



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. B. v. Minister of Employment and Social Development*, 2016 SSTADIS 50

Date: January 22, 2016

File number: AD-15-919

APPEAL DIVISION

Between:

S. B.

Appellant

and

**Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)**

Respondent

Decision by: Valerie Hazlett Parker, Member, Appeal Division

Heard by Videoconference on January 19, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant

S. B.

Counsel for the Respondent

Vanessa Luna

INTRODUCTION

[1] The Appellant claimed that she was disabled by fibromyalgia, anxiety, depression, chronic pain conditions and physical limitations when she applied for a *Canada Pension Plan* disability pension. The Respondent denied her claim initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals. The appeal was transferred to the General Division of the Social Security Tribunal on April 1, 2013 pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division held an in-person hearing and on April 30, 2015 dismissed the appeal.

[2] On August 31, 2015 the Appellant was granted leave to appeal the General Division decision to the Appeal Division of the Tribunal. She argued that the General Division decision contained errors as it did not consider her condition in totality, failed to consider all of her symptoms of fibromyalgia and erred in how it weighed evidence of her work experience to reach the decision. The Respondent argued that the General Division decision contained no errors and should stand. Each of these grounds of appeal is considered below.

[3] This appeal was heard by videoconference after considering the following:

- a) The complexity of the issues under appeal;
- b) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit; and

- c) the nature of the submissions of the parties, including how each characterized the issues in this appeal.

ANALYSIS

[4] The *Department of Employment and Social Development Act* governs the operation of this Tribunal. Section 58 of the Act sets out that the only grounds of appeal are that

- 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.

Section 59 of the Act sets out the remedies that the Appeal Division can grant on an appeal. It states that

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.

I must decide if the General Division decision contains an error as set out in section 58 of the Act, and if so, what remedy is appropriate to award in this case. I have considered the written material in the appeal file and the parties' submissions in reaching this decision.

Consideration of the Appellant's Conditions in Totality

[5] In *Bungay v. Canada (Attorney General)*, 2011 FCA 47 the Federal Court of Appeal concluded that in order to decide if a disability pension claimant was disabled under the *Canada Pension Plan* all of her conditions must be examined together, not just the main disabling condition. The first ground of appeal advanced by the Appellant was that the General Division decision contained an error in law because it failed to consider all of her medical conditions in totality. In her written submissions, the Appellant suggested that the General Division decision contained an analysis of her range of motion impairment related to fibromyalgia, mood and

stress disorders, and sleep disorder with fatigue, and concluded that each of these conditions was not severe. It did not, however, consider the combined effect of these and other medical conditions on her capacity to pursue a substantially gainful occupation.

[6] In oral argument, the Appellant forcefully argued that she had been diagnosed with ankylosing spondylosis and that this was not considered by the General Division and should have been as it is the basis for all of her symptoms.

[7] The Respondent argued that the General Division, by considering each of the Appellant's claimed conditions, did in fact consider their combined effect on her capacity to work. Further, it contended that the decision weighed and analysed the evidence regarding each condition as it was reported in the decision. This was demonstrated as the decision summarized the medical evidence and testimony in a combined fashion. Finally, counsel argued that the *Bungay* decision should be distinguished from the one at hand because in that case the Pension Appeals Board ignored all but one of Ms. Bungay's medical conditions whereas in this case the General Division decision referred to and analysed all of the Appellant's conditions.

[8] The law is clear that to decide if a *Canada Pension Plan* disability pension claimant is disabled all of her claimed conditions and their cumulative effect on her capacity regularly of pursuing any substantially gainful occupation must be examined. I am not satisfied that the General Division did so in this case. I accept that the decision summarized the evidence that was before it. This is reported in the section of the decision entitled Evidence. I am not persuaded by the Respondent's argument that this summary included any analysis or weighing of this evidence; it includes a chronological synopsis of all of the evidence, with testimony and written evidence reported in a combined fashion.

[9] The General Division decision stated at paragraph 58 that it based its decision on the "analysis in this section" (the section entitled Analysis). This further supports my conclusion that the reporting of the evidence in the Evidence section of the decision contained no analysis of it.

[10] I am not persuaded that the *Bungay* decision should be distinguished from the matter at hand. While the facts may be different, the general principle, that all of a claimant's disabilities

must be examined is relevant and to be applied in this case. I acknowledge that the decision contained a thoughtful and thorough consideration of the Appellant's complaints related to range of motion restrictions, mental health issues and sleep issues and their treatment. The decision did not, however, consider how the combined effect of these conditions impacted the Appellant. This is an error in law.

[11] The decision makes no specific reference to ankylosing spondylosis. From the submissions made at the appeal hearing, it was not clear to me if this condition was presented at the General Division hearing, although there was evidence of back pain and some medical investigations in that regard. If this diagnosis was not made until after the General Division hearing, the General Division was correct not to have considered it.

Consideration of All Fibromyalgia Symptoms:

[12] The Appellant also argued that the General Division decision contained an error as it did not consider all of her fibromyalgia symptoms, but only her restricted range of motion. In her written submissions the Appellant referred to a number of medical reports that set out a variety of fibromyalgia symptoms that the Appellant suffered from including mood issues, sleep disruption, memory, concentration and focus difficulties, limitations with sitting, standing, walking, bending, reaching, and driving limitations. She argued that these were not considered.

[13] In oral argument the Appellant also took exception to any statement that she was unwilling to attend for mental health treatment. She repeated her evidence that she underwent mental health treatment for over eight months. She stated that the treatment provider committed suicide, and she was thereafter reluctant to pursue further such treatment.

[14] Conversely the Respondent argued that the General Division analysed the evidence regarding her varied symptoms because it reported it in the decision. In addition, counsel for the Respondent submitted that the decision clearly considered the mental health symptoms that the Appellant suffered and the recommendation for treatment which the Appellant did not follow.

[15] I agree with counsel for the Respondent that the General Division decision must be read as a whole to determine if all of the fibromyalgia symptoms were considered. The

decision clearly considered the range of motion and mental health issues. I am not persuaded, however, that by interweaving testimony and medical evidence in the summary of the evidence the General Division can be said to have considered and drawn inferences regarding the reported symptoms. The decision does not set out what impact the Appellant's pain, concentration, memory, focus or sleep deprivation had on her capacity to pursue a substantially gainful occupation, or how these symptoms affected her daily activities. The decision also did not indicate that the General Division was alive to the cumulative effect of these symptoms on the medical conditions that were considered in reaching the decision.

[16] The Appellant argued that the lack of considering symptoms was an error in law as it resulted in the misapplication of the legal principles in *Villani v. Canada (Attorney General)*, 2001 FCA 248. Accordingly, it should be assessed on a correctness standard of review. Counsel for the Respondent argued that this error would be an error of mixed fact and law, and as such the Appeal Division should show some deference to the General Division when assessing it.

[17] I agree with the Appellant that the lack of consideration of the Appellant's symptoms resulted in a misapplication of the legal principles set out in *Villani*. That decision stated that a claimant's personal characteristics are to be considered to determine if she is disabled. The General Division did not consider a number of her personal characteristics, which would be affected by her symptoms. I am thus persuaded that the General Division erred in law in this regard.

Consideration of Evidence Regarding Work Experience:

[18] Finally, the Appellant argued that the General Division erred as it misapprehended the evidence regarding her work experience. In oral argument the Appellant stated that she could no longer remember any of the work skills that she had as a young woman. She also contended that as she last worked in 2002 and has not kept up any skills, they would now be outdated and not useful to any employer. The Appellant also stated that she was not involved with the music industry to earn an income, but so that her children could remember her, and that it was her Father who set up this corporation for her.

[19] The Respondent argued that the General Division reasonably considered the Appellant's work experience and reasonably concluded that although at present she would have to seek out entry-level jobs, upgrading her skills would likely be possible with accommodations.

[20] It was not disputed that the General Division ought to the Appellant's work experience (*Villani*). It did so correctly. The evidentiary basis for its conclusion on this was set out. I am not persuaded that the General Division erred when it referred to the Appellant having a "range of skills", as she had experience in a number of different jobs. The evidentiary basis for the conclusion that her music industry involvement was more than hobby was also set out. Accordingly, I am not persuaded that the General Division made an error in this regard. The appeal cannot succeed on this basis.

CONCLUSION

[21] The appeal is allowed as I am satisfied, on balance, that the General Division erred in law as it did not consider all of the Appellant's disabilities together or all of her fibromyalgia symptoms. This also resulted in a misapplication of the *Villani* principles to the matter at hand. These errors fall under section 58 of the Act.

[22] Section 59 of the Act sets out the remedies that can be granted on an appeal. As I did not hear any evidence in this matter, it is not appropriate for me to give the decision that the General Division should have given. The matter is referred back to the General Division for reconsideration. To avoid any possibility of an apprehension of bias the matter should be assigned to a different General Division Member and the decision of April 30, 2015 removed from the record.

Valerie Hazlett Parker
Member, Appeal Division