Citation: *M. B. v. Minister of Employment and Social Development,* 2014 SSTAD 366

Appeal No.: AD-13-48

BETWEEN:

M. B.

Appellant

and

Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

SOCIAL SECURITY TRIBUNAL MEMBER: HAZELYN ROSS

TYPE OF HEARING: On the Written Record

DECISION DATE: December 15, 2014

PARTIES

Appellant	-	M. B.
Appellant's Counsel	-	Thomas Zwiebel
Respondent's Representative	-	Amichai Wise

DECISION

[1] A *Canada Pension Plan*, ("CPP"), Disability Pension is not payable to the Appellant.

INTRODUCTION

[2] By a decision issued April 25, 2013, a Review Tribunal concluded that a CPP Disability Pension was not payable to the Appellant. The Appellant sought and obtained Leave to Appeal the Review Tribunal decision. The Appeal Division of the Social Security Tribunal, ("the Tribunal"), granted the application for leave in accordance with the provisions of s. 260 of the *Jobs, Growth and Long-term Prosperity Act.*

GROUNDS OF APPEAL

[3] S. 58 of the *Department of Employment and Social Development Act*, ("the DESD Act"), provides for three grounds of appeal, namely,

a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[4] S. 59 prescribes the powers of the Appeal Division as follows,

> 59**.** (1) The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

[5] Counsel for the Appellant advanced error of law as the ground of appeal. He submits that the Review Tribunal failed to apply the real world context set out in *Villani*[1] and, also failed to properly apply *Inclima*[2]. The Tribunal granted Leave to Appeal on the basis that,

> [14] "Without addressing the merits of the case, the Tribunal finds that the *dicta* of the FCA in *Villani* provide a clear direction that the Review Tribunal was bound to follow. Therefore, it was an error of law for the Review Tribunal to state, as it did, that the *Villani* case does not apply."

ISSUE

[6] The issue before the Tribunal is whether the Review Tribunal committed an error of law when it stated that *Villani* did not apply to the Appellant's case?

SUBMISSIONS

[7] Once leave has been granted, s. 42 of the *Social Security Tribunal Regulations SOR/ 2013-60* ("the Regulations") gives the parties 45 days to either file submissions with the Appeal Division or to file a notice stating that they have no submissions. The Tribunal received submissions from Counsel for the Appellant on June 23, 2014. Counsel's submissions consisted of the clinical notes and records of the Appellant's family doctor, Dr. Accardo and a copy of the Appellant's WSIB file.

[8] On September 10, 2014, the Tribunal received further documents from Counsel for the Appellant, namely, a Medical report of Dr. Igor Wilderman in which he states that the Appellant is "not suited to any full-time, part-time, or seasonal employment."

[9] Counsel for the Appellant made no other submissions.

[10] On July 17, 2014, the Tribunal received submissions from the Respondent's counsel. The Respondent's counsel took the position that with respect to the ground on which leave to appeal was granted the Review Tribunal's decision was reasonable and contained no reviewable

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[1] *Villani v. Canada (A. G.),* 2001 FCA 248.
[2] *Inclima v. Canada (A.G.),* 2003 FCA 117.

error that would permit the Appeal Division to intervene. Accordingly, the Appeal Division should dismiss the appeal. As well, in the view of the Respondent's counsel, Dr. Accardo's clinical notes and records as well as the Appellant's WSIB file documents were in the nature of new evidence and were for that reason inadmissible.

ANALYSIS

The applicable standard of review

[11] It has come to this Tribunal's attention that that grounds of appeal listed in s. 58 are identical to the former grounds applicable to Umpires' decisions under the former subsection 115(2) of the *Employment Insurance Act*. In the context of decisions of the former Board of Umpires reviewing Board of Referees decisions, the case law establishes that an Umpire was required to identify the appropriate standard of review to exercise. In *Canada (Attorney General) v. Murugaiah* 2008 FCA 10 the Court stated that where the question before the Board of Referees had been one of mixed law and fact, the Umpire was required to identify the appropriate standard of review, namely, "reasonableness simpliciter". This view was repeated in *Canada (Attorney General) v White* 2011 FCA 190 where the Umpire was required to stipulate the standard of review applicable to the Board's assessment of the facts with respect to the issue of just cause. The argument may be advanced that by analogy, the Appeal Division must also stipulate the standard of review applicable to its review of General Division decisions and in this case, the Review Tribunal decision.

[12] The Tribunal is of the view that in order to exercise the jurisdiction contained in ss. 59(1), it must apply the type of "standard of review" analysis demanded by *Dunsmuir* at paragraph 62, namely,

> [62] In summary, the process involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[13] The view is urged by Counsel for the Respondent that the test for determining "severe and prolonged" within the meaning of the CPP does not fall within the categories reserved for a correctness standard of review. Counsel for the Respondent submitted that the Tribunal must apply a "reasonableness" standard to its review of the Review Tribunal decision. In Counsel's argument, in its decision-making the Review Tribunal was addressing neither a question pertaining to either its jurisdiction nor the constitution nor was it addressing a question of central importance to the legal system as a whole and outside the expertise of the Review Tribunal. Rather, the Review Tribunal was interpreting and applying its "home" statute. Counsel reasoned that according to *Dunsmuir,* "reasonableness" is the appropriate standard of review to be applied and applying the standard of reasonableness" requires the Tribunal to decide whether, taken as a whole, the decision falls within the range of possible acceptable outcomes which are defensible in respect of the facts and the law. The Tribunal concurs.

Is the Review Tribunal decision "reasonable"?

[14] The Appellant's Counsel submits it was an error for the Review Tribunal to assert that *Villani* did not apply to the Appellant's case, while the Respondent's Counsel argues that, in the circumstances of the case, the Review Tribunal committed no error. The Respondent's Counsel submits that once the Review Tribunal found that the Appellant did not have a "serious medical condition" then, following *Giannaros v Canada (Minister of Social Development)* 2005 FCA 187 at 14-15, it was not necessary for it to undergo a "real world approach" analysis. Counsel for the Respondent offered the further submission that the Review Tribunal specifically addressed the *Villani* factors at paragraph 81 of its decision.

[15] Paragraph 81 states,

> [81] The Tribunal finds that the *Villani* case does not apply because of the Appellant's relatively young age, his ability to converse in English, and because he has transferable skills learned in various restaurant work environments as dishwasher and supervisor of a crew, working at gas bar, a factory as a pizza maker and in his work as a battery booster and tow truck driver.

[16] Counsel for the Respondent characterizes the statement "*Villani* does not apply" as poor phrasing on the part of the Review Tribunal; and he argues that the reasoning applied by the Tribunal indicates that the *Villani* factors, were, indeed, considered and applied, and that the decision is understandable and eminently reasonable.

[17] The Tribunal is not entirely persuaded of Counsel for the Respondent's view. In the Tribunal's view, correctly applied, *Villani* always requires a Review Tribunal to assess the characteristics of the Appellant as part of its examination of the Appellant's retained capacity for employment and its determination on "severe". The Tribunal finds that in *Villani* itself, the Federal Court of Appeal has provided clear direction in this regard. In the Tribunal's view it remains an error to state in the manner that the Review Tribunal did that *Villani* did not apply. Nonetheless, because of the impact of the *Giannaros*[3] decision, this finding alone may not be fatal to the Review Tribunal decision when it is taken as a whole.

The impact of *Giannaros* on the Review Tribunal decision

[18] Relying on *Giannaros,* Counsel for the Respondent has put forward the alternative argument that having found that the Appellant did not have a severe medical condition, it was not necessary for the Review Tribunal to apply the real world approach to the Appellant's case. In paragraphs14-15 of its decision in *Giannaros*, the Federal Court of Appeal opined that whenever the decision maker is not persuaded that there is a serious medical condition, it is not necessary to undergo the "real world approach" analysis. In the Tribunal's view, for *Giannaros* to apply, it presupposes a finding separate and apart from the severity analysis and on examining the decision the Tribunal finds that the Review Tribunal did make such an anterior finding.[4] At paragraph 75, the Review Tribunal states,

> [75] The Tribunal noted the lack of objective evidence between 2005-2010 and relied on the Appellant's subjective evidence to fill in the gaps. However the Tribunal did not find the Appellant's subjective evidence was compelling in presenting a severe condition in regards to his shoulders, headaches, and low back pain and/or his depression during this period, and more specifically around his MQP of December 31, 2009.

[3] *Giannaros v. Canada (Minister of Social Development),* 2005 FCA 187.
[4] Review Tribunal decision, para. 75

[19] Thus, applying the reasoning in *Giannaros* once the Review Tribunal found that the Appellant had failed to establish that he had a severe condition, it was no longer necessary for the Review Tribunal to consider the *Villani* factors. Accordingly, while the Tribunal finds the Review Tribunal erred in its application of *Villani*, the Tribunal does not find the error fatal to the overall decision.

Is the Review Tribunal's decision reasonable?

[20] Counsel for the Respondent submits that the Review Tribunal rendered a decision that is intelligible and which falls within the range of possible acceptable outcomes available within the law and the evidence that was before it. Counsel for the Respondent also notes that at paragraph 75 of its decision, the Review Tribunal provided an explanation for the decision it reached and that overall the decision is understandable and eminently reasonable. The Tribunal concurs.

[21] On examining the Review Tribunal decision, it is evident that the Review Tribunal made initial findings on the seriousness or severity of the Appellant's medical condition based on his subjective testimony and what objective evidence that was before it. The Review Tribunal's findings and decision was based, in part, on the Appellant's non- compliance with treatment recommendations, his failure to adhere to a prescribed medication regime and his failure to continue with anxiety and depression management. The Review Tribunal's findings on severe were also based on the absence of medical evidence to support the Appellant's claim that he suffered from back pain.

[22] Further, the Review Tribunal found that there was neither documentary nor subjective evidence regarding any "further investigations, consults and /or therapy for either of these conditions" namely headaches and neck pain.[5] All of which led the Review Tribunal to conclude that the Appellant had not met his onus to establish that his medical condition was severe within the meaning of the CPP.

[5] Review Tribunal decision, para. 69.

[23] In *Gennarios*, para. 14, Nadon, J. A. observed that in *Villani*, supra, at para. 50, the Federal Court stated unequivocally that a claimant must always be in a position to demonstrate that he or she suffers from a severe and prolonged disability which prevents him or her from working:

> [50] This restatement of the approach to the definition of disability does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation". Medical evidence will still be needed as will evidence of employment efforts and possibilities. Cross-examination will, of course, be available to test the veracity and credibility of the evidence of claimants and others.

[24] The Review Tribunal's decision clearly demonstrates that it did not find the Appellant had discharged this onus. According to the dicta in *Gennarios*, this failure would render moot any further discussion of the "severe" criteria or the application of the real world approach prescribed by *Villani.*

[25] It follows, therefore, that notwithstanding any error relating to the statement, "*Villani* does not apply" the Review Tribunal's decision, is in all the circumstances of the case, reasonable.

Are the Medical Records and WSIB Documents new evidence?

[26] Having found that the Review Tribunal decision was reasonable it is not strictly necessary for the Tribunal to address the question of the admissibility of the documents that the Appellant's Counsel provided as part of his submissions. Nonetheless, the Tribunal elects to do so.

[27] The Tribunal notes that s. 42 of the Regulations do not explicitly set out either the form of or the content of submissions and it must be noted that this is not a new facts application. However, it is apparent from the Review Tribunal decision that the Appellant had given extensive testimony on his WSIB application and the medical content relating to it, such that the WSIB materials is not new evidence in the sense that it is not evidence that could not have been discovered with the application of reasonable diligence prior to the Review Tribunal hearing.

The Tribunal makes the same finding concerning the clinical notes and records of the Appellant's family physician. With respect to the September 6, 2014 letter by Dr. Accardo; this letter is not admissible as being submitted outside of the 45 day time limit for submissions.

[28] For all of the above reasons the appeal is dismissed.

CONCLUSION

[29] The appeal is dismissed.

Hazelyn Ross
Member, Appeal Division