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

Citation: *T. A. v Minister of Employment and Social Development*, 2020 SST 309

Tribunal File Number: AD-20-97

BETWEEN:

T. A.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: April 16, 2020

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The General Division based its decision on an important factual error and made an error in law.

[2] The decision that the General Division should have give is made. The Claimant is entitled to the disability pension.

OVERVIEW

[3] T. A. (Claimant) completed Grade 11 before entering the workforce. He worked in physically demanding jobs until he began to have chronic intermittent hives brought on by exposure to manufacturing substances and environmental triggers. The Claimant then worked at his brother's moving company. He stopped working in 2010 after undergoing hernia surgery.

[4] The Claimant applied for a Canada Pension Plan disability pension and claimed that he was disabled by a number of conditions, including chronic hives, depression and a hernia. 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. It decided that the Claimant did not have a severe disability before the end of the minimum qualifying period (MQP – the date by which a claimant must be found to be disabled to receive the pension).

[5] Leave to appeal the General Division's decision to the Tribunal's Appeal Division was granted on the basis that the General Division may have based its decision on an important factual error that there was no medical report that supports that the Claimant is incapable of any work.

[6] I have now reviewed the General Division decision, the documents filed with the Appeal Division, and the documents filed with the General Division. The General Division based its decision on this important error of fact and made an error in law. The appeal is allowed. It is also appropriate that the Appeal Division give the decision that the General Division should have

given. The Claimant was disabled before the end of the MQP. He is entitled to the disability pension.

PRELIMINARY MATTER

[7] This appeal was decided on the basis of the documents filed with the Tribunal for the following reasons:

a) The legal issues to be decided are straightforward;

b) The parties have filed written submissions that clearly set out their legal position on the issues;

c) The Claimant requests that the Appeal Division give the decision that the General Division should have given, that the Claimant is disabled before the end of the MQP;

d) The Minister concedes that the General Division based its decision on an important factual error and that it made an error in law. It also requests that the Appeal Division give the decision that the General Division should have given, that the Claimant was disabled before the end of the MQP.

ISSUES

[8] Did the General Division based its decision on at least one of the following important factual errors:

a) That no medical report supports that the Claimant was incapable of all work at the MQP;

b) That the Claimant's work capacity was the same before and after undergoing hernia surgery.

[9] Did the General Division made at least one of the following errors in law

a) It failed to consider how the Claimant's lack of transferrable skills would impact his capacity to work in a sedentary job;

b) It failed to consider how the Claimant's education would impact his capacity regularly to pursue any substantially gainful occupation

c) It failed to apply legal principles to decide whether the Claimant's last employer was a benevolent employer

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]

[11] The Claimant argues that the General Division based its decision on important factual errors and made errors in law. His arguments are considered below in this context.

Important factual error regarding medical evidence

[12] One ground of appeal under the DESD Act is that the General Division based its decision on an important factual error. To succeed on this basis, the Claimant must prove three things:

a) That a finding of fact was erroneous (in error);

b) That the finding was made perversely, capriciously, or without regard for the material that was before the General Division; and

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

c) That the decision was based on this finding of fact.[2]

[13] The Claimant argues, first, that the appeal should be allowed because the General Division based its decision on an important factual error that there was no medical report that supports an incapacity for all work as of the MQP.[3]

[14] In spite of this, the decision refers to a number of medical reports that do state that the Claimant was incapable of working, including

a) In November 2011, the family doctor wrote that the Claimant was medically disabled;[4]

b) In May 2012, the family doctor again stated that the Claimant was medically disabled at that time and for the foreseeable future;[5] and

c) In July 2012, the family doctor stated that angioedema prevents physical exertion and that the Claimant had not been able to tolerate work since 2010.[6]

[15] Therefore, the finding of fact that there was no medical report that supports the Claimant's incapacity for all work was made in error. It was made without regard for the medical evidence that was presented to the General Division, including evidence that the decision refers to. The decision was based, at least in part, on this finding of fact.

[16] In addition, the Supreme Court of Canada teaches that it is necessary to give reasons for findings of fact made on contradictory evidence and on which the outcome of the appeal is largely dependent.[7] The General Division failed to do so. It uses a footnote to refer, generally, to the medical evidence from the family doctor when it explains why it made the decision it did. This evidence is contradictory to the conclusion that the General Division reached. The General Division did not analyze this evidence, nor explain why no weight was given to it. Referring to

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[2] DESD Act s. 58(1)(*c*)
[3] General Division decision at para. 34
[4] General Division decision at para. 18
[5] General Division decision at para. 19
[6] General Division decision at para. 20
[7] *R. v. Sheppard*, 2002 SCC 26

evidence only in a footnote is insufficient to demonstrate that the General Division properly considered this evidence when making its decision.

[17] Therefore, the General Division based its decision on an important factual error. The appeal must be allowed on this basis.

Error in law regarding the Claimant's personal circumstances

[18] The Claimant also argues that the General Division made an error in law. The Federal Court of Appeal teaches that when deciding whether a claimant is disabled, the decision maker must consider their medical condition(s) and their personal circumstances, including age, language ability, education and work and life experience.[8]

[19] The General Division decision correctly states this principle.[9] The decision also states that the Claimant had no language problems, and that he has limited transferrable skills because his work history is in manual labour.[10] However, the General Division failed to consider the impact of the Claimant's education on his capacity regularly to pursue any substantially gainful occupation. The fact that the Claimant did not complete high school is significant. This would impact the Claimant's ability to obtain work.

[20] The General Division therefore also made an error in law. The appeal must be allowed on this basis also.

Other issues

[21] The Claimant presents a number of other grounds of appeal as well. However, since the appeal must be allowed on the basis of the errors examined above, it is not necessary to consider the remaining grounds of appeal.

REMEDY

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[8] *Villani v. Canada (Attorney General)*, 2001 FCA 248
[9] General Division decision at para. 39
[10] *Ibid.*

[22] 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 written record is complete;

b) The parties have clearly set out their legal position on the issues;

c) The Claimant applied for a disability pension in 2017. The matter has been ongoing for approximately three years, and further delay would be incurred if the matter is referred back to the General Division for reconsideration.

d) The parties both request that the Appeal Division give the decision that the General Division should have given.

Analysis

[23] The facts are set out in the documents filed with the Tribunal. They are summarized below:

a) The Claimant completed Grade 11 before entering the paid workforce

b) The Claimant worked as an apprentice mechanic and a grinder. He stopped working in this field because of chronic hives, caused by exposure to industrial substances and environmental factors;

c) The Claimant then worked for his brother's moving company. He stopped working in 2010 after undergoing hernia surgery;

d) The Claimant also has angioedema, and had shortness of breath on exertion when he worked;

e) The Claimant's MQP ends on December 31, 2013

f) The Claimant was 56 years old at the end of the MQP;

g) The Claimant's family physician wrote three medical reports before the end of the MQP that stated that the Claimant was incapable of working because of his medical conditions;

h) The Claimant reports that he has difficulty with concentration, sleep, and breathing because of itchiness from hives. He cannot lift because of the hernia.[11]

[24] From the materials filed with the Tribunal it is clear that the Claimant cannot work in a closed or industrial environment. He reacts to a number of chemical and environmental substances, resulting in chronic hives that limit him physically. The only recommended treatment for this is symptomatic treatment for the hives, and avoidance of triggering substances. This significantly limits the Claimant's work possibilities.

[25] On June 4, 2012, the family doctor also wrote that the Claimant's angioedema prevents him from physical exertion because any attempt at work produces tongue swelling, and shortness of breath, and that despite being out of the workforce since 2010 he continues to have many environmental triggers for this.[12]

[26] In addition, the Claimant had hernia surgery in 2010. As a result he cannot lift any significant weight. This further limits what jobs he could perform.

[27] I place weight on the Claimant's family doctor's notes written in the year before the end of the MQP. Dr. Bernard states clearly and consistently that the Claimant is incapable of working. His notes were made at the time of his consultations with the Claimant. He treated all of the Claimant's conditions.

[28] The Federal Court instructs that I must consider the Claimant's medical condition as well as their personal circumstances, including age, education, language skills and work and life experience.[13] The Claimant completed Grade 11. There is no evidence that he is proficient on computers. He has no work experience in sedentary or administrative work. His only work experience is in physically demanding jobs. In addition, the Claimant's lack of formal education

[11] GD2-113
[12] GD1-183
[13] *Villani*, above

would significantly impact on his capacity to obtain or complete sedentary work. The Claimant was 56 years of age at the end of the MQP. This would also impair his capacity to obtain work.

[29] The Claimant's medical conditions together with his personal characteristics demonstrate that the Claimant is incapable regularly of pursuing any substantially gainful occupation. His disability is therefore severe. It was severe when he stopped working in 2010, which is before the end of the MQP.

[30] The Claimant's disability is also prolonged. The Claimant has not worked since 2010 due to his conditions. He has followed treatment recommendations, however, his hives and angioedema have not improved. There is no suggestion that his conditions will improve in the future.

CONCLUSION

[31] The appeal is allowed. The General Division based its decision on an important factual error, and made an error in law.

[32] The decision that the General Division should have given is made. The Claimant is disabled. He became disabled before the end of the MQP.

[33] However, the *Canada Pension Plan* says that a person cannot be found to be disabled more than 15 months before they applied for the disability pension.[14] The Claimant applied for the disability pension in May 2017. Therefore, he is deemed to be disabled in February 2016.

[34] The *Canada Pension Plan* also says that payment of the disability pension begins four months after a person is found to be disabled.[15] Therefore, payment of the disability pension starts June 2016.

Valerie Hazlett Parker
Member, Appeal Division

[14] *Canada Pension Plan* s. 42(2)(*b*)
[15] *Canada Pension Plan* s. 69

METHOD OF PROCEEDING:	On the Record
SUBMISSIONS:	Alexandra Victoros, Counsel for the Appellant Susan Johnstone, Representative for the Respondent