the basis for a finding that the claimant was not "severe" at MQP.

[25] The focus must be on the MQP. The General Division did not discuss what the Claimant's functional limitations were from February 2008 (when it sounds like he was no longer confined to a hospital bed in his home) to December 31, 2008 when his MQP ended. It is not clear to me what the Claimant's limitations were at that time (and I do not have access to the recording of the General Division's hearing in this case).

[26] The General Division is free to conclude that a claimant had a residual capacity to work during the MQP, but it is not at all clear what the Claimant's limitations actually were when the MQP was over. The reasons for the this part of the decision are not at all clear. Given the severity of his injuries and the severity of the Claimant's limitations in the first year that he was home from the hospital, it is not clear how the General Division inferred that medical evidence after the MQP was relevant to the Claimant's condition during the MQP.

[27] It may be that the improvements to the Claimant's limitations show that he was not continuously disabled from the MQP to the present. It may be that the improvements to the Claimant's condition when he was at school and at work show that his disability improved

enough that it was no longer severe. The General Division acknowledged a further deterioration after the 2015 surgery, which stemmed from ongoing treatment of the same injury from 2006.

[28] The General Division made an error of law. The finding that there was some capacity for work must be explained and they must be connected to the Claimant's condition during MQP. If it is based on evidence about the Claimant's condition after the MQP, the General Division should give reasons as to how that post-MQP evidence speaks to the Claimant's condition during the MQP.

[29] As a final note: the General Division seems to have considered the Claimant's work activities after the MQP in the context of deciding whether the Claimant showed that efforts to get and keep employment were unsuccessful because of the disability (I will call this the "employment efforts test").[12] Claimants need to show evidence of their employment efforts from before the end of the MQP in order to meet the "severe" test. In other words, the General Division should not rely on activities after the end of the MQP to decide whether the Claimant met the employment efforts test. The entire analysis about whether the Claimant's disability is severe needs to focus on the MQP. If the General Division finds a severe disability, then the General Division may have to address the Claimant's activities after the end of the MQP.

REMEDY

[30] When the General Division makes an error, I can give the decision that the General Division should have given, or I can return the matter to the General Division for reconsideration.[13]

[31] When the record is complete, giving the decision that the General Division should have given is often the most efficient way forward. In this case, unfortunately, I do not have an audio recording of the hearing before the General Division. So although the Claimant would have liked for me to give the decision that the General Division should have given, I cannot do that here. I do not have access to the testimony to determine what all of the evidence was about the

[12] General Division decision, para 18. Where there is evidence of work capacity, claimants must show that efforts to get and keep employment were unsuccessful because of their disability. The Federal Court of Appeal described that employment efforts test in a decision called *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[13] DESDA, s 59.

Claimant's condition from February 2008 to December 31, 2008. This would likely be important in any analysis of whether he had any capacity to work at the end of the MQP.

[32] I will return the matter to the General Division for reconsideration. The record is not complete without the recording of the General Division hearing.

CONCLUSION

[33] The appeal is allowed. The General Division made an error of law. I return the case to the General Division for reconsideration.

Kate Sellar
Member, Appeal Division

HEARD ON:	December 17, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. W., Appellant Viola Herbert, Representative for the Respondent