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

Citation: ***K. M. v. Minister of Employment and Social Development,*** **2016 SSTADIS 89**

Date: January 25, 2016

File number: AD-15-344

APPEAL DIVISION

Between:

K. M.

Appellant

and

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

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

DECISION

[1] The Appeal is dismissed.

INTRODUCTION

[2] On March 10, 2015 the General Division of the Social Security Tribunal of Canada, (the "Tribunal"), issued a decision in which it denied the Appellant's appeal from a reconsideration decision that refused him payment of a *Canada Pension Plan*, ("CPP"), disability pension. The Appellant sought and obtained leave to appeal this decision.

GROUNDS OF THE APPEAL

[3] Leave to Appeal was granted on the basis that by making only scant reference to the Appellant's mental health condition, specifically, his depression in its decision, the General Division may have erred. Leave was also granted on the basis that the General Division's treatment of the Appellant's "*Villani*"[1] factors gave rise to the possibility of an error of law.

ISSUES

[4] The following issues arise for determination by the Appeal Division:

1. Did the General Division err by failing to give appropriate consideration to the Appellant's mental health? If so, was this an error of law as submitted by Counsel for the Appellant?
2. In assessing whether or not the Appellant had a disability that was severe and prolonged, did the General Division commit an error law in its treatment of the *Villani* factors?

THE LAW RESPECTING THE GRANT OF APPEALS

[5] Section 55 of the *Department of Employment and Social Development Act*, (DESD Act), grants a right of appeal to any person who is the subject of a General Division decision, namely:

---

[1] *Villani v. Canada (Attorney General)* 2001FCA 248.

> **55.** *Appeal* – Any decision of the General Division may be appealed to the Appeal Division by any person who is the subject of the decision and other prescribed person.

[6] Upon granting leave to appeal, the Appeal Division must then decide the matter. The DESD Act provides for a number of ways how this is done, Thus:

> **59.** *Decision* – (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.

[7] The DESD Act also prescribes the grounds of appeal in the following provision:

> **58(1)** *Grounds of Appeal* – 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.

STANDARD OF REVIEW

[8] Counsels for the parties did not agree on what the standard of review should be. Counsel for the Appellant submitted that the issues on which leave to appeal was granted involved errors of law; therefore, correctness was the appropriate standard of review. On the other hand, the Respondent's representative submitted that the appeal involves questions of fact and questions of mixed law and fact; therefore, reasonableness was the appropriate standard of review.

[9] Recent decisions of the Federal Court of Appeal and the Federal Court have, likely rendered redundant any engagement in a standard of review analysis by the Appeal Division. This new position was first set out in *Canada (Attorney General) v. Jean; Canada (Attorney General) v. Paradis*, 2015 CAF 242 (CanLII), 2015 FCA 242. In *Jean,* The Federal Court of Appeal expressed the view[2] that the Appeal Division ought to

[2] Paras. 19, 20 (albeit in *obiter dicta)*

confine its inquiry to an assessment of whether or not the General Division breached any of the provisions of section 58(1) of the DESD Act.

[10] The Federal Court of Appeal drew a distinction between appeals that had been heard pursuant to the transitional provisions of the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19, ss. 266-267, and appeals from decisions rendered by the General Division of the Tribunal. It took the position that when the Appeal Division hears appeals under section 58 (1) of the DESD Act, the governing statute of the Tribunal, it needs must confine itself to the mandate provided by sections 55 to 69 of the Act:

> "[19]… When it acts as an administrative appeal tribunal for decisions rendered by the General Division of the Social Security Tribunal, the Appeal Division does not exercise a superintending power similar to that exercised by a higher court. Given the risk of a blurring of lines, it seems to me that we must refrain from borrowing from the terminology and spirit of judicial review in an administrative appeal context. Not only does the Appeal Division have as much expertise as the General Division of the Social security Tribunal and thus is not required to show deference, but an administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or, in the case of "federal board", for the Federal Court and the Federal Court of Appeal (ss.18.1 and 28 of the Federal Courts Act, R.S.C. 1985, c. F-7). Where it hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act,* the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act. In particular, it must determine whether the General Division "erred in law in making its decision, whether or not the error appears on the face of the record" (paragraph 58(1)(b) of the *Act).* There is no need to add to this wording the case law that has developed on judicial review.

[11] The Federal Court of Appeal returned to the question in *Maunder v. Canada (Attorney General),* 2015 FCA 274, affirming the position set out in *Jean /Paradis.*

[12] It is not clear from the above paragraph whether the argument is with "what" the Appeal Division does or whether it is with how what it does is styled. What seems to be clear is that the Federal Court of Appeal is decreeing that the Appeal Division only apply sections 56 to 59 of the DESD Act. Perhaps, further direction will come from the Court on how the Appeal Division should apply that mandate. For now, the Appeal Division finds that a standard of review analysis is not required. The scope of the enquiry will be confined to determining whether there has been a breach of subsection 58(1) of the CPP.

SUBMISSIONS

[13] The Appeal Division received submissions from both parties. Counsel for the Appellant mainly addressed the standard of review that the Appeal Division should apply. However, she indicated that she was also relying on the submissions she made in leave application. In the leave application, Counsel for the Appellant argued that the General Division failed to properly consider evidence of the Appellant's depression and relied too heavily on the Appellant's evidence that his mental health had improved as well as failed to consider evidence that showed that the Appellant's condition remained severe even after he started seeing a psychiatrist in 2013.

[14] The Respondent's representative submitted that on the grounds on which leave to appeal was granted the General Division had committed no error, arguing that the General Division had properly evaluated the evidence regarding the Appellant's depression and had referred to that evidence directly in the decision.[3] It was also submitted that in light of the Appellant's testimony and the medical evidence the General Division did not fail to consider the Appellant's mental health condition after his MQP.

[15] On the question of whether the General Division had properly applied the principles set out in *Villani v. Canada (Attorney General)* 2001FCA 248, the Respondent's representative submitted that General Division "did not err in either setting out the principles of *Villani v. Canada (Attorney General)* 2001FCA 248 or in considering them in conjunction with the Appellant's medical conditions.

---

[3] "Contrary to the Appellant's assertions, the SST-GD's decision directly addressed the Appellant's "insomnia, anxiety and worsening breathing issues and depression". Further, the SST-GD recognized that the appellant's anxiety and panic attacks worsened in February 2010 when he returned to consuming alcohol and other drugs."

"The SST-GD's decision also specifically considered the Appellant's hospitalisation as a result of his complaints from "suicidal ideation and chronic depression." However, the SST-GD, as the trier of fact, weighed this evidence against the Appellant's admission that, compared to his MQP date "his mental health was better as he had begun to see a psychiatrist again in 2013", that his mental health has "improved since his episodes with suicidal ideation in 2010" and that "he experiences some panic and anxiety which go away once he has used his medication and his breathing returns to normal."

ANALYSIS

Did the General Division fail to give appropriate consideration to the Appellant's depression?

[16] Leave to Appeal was granted, in part, on the basis that the General Division may have erred in law by failing to give appropriate consideration to the Appellant's mental health condition. The Appellant stopped working on the 30th October 2009, which is some three years before the end of his minimum qualifying period, (MQP), of December 31, 2012. The General Division hearing was held some two years and one month after the MQP.

[17] In the questionnaire that accompanied his application for CPP disability benefits, the Appellant indicated that he stopped working because of depression, anxiety, panic attacks, stress and COPD. (GT1-35) He indicated that these were the illnesses that prevented him from working. (GT1-37) His family physician, Dr. Nemtean, diagnosed him with drug dependency, personality disorder, major depression and COPD. The family physician noted that "in 2010 patient became more depressed and suicidal. Was hospitalized on several occasions due to suicidal behaviour and thoughts." (GT1-42)

[18] At paragraph 16 of the decision, the General Division noted that the Appellant testified as follows: "He states that his mental health has improved since his episodes with suicidal ideation in 2010" the General Division went on to find that, on a balance of probabilities, the Appellant did not have a severe disability on or before his MQP."

[19] Counsel for the Appellant submitted the General Division erred by failing to consider evidence which showed that the Appellant's condition remained severe after he had seen a psychiatrist in 2013. She relies largely on medical reports dated between February 2010 and September 2013. (AD1-7) Counsel for the Appellant placed particular reliance on the February 6, 2013 medical report of Dr. Nemtean, provided to Holly Gomes, in which he made the diagnoses referred to earlier. The text of this report is reproduced below:

> "I am writing this letter in regards to Mr M.'s application for disability benefits for CPP I have recently seen him on February 4, 2013 and his condition is still severe, prolonged and disabling. He is chronically depressed despite medications and I am happy to report that he is drug and alcohol free. Despite this he remains very depressed and anxious, and hardly capable of employment. In addition he has

> severe COPD and suffers from shortness of breath with exertion. He formerly worked as a welder, but his COPD would prevent him from doing any occupation requiring physical work for now and in the future.
>
> Furthermore Mr. M. has limited educational tools and has personality disorder which would make his ability to integrate into today's workforce impossible. I have known him for years, and his work history in the past was constantly fraught with upheaval even at the best of times. It is my opinion that the combination of his poor physical state combined with his challenging issues of depression and anxiety would preclude any meaningful employment for now and future. His current medications include trazodone 100mg daily, Xanax 0.6mg twice dally and zopicone 7.5 mg for sleep.
>
> He has tried numerous different medications in the past several years with limited benefit on his overall mental status. He is constantly anxious, worried and has limitations in insight and judgement to be able to overcome these barriers."

[20] Earlier medical reports indicated that while the Appellant had, indeed been diagnosed with several mental health conditions that included adjustment disorder and depression his disorders could be managed with medication and therapy. For example, in February 2010 Dr. Hassan diagnosed the Appellant with "adjustment disorder with depressed mood". (GT1-51) Dr. Hassan's diagnosis followed the Appellant's hospitalisation for alcoholism. Following that same hospitalisation, Dr. Malik indicated that there were treatment strategies he wished to explore with the Appellant, although it was clear that the choice of strategy would be left to the Appellant:

> "We would like to look at his various options with regards to treating his chronic suicidality. If he could be trusted and would be agreeable, consideration to put him on Lithium therapy which hopefully can soothe his chronic ongoing suicidal ideations will be considered. He will also be encouraged to attend Unit activities and get some grief counselling. He will also be encouraged to seek help with regards to his alcohol abuse as well as substance abuse problems. We would like to look at his various options with regards to treating his chronic suicidality."

Also during this hospitalisation the Appellant was referred to the Concurrent Disorder services, participating in both individual and group sessions. (GT1-59) he was then referred back to his family doctor. (GT1-59)

[21] On April 28, 2010, Dr. Malik made the following diagnosis:

> "K. presented with a number of complaints including having sleep problems, feeling tense and angry most of the time, having concentration difficulties, and feeling agitated and depressed since January/February of this year when he stopped taking OxyContin."

[22] Thus, it would seem that, at least up until January or February 2010, the Appellant's mental health issues had largely been managed with medication. In September 2010, Dr. Nemtean informed Service Canada that not only was he the Appellant's family doctor, but so far as he was aware, the Appellant was not then under the care of a psychiatrist and had not attended any support programmes since he, Dr. Nemtean, had been his family doctor. (GT1-57) Dr. Nemtean did not then express the opinion that the Appellant was disabled. However, in January 2011, Dr. Nemtean took the position that the Appellant:

> "was completely disabled due to his severe chronic obstructive pulmonary disease which limited his "exertional capacity" and his ability to do sustained work. He also suffers from a mental disorder, the severity of which requires him to take multiple medications, which leaves him fatigued and suffering from poor concentration, poor judgment and lack of ability to work on an ongoing basis. I believe him to be completely disabled on both counts." (GT1-62)

[23] The Appellant began to see a psychiatrist, Dr. Zofia Aleksiejuk in July 2013. She diagnosed him with chronic, major depressive disorder and mixed personality disorder in addition to COPD and Erectile Dysfunction. (GT4-21-27 It is to Dr. Aleksiejuk that Counsel for the Appellant refers when she states that his condition remained severe after he began to see a psychiatrist.

[24] Counsel for the Appellant contends that the General Division ignored evidence of the continued severity of the Appellant's mental health conditions; however, the Appeal Division is not persuaded of the truth of this argument. In its decision, the General Division refers to the appellant's mental health conditions, noting that it was the Appellant's testimony at the hearing was that the only medications he was taking were his "COPD inhalers and an antidepressant."

[25] While acknowledging that there may be some validity to the argument that a condition that continued to be serious after the MQP was likely a condition that was serious prior to the MQP, the Appeal Division finds that the General Division decision does not, on

its face, lend itself unequivocally to the argument put forward by Counsel for the Appellant. The General Division had before it not only the Appellant's testimony; it also had the reports of his doctors. While the General Division did not do much more than cite the Appellant's oral testimony concerning his mental health and personality disorder, the Appeal Division finds that given the medical evidence this is not an error that could materially alter the General Division's findings concerning the effect of the Appellant's mental health condition on his ability to regularly pursue any substantially gainful occupation.

[26] The Appeal Division comes to this conclusion despite the medical report of Dr. Zofia Aleksiejuk. First, at the time she wrote the report Dr. Aleksiejuk had met with the Appellant on only three occasions.[4] (GT4-21) Second, Dr. Aleksiejuk wrote her report in 2013, after the end of the Appellant's MQP. Furthermore, it is not so much that the General Division did not consider the Appellant's mental health after his MQP. It is simply that it considered his conditions in light of the Appellant's own testimony that his mental health has improved.

[27] Absent an adverse credibility finding, which the General Division did not make, the Appeal Division is of the view that it was entitled to rely on the Appellant's testimony. "It is the role of the trier of fact to assess, weigh the evidence and decide whether to accept it. It is not the role of the appellate body to reassess the weight to be given to evidence." *Simpson v. Canada (Attorney General),* 2012 FCA 82 at para. 10. Therefore, taking all of the above into consideration, the Appeal Division finds that the appeal does not succeed on this first ground.

Did the General Division commit an error law in its treatment of the *Villani* factors?

[28] Counsel for the Appellant submitted that the General Division erred in law in its treatment of the factors set out in *Villani.* In *Villani*, the Federal Court of Appeal considered

---

[4] Dr. Aleksiejuk, M.D. saw the Appellant on July 18, August 6 and September 24, 2013. She reported to Dr. Nemtean that based on the history provided and clinical presentation, that he made the following diagnosis:
Major Depressive Disorder- chronic. Alcohol and substance abuse by history.
Personality Disorder- mixed.
COPD, Erectile Dysfunction.
Severe Psychosocial Stressors (single, unable to work, limited finances

the proper interpretation to be given to subparagraph 42(2)(a)(i) of the CPP. Isaac, J. A. writing for the Federal Court of Appeal opined:

> [38] Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.

[29] The General Division after describing the Appellant as being 51years old with a grade 12 education; and a native English speaker who held different jobs over a number of years in a single industry went on to find that he did "not meet the severe criterion as outlined in the *Villani case* context." The problem with this statement is that in respect of its most usual application, *Villani* sets out factors that must be considered in the Tribunal's determination of whether an applicant is eligible for a CPP disability pension; it does not outline the severe criterion. The question, then, is whether this is an error of such materiality that it could have altered the General Division decision. In the circumstances the Appeal Division decided that it was not because the focus of the General Division decision was on the Appellant's retained work capacity within his limitations.

[30] As noted in the leave to appeal decision, the evidence that was before the General Division was that the Appellant made no effort to obtain alternative employment of any kind. He testified that he had made no effort to seek alternative employment, stating that he had not been "motivated to look for work because he would likely quit should he find an employer."

[31] In *Klabouch v. Canada (Minister of Social Development)* 2008 FCA 33, the Federal Court of Appeal made it clear that the issue as to whether a claimant attempted to find alternative work or lacked motivation to do so was clearly a relevant consideration in determining whether his disability was severe." Furthermore, in M.C. v. MHRSD (October 10, 2010) CP 26420 PAB, the Pensions Appeal Board held that "claimants seeking CPP disability are expected to show meaningful effort to find other employment to suit their skills and

limitations and follow recommended treatment programmes. Failing that they are obliged to provide reasonable explanations or be disentitled."

[32] The General Division found that the Appellant failed to meet this latter test. He had showed no meaningful effort to find other suitable employment, indeed he admitted to making no effort at all; neither did he provide what the General Division found was a reasonable explanation for his failure to do so.

[33] As further support for the Appeal Division's finding that the General Division decision should stand despite its treatment of *Villani*, reliance is placed on the decision of the Federal court of Appeal in *Giannaros.*[5] At paragraphs14-15 of its decision 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. Thus, applying this reasoning to the decision of the General Division, once it was found that the Appellant retained work capacity, the General Division need not have entered into an analysis of the Appellant's "*Villani* factors". Thus, based on the above analysis, the Appeal Division finds that the appeal cannot succeed on the basis that the General Division failed to properly apply *Villani.*

CONCLUSION

[34] The Appeal is dismissed.

Hazelyn Ross
Member, Appeal Division

[5] *Giannaros v. Canada (Minister of Social Development),* 2005 FCA 187.