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

Citation: *MM v Minister of Employment and Social Development*, 2020 SST 886

Tribunal File Number: AD-20-621

BETWEEN:

M. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: October 15, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

[2] The General Division based its decision on an important factual error. However, when this is corrected, the same decision is made. The Claimant did not have a severe disability before the end of the minimum qualifying period.

OVERVIEW

[3] M. M. (Claimant) earned a college diploma. He has worked as an electronic technologist, as a supervisor, and as a commercial driver. He stopped working in 2011 because of fatigue due to sleep apnea. The Claimant applied for a Canada Pension Plan disability pension and said that he was disabled by this condition and physical injuries.

[4] 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 had capacity to retrain or perform alternate work.

[5] Leave to appeal the General Division decision to the Tribunal's Appeal Division was granted. The appeal had a reasonable chance of success because the General Division may have based its decision on an important factual error. I have now read the parties' written submissions and heard their oral arguments. I have also considered the General Division decision and the written record. The appeal is dismissed. Although the General Division based its decision on an important factual error, when this is corrected, the same decision is made: the Claimant did not have a severe disability before the end of the minimum qualifying period (MQP).

PRELIMINARY MATTER

[6] At the Appeal Division hearing the Claimant argued that the General Division had erred because it failed to consider the Claimant's fibromyalgia. This had not been raised in the leave to

appeal application or in the Claimant's written submissions. The Minister objected to the Claimant raising this issue orally at the appeal hearing.

[7] The parties agreed that the Appeal Division could consider this issue provided that they each had an opportunity to file written submissions on it. A timetable to provide these submissions was agreed to. The parties filed their submissions in accordance with the timetable. This issue is considered in making the decision.

ISSUES

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

a) That the Claimant's refusal of treatment by tracheostomy was unreasonable;

b) That the Claimant had been non-compliant with taking prescribed medication; or

c) That the Claimant's lack of treatment for claustrophobia was unreasonable?

[9] Did the General Division make an error in law by failing to consider his fibromyalgia?

ANALYSIS

[10] An appeal to the Tribunal's Appeal Division is not a re-hearing of the original claim. Instead, the Appeal Division can only 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]

[1]This paraphrases the grounds of appeal set out in s. 58(1) of the *Department of Employment and Social Development Act*

[11] The Claimant says that the General Division based its decision on important factual errors. 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

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

Tracheostomy Treatment

[12] The first important factual error that the Claimant points to is regarding treatment for his sleep apnea. The prescribed treatment for this is to use a continuous positive air pressure machine (CPAP) when sleeping. The Claimant had trouble with this because he also has claustrophobia, and felt like he was suffocating when wearing a CPAP mask.[2]

[13] The General Division decision states that the Claimant's doctor wrote that alternative treatment was a tracheostomy. The Claimant declined this surgery.[3] The General Division concludes that while it would be reasonable to refuse tracheostomy surgery in the early days of sleep apnea diagnosis, it was not reasonable to refuse this after repeated failures to use a CPAP.[4]

[14] The Claimant says that this finding of fact was an important factual error. He points to his testimony and his representative's submissions about how intrusive this procedure is,[5] and says that the General Division made its finding of fact without regard for this evidence.

[15] I am satisfied that the General Division's finding of fact that the Claimant's refusal to undergo a tracheostomy was unreasonable was made in error. It was made without regard for all of the evidence that was before the General Division. The decision does not refer to the Claimant's testimony about why he declined this treatment. In addition, there was no evidence of

[2] General Division decision at para. 20
[3] General Division decision at para. 23, 25
[4] General Division decision at para. 42
[5] General Division hearing recording approximate minute 51:00, 1:16:50

any referral to a surgeon or other specialist who would perform this procedure. There is also no evidence that the risks or benefits of this surgery were discussed with the Claimant.

[16] The decision was based, in part, on this finding of fact.

[17] Therefore, the General Division made a reviewable error. The Appeal Division must intervene on this basis.

Treatment For Claustrophobia

[18] Second, the General Division decision states that when asked at the hearing if the Claimant had considered treatment for claustrophobia he said that he had not because his doctor had not mentioned it.[6] The Claimant says that the General Division based its decision on an important factual error in this regard.

[19] I have listened to the General Division hearing recording. When asked about treatment for claustrophobia, the Claimant testified that a CPAP technician told him to try wearing the mask during the day to become acclimated to it. He further testified that this did not work.[7] When asked about mental health therapy, the Claimant testified that his doctor suggested that he see a mental health professional for depression, but no referral was made. He did not pursue it because he couldn't afford to pay for therapy.[8]

[20] The Pension Appeals Board decided that compliance with treatment recommendations must be viewed in the context of the Claimant's circumstances.[9] The Claimant's circumstances include his financial situation. It is reasonable for a claimant to forego recommended treatment if they cannot afford to pay for it. The Claimant's finances are strained. He last worked in 2011. His wife receives provincial disability payments. The bank foreclosed on his house because he could not make payments. Therefore, his failure to obtain mental health treatment that he would have to pay for it is reasonable.

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[6] General Division decision at para. 42
[7] General Division hearing recording approximate minute 53:00.
[8] General Division hearing recording approximate minute 55:45
[9] *Bulger v. Minister of Human Resources Development* (May 18, 2000), CP 9164 (PAB)

[21] The General Division's finding of fact that the Claimant's failure to obtain treatment for claustrophobia was unreasonable was made in error. It was made without regard to all of the Claimant's circumstances. The decision was based in part on this finding of fact. This is also a reviewable error. Therefore, the Appeal Division must intervene on this basis.

Compliance With Medication

[22] Third, the General Division found as fact that the Claimant was non-compliant with taking prescribed medication, and that his non-compliance was unreasonable. The Claimant was prescribed two medications, one to help him sleep (Trazadone), and one to counteract daytime drowsiness (Modafinil). The Claimant's doctor prescribed Trazadone and told the Claimant to start with a low dose and monitor it for feasibility. The prescription was renewed later at the Claimant's request. The doctor wrote that this medication was effective at full dose. The Claimant testified that he takes Trazadone from time to time, when he really needs to sleep. He does not take it all the time because he awakens groggy after taking it.

[23] Regarding Modafinil the Claimant testified that he only tried it once. He explained that he did not want to "be on uppers and downers all the time". Nothing suggests, however, that the Claimant discussed this with his doctor, or inquired about alternative medication that would allow him to sleep properly and not be groggy.

[24] There is an evidentiary basis for the General Division's finding of fact that the Claimant was non-compliant with taking this medication. The General Division's finding of fact was not made in error. Therefore, the appeal fails on this basis.

Fibromyalgia

[25] To decide whether a claimant is disabled, the General Division must consider all of their mental and physical conditions, not just the main one(s). This is correctly set out in the General Division decision.[10] The Claimant says that the General Division made an error in law because it failed to consider his fibromyalgia.

[10] General Division decision at para. 9

[26] The only medical report that refers to this condition is dated September 2019,[11] over six years after the end of the MQP. The General Division had to decide whether the Claimant was disabled before the end of the MQP, so it did not err when it failed to consider a condition that arose after this time.

[27] In addition, the evidence regarding pain and other symptoms that could point to the Claimant having fibromyalgia before the end of the MQP are that the Claimant had a sore back, and bursitis in a shoulder and knee. When each of these conditions occurred, the Claimant went to his doctor, and was treated. He returned to his regular work after treatment on each occasion. Therefore, these conditions, taken alone or cumulatively with the Claimant's other conditions, were not disabling before the end of the MQP.

[28] Therefore, the General Division made no error in law, and the appeal fails on this basis.

REMEDY

[29] The Appeal Division must intervene because the General Division based its decision on two important factual errors - the Claimant's refusal to undergo a tracheostomy and failure to obtain treatment for claustrophobia were unreasonable. When it intervenes, the Appeal Division can give a number of remedies.[12] It is appropriate for the Appeal Division to confirm the General Division decision for the following reasons:

a) The issues to be resolved are straightforward;

b) The parties' made submissions about what remedy the Appeal Division should give and why;

c) There are no gaps in the evidence or submissions;

d) The Tribunal can decide questions of law or fact necessary to dispose of an appeal;[13] and

[11] GD12-2
[12] *Department of Employment and Social Development Act* s. 59(1)
[13] *Department of Employment and Social Development Act* s. 64(1)

e) Appeals must be concluded as quickly as the considerations of fairness and natural justice permit.[14]

The Claimant's Disability Was Not Severe

[30] The Claimant has a post-secondary education in electronic technology. He worked in this field, but stopped for reasons not related to his health. He worked as a supervisor. He then drove commercial vehicles, including para-transit buses. This work was physically demanding as it required the Claimant to assist disabled passengers as well as drive. The Claimant was injured while at work. He returned to work after each of his injuries.

[31] The Claimant stated in the questionnaire he completed with the disability pension application that he has asthma and osteoarthritis. However, there was very little written evidence about these conditions. The Claimant did not testify about them. Consequently, there is insufficient evidence to establish that these conditions, alone or in combination with the others, was a severe disability at the relevant time.

[32] The Claimant lost his commercial vehicle drivers license because of fatigue caused by sleep apnea. When he applied for the disability pension he claimed that this condition rendered him disabled.[15] The Claimant's doctor prescribed CPAP treatment for this. The Claimant tried hard for a number of years to comply with this treatment.[16] This was unsuccessful because the Claimant is claustrophobic and cannot tolerate wearing a mask.

[33] The Claimant has not unreasonably refused CPAP treatment. The medical evidence shows that he has tried, for many years, to use a CPAP machine, but cannot tolerate it.

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[14] *Social Security Tribunal Regulations* s. 3(1)
[15] GD2-66
[16] See GD2-58, GD6-13 as examples of medical reports that show the Claimant's efforts to use the CPAP unsuccessfully

[34] The Claimant's family doctor wrote that alternative treatment for sleep apnea is a tracheostomy. The Claimant has refused this.[17] However, this doctor only made this suggestion. He did not refer the Claimant to a surgeon to investigate the risks and benefits of this procedure, or to evaluate whether he was a good candidate for surgery. The Claimant's testimony about this was brief, and based on his belief about what a tracheostomy would involve. Similarly, the Claimant's submissions that this treatment is extremely intrusive was not based on evidence presented at the hearing. Therefore, there is insufficient evidence upon which to conclude that the Claimant's refusal to undergo this treatment was unreasonable.

[35] The Claimant's evidence was clear that he could not tolerate the CPAP because of his claustrophobia. No formal treatment for claustrophobia was recommended by the Claimant's doctor. A respiratory therapist did suggest, however, that the Claimant wear the CPAP mask during the day to become accustomed to it. The Claimant testified that this did not work. He also testified that he could not afford to pay for mental health therapy (recommended for depression). I accept this evidence. When all of the Claimant's circumstances are considered, it was not unreasonable for him not to pursue mental health therapy.

[36] However, the Claimant unreasonably failed to follow recommended treatment to take medication for to assist with sleep and daytime drowsiness. The evidence demonstrates that the sleep medication was effective at the correct dose. The Claimant testified that he takes it from time to time when he really needs to sleep. He did not discuss any potential changes to the medication to avoid some grogginess upon waking with his doctor. His non-compliance with this treatment was unreasonable.

[37] I must consider whether the Claimant's unreasonable refusal to comply with this treatment recommendation affects his disability status.[18] The Claimant tolerated Trazadone, although he was groggy upon waking. It is likely that his sleep apnea would be controlled if he regularly took this medication. Therefore, the Claimant's disability status was negatively affected by his failure to follow this treatment recommendation.

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[17] See GD2-58
[18] *Lalonde v. Canada (Attorney General)*, 2002 FCA 211

[38] I must also consider the Claimant's personal characteristics.[19] The Claimant was young at the end of the MQP. He has a post-secondary education, and no learning issues that would impact his ability to retrain. He has no language barriers. His personal characteristics do not negatively impair his capacity to work.

[39] Finally, the Claimant testified that when he stopped driving para-transit buses, he hoped that the employer would accommodate him by giving him a sedentary job.[20] This is evidence that the Claimant had capacity for sedentary work. When there is evidence of work capacity a claimant must show that they could not obtain or maintain work due to their health condition.[21] The Claimant presented no evidence that he tried to obtain or maintain any other work. Therefore, he has failed to meet this legal obligation.

[40] For these reasons the Claimant did not have a severe disability before the end of the MQP.

[41] In order to be disabled under the *Canada Pension Plan*, a claimant must have a disability that is both severe and prolonged.[22] Because I have concluded that the Claimant's disability is not severe, I need not consider whether it is prolonged.

CONCLUSION

[42] The appeal is dismissed.

[43] Although the General Division made an error upon which the Appeal Division must intervene, when that error is corrected, the same decision is made. The Claimant did not have a severe disability before the end of the MQP.

Valerie Hazlett Parker
Member, Appeal Division

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[19] *Villani v. Canada (Attorney General)*, 2001 FCA 248
[20] General Division hearing recording at approximate minute 1:06:00
[21] *Inclima v. Canada (Attorney General)*, 2003 FCA 117
[22] *Canada Pension Plan* s. 42(2)

HEARD ON:	September 23, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Chantelle Yang, Representative for the Appellant Viola Herbert, Representative for the Respondent