Citation: *K. A. v. Minister of Employment and Social Development,* 2014 SSTAD 404

Appeal No: AD-13-41

BETWEEN:

K. A.

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 30, 2014

PARTIES

Appellant	-	K. A.
Appellant's Representative	-	Paul Sacco
Respondent's Representative	-	Linda Lafond

DECISION

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

INTRODUCTION

[2] The Appellant obtained Leave to appeal the decision of a Review Tribunal issued on May 23, 2013, denying him a CPP disability pension. The Member of the Social Security Tribunal, ("the Tribunal"), that granted Leave, did so on the narrow ground that the Appellant's argument that his participation in a retraining programme for several years after the MQP was not, necessarily, strong evidence that he had capacity to regularly pursue gainful employment as of the MQP.

[3] Once leave has been granted, s. 42 of *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. On May 23, 2014 the Tribunal received a Notice of No Submission from the Appellant's representative. On July 03, 2014, the Tribunal received submissions from the Respondent's representative. The Tribunal has received no other submissions.

THE APPLICABLE LEGISLATION

Grounds of Appeal

[4] With respect to the permissible grounds of appeal and the powers of the Appeal Division, ss. 58 (1) of the *Department of Employment and Social Development Act*, ("the DESD

Act") provides for three grounds of appeal, while ss. 59 (1) prescribes the powers of the Appeal Division.

[5] The statutory provisions set out,

> 58(1) - The only grounds of appeal are,
>
> 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.
>
> 59(1) - Decision - 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.

[6] From the manner in which the Appellant's representative framed the Application, on the ground on which Leave to appeal was granted the Tribunal inferred that the Appellant was invoking either the second or the third ground of Appeal.

THE SUBMISSIONS

[7] In her submissions the Respondent's representative 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 error that would permit the Appeal Division to intervene. Accordingly, the Appeal Division should dismiss the appeal.

[8] The Appellant did not make further submissions, but it is clear that, in his view, the appeal ought to be allowed.

ANALYSIS

The applicable standard of review

[9] In earlier decisions this Tribunal concluded that it was appropriate for the Appeal Division to stipulate the standard of review applicable to its review of General Division decisions. For the Tribunal's purposes, decisions of the Review Tribunal are decisions of the General Division. The Tribunal sees no reason to depart from that position. However, the Tribunal is also of the view that in order to exercise the jurisdiction contained in section 59(1), it must apply the two step 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.

[10] 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.

[11] Thus, the issue before this Tribunal is whether the Review Tribunal committed an error when it concluded that the fact that the Appellant participated in and successfully completed a retraining programme after the date of his MQP of December 2002, was indicative that he had retained work capacity prior to the MQP.

[12] The Appellant's representative contends that the Appellant's courses took him an inordinate amount of time to complete and ultimately exceeded his physical limitations. He further contends that the Appellant made a reasonable effort to undertake and participate in a Vocational Rehabilitation programme but, ultimately, he failed. The Appellant's representative also contends that while the Appellant was found to be a candidate for retraining by WSIB and cooperated, this fact alone was not an impediment to the Review Tribunal finding that the Appellant's disability was severe.

[13] The main contention being that the fact that the Appellant could be retrained does not mean that the Appellant has demonstrated the capacity to work.

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, which 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.

[15] Counsel for the Respondent characterises 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.

[16] 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*[1] 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

[17] 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.[2]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.

[18] 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

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

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?

[19] 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 on 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.

[20] 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.

[21] 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 headache and neck pain.[3]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.

[22] 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

[3] Review Tribunal decision, para. 69.

> 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.

[23] 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.*

[24] 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?

[25] 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.

[26] 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.

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

CONCLUSION

[28] The appeal is dismissed.

Hazelyn Ross
Member, Appeal Division