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

Citation: *J. P. v Minister of Employment and Social Development*, 2020 SST 791

Tribunal File Number: AD-20-666

BETWEEN:

J. 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 18, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Claimant is a former heavy equipment operator who was working in the Alberta oil fields when he injured his back in 2014. He attempted to return to his regular job several times but no longer felt capable of physical work. X, his employer, gave him a desk job, but he continued to experience discomfort despite taking painkillers. Eventually, he decided to return to his home province, New Brunswick, where he attempted to work variously as a cook, a caterer, and a computer repairperson.

[3] In June 2016, the Claimant applied for Canada Pension Plan (CPP) disability benefits, claiming that he could no longer work because of chronic back pain and depression. 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, 2016.

[4] The Claimant appealed the Minister's refusal to the General Division of the Social Security Tribunal. In July 2018, the General Division held a hearing by teleconference and dismissed the appeal, finding insufficient medical evidence that the Claimant was incapable regularly of a substantially gainful occupation as of the MQP. In particular, the General Division found that the Claimant had not shown that his efforts to obtain and maintain employment were unsuccessful because of his health condition.[1]

[5] The Claimant appealed that decision to the Tribunal's Appeal Division, alleging various errors on the part of the General Division. One of my colleagues on the Appeal Division allowed the appeal because, in her view, the General Division had failed to adequately consider the several months of deskwork that the Claimant had performed while still in Alberta. She then

[1] See General Division decision dated July 12, 2018.

considered the evidence that was on the record and substituted her own decision for the General Division's, finding the Claimant disabled as of December 31, 2016.

[6] The Minister then went to the Federal Court of Appeal and asked it to review the Appeal Division's decision. On May 29, 2020, the Court found the Appeal Division's decision unreasonable and ordered it set aside. The Court returned to matter to the Appeal Division for reconsideration.

[7] Earlier this month, I held another hearing to discuss the issues that the Claimant raised when he first applied for leave to appeal. Now, having heard submissions from both parties, I have decided that the General Division's decision must stand.

ISSUES

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

- It failed to consider all his conditions in their totality. While the General Division considered evidence relating to his diagnosed depression and adjustment disorder, it didn't consider those conditions in combination with his back pain.
- It gave inadequate consideration to his X desk job and erroneously found that he had not attempted sedentary work.

[9] My job is to decide whether either of these allegations have merit.

ANALYSIS

[10] 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]

[11] 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).

Issue 1: Did the General Division neglect to consider the Claimant's condition in their totality?

[12] The Claimant alleges that the General Division erred in law by failing to consider the cumulative impact of his symptoms and impairments, contrary to the Federal Court of Appeal's direction in a case called *Bungay*.[3] The Claimant acknowledges that the General Division referred to the *Bungay* principle in its decision, but alleges that it then went on to assess his physical and psychological conditions separately, rather than considering their combined effect on his work capacity.

[13] I have carefully considered the Claimant's submissions. In my view, the General Division's approach to the evidence was consistent with *Bungay*.

[14] As the Claimant notes, the courts have confirmed that the CPP disability test may be satisfied by a combination of physical or mental disabilities—even where each condition might not be considered to be "severe" in itself. *Bungay* says that employability is not to be assessed in the abstract, but rather in light of all of the circumstances, including the claimant's overall medical condition, which comprises all the impairments that could affect employability, not just the "biggest" or "dominant" ones.

[15] In its decision, the General Division alluded to this principle[4] and proceeded to review what it determined were the most significant medical reports. I agree with the Claimant that it is not enough to state the law correctly; it must also be applied correctly. However, in this case, I don't see any error in how the General Division assessed the Claimant's condition.

[16] The General Division was certainly focused on the Claimant's back pain, but that is only because much of the material on file was also focused on his back pain. The majority of the available medical evidence—including two orthopedic reports, numerous physiotherapy updates, and several MRIs and x-rays—was exclusively concerned with the Claimant's spinal injury and the treatments he received for it. The only medical documents that addressed the Claimant's mental health to any extent were Dr. Robichaud's CPP medical questionnaire, which said that the Claimant experienced "depressive symptoms associated with loss of full function"[5] and Dr.

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[3] *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[4] General Division decision, paragraph 7.
[5] CPP medical questionnaire completed by Dr. Veronique Robichaud on May 31, 2016, GD2-53.

Agyapong's two psychiatric reports, in which the Claimant was diagnosed with "adjustment disorder with depressed mood secondary to significant medical and social stressors."[6]

[17] Dr. Robichaud, as the Claimant's family doctor, was well positioned to assess her patient as a whole person, and she presumably took his mental health into account when she offered a prognosis of "poor," citing the chronicity of his condition and his limited response to treatment. Similarly, Dr. Agyapong was aware of the Claimant's physical problems when he described the Claimant's mood as "objectively good" and discharged him into Dr. Robichaud's care.

[18] I find that, to the extent that Dr. Robichaud and Dr. Agyapong considered the Claimant in his entirety, so too did the General Division when it, in turn, considered their reports. The Claimant may not agree with the conclusions that the General Division drew from those reports, but one cannot say that it disregarded or misconstrued them. The General Division, in its role as trier of fact, is entitled to some leeway in how it weighs the evidence. In this case, the General Division's decision contains what appears to be a reasonably thorough summary of the Claimant's medical file, accompanied by an analysis that meaningfully discusses his physical and psychological conditions as of the MQP in the context of his personal characteristics. In short, I am satisfied that the General Division looked at the Claimant as a whole person and did not consider his various complaints in silos.

Issue 2: Did the General Division base its decision on an erroneous finding that the Claimant had not attempted sedentary work?

[19] Disability claimants typically have to show that they have made a reasonable attempt to remain in the workforce. According to a leading case called *Inclima*, where there is evidence of work capacity, a claimant must show that efforts at obtaining and maintaining employment have been unsuccessful because of his or her health condition.[7]

[20] The Claimant alleges that the General Division wrongly found that he had not attempted sedentary work. In particular, he takes issue with the General Division's finding that the Claimant's only attempt to return to work was as a line cook, which was not appropriate for his

[6] Reports by Dr. Vincent Agyapong dated April 17, 2014 (GD3-61) and May15, 2014 (GD3-66).
[7] *Inclima v Canada (Attorney General)*, 2003 FCA 117.

abilities.[8] The Claimant argues that this is an error because it disregarded his desk job at X, in which he spent some time working through pain on so-called "modified duties."

[21] Having reviewed the record, I fail to see merit in this submission. When it granted the Minister's application for judicial review, the Federal Court of Appeal provided guidance on how the Tribunal should apply the *Inclima* principle. In this case, the General Division looked at the Claimant's X desk job to assess his efforts to pursue alternative employment but **not** to assess his residual capacity. The Court held that, contrary to the view of the Appeal Division member who first heard this case, it didn't matter **when** the General Division considered the Claimant's post-impairment work activities; what mattered was the fact that it did so.

[22] It cannot be said that the General Division was unaware of the X desk job, since it explicitly referred to it in its decision:

> He was then assigned a "no job" position in the office at X where he did very little work with no shift work and regular business hours, 5 days per week. As such, he was unable to return home to Moncton very often which affected his mood.

From what I can determine, this passage accurately reflects what the Claimant told the General Division at the hearing. He testified that he had stopped taking painkillers and that he could not do the deskwork at X without them. However, the General Division was entitled to weigh the Claimant's testimony against the evidence of medical practitioners. In its decision, the General Division did just that, stating as follows: "I acknowledge the Claimant's testimony regarding his functional limitations, however, his doctors do not preclude lighter, more sedentary work."[9] There is no error in this passage.

[23] While the Claimant testified that he remained in pain while sitting in front of a computer, he also made it clear that he quit X, not only because of his health, but also because the desk job reduced his opportunities to return to his home province. The General Division, as trier of fact, was within its authority to find that the Claimant's effort to work at a desk job had been unsuccessful for reasons other than his health condition.

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[8] See General Division decision, paragraph 18.
[9] General Division decision, paragraph 15.

[24] The Claimant also argues that the General Division ignored Dr. Robichaud's finding, in a clinical note dated August 24, 2014, that he had tried a desk job but was unable to tolerate prolonged sitting due to increased back pain.[10] While the General Division did not explicitly refer to that clinical note, a decision-maker is presumed to have considered all the material before it and need not address each and every item of evidence in its reasons. That said, the General Division did discuss Dr. Robichaud's May 2016 CPP medical questionnaire in its decision, and knew that Dr. Robichaud had been the Claimant's family physician since August 2014.[11] In making its decision, the General Division was aware of Dr. Robichaud's statement that the General Division had tried a desk job but was unable to tolerate prolonged sitting due to increased back pain. I see no reason to believe that the General Division failed to take this statement into account when it found that the Claimant's disability fell short of severe and prolonged.

CONCLUSION

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

[26] The appeal is therefore dismissed.

Member, Appeal Division

HEARD ON:	September 2, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. P., Appellant Duncan Allison, Representative for the Appellant Marcus Dirnberger, Representative for the Respondent

[10] Clinical note dated August 24, 2014, GD3-24.
[11] General Division decision, paragraph 8.