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

Citation: *D. P. v Minister of Employment and Social Development*, 2020 SST 767

Tribunal File Number: AD-20-655

BETWEEN:

D. P.

Appellant
(Claimant)

and

Minister of Employment and Social Development

Respondent
(Minister)

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: September 9, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Claimant formerly worked at a flour processing plant. In February 2000, he injured his lower back when he slipped and fell in the company parking lot. He spent most of the next year recovering. He then returned to modified duties but reinjured his back in November 2003. He was off work for another several months. He resumed working and remained employed at the plant until it closed in 2007. Between 2010 and 2014, he worked as a self-employed painter, although he claims to have made little money in this occupation.

[3] In May 2017, the Claimant applied for Canada Pension Plan (CPP) disability benefits, claiming that he could no longer work because of back and knee pain. The Minister refused the application because, in its view, the Claimant had not shown that he suffered from a "severe and prolonged" disability during his minimum qualifying period (MQP), which ended on December 31, 2009.

[4] The Claimant appealed the Minister's refusal to the General Division of the Social Security Tribunal. The General Division held a hearing by teleconference in July 2019 and, after accepting post-hearing documents from the Claimant, dismissed the appeal.[1] In support of its decision, the General Division pointed to a gap in the Claimant's medical records between 2004 and 2011.

[5] On May 29, 2020, the Claimant requested leave to appeal from the Tribunal's Appeal Division, alleging various errors on the part of the General Division. I granted the Claimant leave to appeal because I thought his arguments had a reasonable chance of success on appeal.

[6] The Minister filed written submissions arguing that, since the General Division did not commit any errors, its decision should stand. I called a hearing by teleconference because, in my

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[1] See General Division decision dated February 26, 2020.

view, the format respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness, and natural justice permit.

ISSUES

[7] The Claimant alleges that the General Division committed the following errors in coming to its decision:

- It failed to consider testimony indicating that the Claimant became disabled well before December 31, 2009;
- It erroneously found that the Claimant's family physician did not see the Claimant for his main condition until March 2010;
- It disregarded evidence from numerous specialists indicating that the Claimant was disabled by his 2000 back injury;
- It ignored the fact the Ontario Workplace Safety Insurance Board (WSIB) recognized that the Claimant had been incapable of work since 2000; and
- It unfairly denied the Claimant an opportunity to submit additional medical documents, in particular an MRI report that would have shown the further deterioration of his back.

[8] My job is to decide whether any of these allegations have merit.

ANALYSIS

[9] There are only three grounds of appeal to the Appeal Division. A claimant must show that the General Division acted unfairly, interpreted the law incorrectly, or based its decision on an important error of fact.[2]

[10] Having reviewed the record and considered the parties' oral and written submissions, I have concluded that none of the Claimant's reasons for appealing justify overturning the General Division's decision. These are my reasons.

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[2] Section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

The General Division did not disregard or misrepresent testimony that the Claimant became disabled before December 31, 2009

[11] Claimant faced a challenge in that, while he submitted many medical documents, they were all dated 2013 or after, years after he last had CPP disability coverage. He did not submit any medical reports from the MQP, which meant that the only direct evidence of his disability during the relevant period was testimony—his own and his wife's.

[12] The Claimant testified that he has been continuously disabled since his 2000 workplace in injury. His wife supported him in this claim. However, the General Division was unwilling to give this testimony much weight, and it explained why:

> In this case, the Claimant was working as a self-employed painter at the time of the MQP and for years thereafter. He wrote in his application that worked from October 11, 2010 to December 30, 2014 doing exterior and interior painting. He wrote that he worked 8-12 hours per day, seven days per week. He also did lawn services, snow removal and disposal of garbage.
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> The information noted in his application differs from the testimony at the hearing. For example, the Claimant testified that, as of the MQP, he worked six hours per day as a painter with some days off.[3]

I have reviewed the Claimant's application and listened to the recording of the hearing. Neither differed significantly from the General Division's account of them. For presumably good reason, the Claimant disclosed in his application that he pursued a painting and yard maintenance business that saw him put in long hours for more than four years after the MQP. The General Division cannot be blamed for choosing to rely on that written disclosure, nor can it be faulted for noting the discrepancy between the disclosure and the Claimant's testimony. The Claimant pointed out that his business did not produce significant income because his back pain prevented him from taking on a more active role, but a business venture's lack success is not by itself proof of disability. In any event, the General Division noted that, whether the Claimant was working, as he wrote, eight to 12 hours per day or, as he testified, six hours per day, both were evidence of a capacity to perform light, part-time work.

[3] General Division decision, paragraphs 30-31.

The General Division did not base its decision on an erroneous finding that Dr. Lee did not treat the Claimant until March 2010

[13] The Claimant alleges that the General Division erred when it stated that Dr. Lee did not start treating him until March 2010.[4] In fact, says the Claimant, Dr. Lee has been treating him since 2000, the year of his injury.

[14] I don't see merit in this submission. In the September 2016 CPP medical report that accompanied his patient's application for benefits,[5] Dr. Lee wrote that he had known the Claimant for "12 years" and had been treating his "main medical condition" since March 2010. Later in the report, Dr. Lee referred to the Claimant's main medical conditions as chronic back pain and knee pain.

[15] The General Division summarized Dr. Lee's report as follows:

> The CPP Medical Report was completed on September 1, 2016 by Dr. Michael Chin Fu Lee, family physician, who has known the Claimant since approximately 2004. Dr. Lee began treating his main medical condition after the MQP in March 2010. He has degenerative disc disease at L5-S1, right knee meniscal tear, hypertension, asthma and GERD. He was noted to have chronic back pain and knee pain. Dr. Lee did not provide any evidence regarding when these health problems began and how they progressed over time.

In my view, this passage accurately characterized the contents of Dr. Lee's CPP medical report. As the General Division noted, the report suggests that Dr. Lee began treating the Claimant sometime around 2004—approximately four years after the Claimant sustained his initial back injury. The report also indicates that Dr. Lee had been the Claimant's family physician for several years before he began treating him for his back pain in 2010. This gap is somewhat surprising at first glance, but it makes sense when one remembers that the Claimant's workplace injury was managed for several years under a treatment plan overseen by the WSIB. When the Board determined that the Claimant's recovery had plateaued, it presumably transferred management of his back condition to his primary caregiver.

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[4] See paragraph 20 of the General Division decision.
[5] CPP Medical Report by Dr. Michael C.F. Lee dated September 1, 2016, GD2-100.

[16] However, the Claimant has a larger point to make—that the General Division systematically discounted Dr. Lee's evidence for no good reason. For example, the Claimant objects to the General Division's dismissal of Dr. Lee's May 2013 and March 2016 notes[6] because they were both prepared "many years after the MQP."[7] Again, I fail to see the error here. The first note said that the Claimant had "missed much work due to chronic back pain related from a 2001 [sic] work place injury." As the General Division noted, this opinion came more than three years after the MQP and, moreover, it referred to an injury that occurred, according to Dr. Lee's own information, before he had any involvement with the Claimant. The second note said only that the Claimant was unable to work in 2015—more than five years after the MQP.

[17] In a November 2017 letter,[8] Dr. Lee unambiguously linked the Claimant's impairment to his February 2000 workplace injury and, again, the General Division discounted the family doctor's opinion. It did so for two reasons: Dr. Lee's opinion was not supported by any medical evidence from the MQP, and it was inconsistent with evidence that the Claimant had continued to work after December 31, 2009.

[18] I don't see any error in the General Division's reasoning. First, the Claimant did not produce any medical information from before 2013. The Claimant insisted that his old files had been destroyed but, whatever the reason for their absence, fact remains that there was nothing on the record from the most relevant period. Second, since Dr. Lee apparently did not start seeing the Claimant until 2004, it is not clear whether he had access to his patient's medical records from the time of his 2000 workplace injury. Dr. Lee linked the Claimant's disability to a herniated disc, but there was no MRI or other imaging scan on the record, from 2000 or any time afterward, to corroborate that type of pathology.[9] Finally, the General Division was within its authority to assess competing items of evidence and make findings of fact—so long as those finding were based on logic and reason. Here, the General Division felt that Dr. Lee's belated insistence that the Claimant's medical condition had been "severely disabling since February 11, 2000" was outweighed by the fact that the Claimant had pursued a fairly physically demanding

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[6] Dr. Lee's notes dated May 3, 2013 (GD2-113) and March 3, 2016 (GD2-111).
[7] See General Division decision, paragraph 21.
[8] Dr. Lee's letter dated November 14, 2017, GD2-14.
[9] The one MRI report on file, dated March 18, 2013, referred to a "generalized disc bulge" at L5-S1. See GD2-119.

occupation for several years after the MQP. I see no reason to second-guess the General Division's judgement on this point.

The General Division did not disregard specialist evidence indicating that the Claimant was disabled by his 2000 back injury

[19] The Claimant wonders how the General Division could have rejected his claim despite numerous specialists' reports confirming that his physical incapacity can be traced to his 2000 workplace injury. He suggests that the General Division must have ignored or mischaracterized those reports.

[20] My review of the record does not support this allegation. As mentioned, the Claimant submitted numerous medical reports and, even though they were prepared several years after the MQP, the General Division nevertheless addressed many of them in its decision. For instance, the General Division summarized the opinions of Dr. Gunnarsson, Dr. Ostrowski, Dr. McMillan, and Dr. Zarinehbaf. Although it gave them all limited weight, one cannot say the General Division ignored them.[10]

[21] I acknowledge that medical reports can have evidentiary value even if they are dated after the end of the coverage period, but the General Division had good reason to discount the opinions of these particular specialists. As the General Division noted, none of them were treating the Claimant at the time of his workplace injury or at any time during the MQP. Dr. Ostrowski saw the Claimant for knee pain, which he said did not arise until 2013. The other specialists saw the Claimant for back pain that they attributed to his 2000 injury, but it is obvious from their reports that they had no other way of making that linkage except to take the Claimant's word for it. In any case, while the specialists might have found the Claimant impaired as of 2013, 2015, 2017, or 2019, as the case may be, they had no way of independently confirming that he was similarly impaired as of 2009.

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[10] GD decision, paragraphs 24-27, which discuss reports by Dr. Thorsteinn Gunnarsson, orthopedic surgeon, July 26, 2013 (GD2-121); Dr. J. Ostrowski, orthopedic surgeon, July 23, 2015 (GD2-114); Dr. Richard W. McMillan, physiatrist, November 23, 2018 (GD4-6); and Dr. Sanaz Zarinehbaf, May 15, 2019 (GD7-2).

[22] The Claimant may not agree with General Division's analysis but, as long as it avoids making a significant factual error, it is entitled to weigh the available the evidence as it sees fit.

The General Division did not err by disregarding the WSIB decision in his favour

[23] The Claimant complains that the General Division ignored the fact that the WSIB recognized his injury as disabling. He points to a 2016 decision of an appeals resolution officer (ARO), who found that he was entitled to a "low back permanent impairment for a herniated disc at LS-S1 and associated mechanical low back pain."[11]

[24] I agree with the Claimant that the General Division seemingly gave little or no weight to the WSIB decision, but I disagree that it erred in doing so. The WSIB is governed by a distinct set of legislative criteria that are unrelated to those of the *Canada Pension Plan*. The Claimant should also be aware that a decision from another administrative tribunal cannot be characterized as evidence.

[25] The ARO decision referred to medical evidence that was unavailable to the General Division, such as Dr. Martin's Non-Economic Loss assessment report dated May 31, 2004 and Dr. Ostrowski's orthopedic report dated June 15, 2004.[12] However, in the absence of primary documents, the General Division is under no obligation to rely on second-hand evidence. Information and opinion from secondary sources do not necessarily reflect the originals and may lack accuracy, context, and nuance.

The General Division did not unfairly deny the Claimant an opportunity to submit additional medical documents

[26] The Claimant alleges that the General Division refused to admit into evidence medical documents that, in his view, were important to his case. He is particularly aggrieved that the General Division did not wait for the results of his latest MRI, which he said would have showed the continued deterioration of his lumbar spine.

[27] I have examined how the General Division handled the evidence before and after the hearing. I have concluded that it did not act unfairly.

[11] WSIB Appeals Resolution Officer Decision dated February 10, 2016, GD2-105.
[12] See WSIB decision, GD2-108.

[28] The record shows that, early in the hearing, the presiding General Division member noted the lack of medical information in the file from before 2012. She offered the Claimant and his wife a post-hearing opportunity to obtain additional reports and set a submission deadline of August 26, 2019, which she later extended to October 8, 2019.[13]

[29] The Claimant eventually did submit a number of additional reports, but they were all dated well after 2011. The Claimant then asked for yet more time in which to submit documents, citing the pending MRI, which was then scheduled for January 25, 2020.[14] This time, the General Division refused the request, because the medical reports would have been "dated many years after the MQP" and "of very limited probative value."[15]

[30] On this, I have to agree with the General Division. The Claimant was given ample opportunity to provide relevant evidence. His case was already disadvantaged by the absence of any medical information from the MQP, and I do not see what further benefit he would have gained from an imaging report prepared more than 10 years later. The file contained evidence that the Claimant had a bulging or herniated disc after his 2000 workplace accident, but it would have been impossible to know whether any deterioration seen in the January 2020 MRI had occurred before or after December 31, 2009. It is a simple but unfortunate reality that the relevance of medical evidence diminishes with time as one proceeds from the MQP. With that in mind, I do not see how the General Division compromised the Claimant's right to present his full case when it refused to consider medical evidence from recent appointments.

CONCLUSION

[31] For the reasons discussed above, the Appellant has not demonstrated to me that the General Division committed an error that falls within the permitted grounds of appeal

[13] General Division's endorsement letter dated September 23, 2019, GD17.
[14] Claimant's email dated December 20, 2019, GD21.
[15] General Division decision, paragraph 6.

[32] The appeal is therefore dismissed.

Member, Appeal Division

HEARD ON:	August 19, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. P., Appellant S. P., Representative for the Appellant Susan Johnstone, Representative for the Respondent