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

Citation: *M. D. v. Minister of Employment and Social Development*, 2016 SSTADIS 224

Tribunal File Number: AD-15-404

BETWEEN:

M. D.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: June 20, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed.

INTRODUCTION

[2] This is an appeal of a decision of the General Division (GD) of the Social Security Tribunal, which dismissed the Appellant's application for a disability pension on the basis that the Appellant did not prove that her disability was severe, for the purposes of the *Canada Pension Plan* (CPP), by her minimum qualifying period (MQP) of December 31, 2012. Leave to appeal was granted on the grounds that the GD may have erred in rendering its decision.

OVERVIEW

[3] The Appellant submitted an application for CPP disability benefits in May 2011. She indicated that she was employed as an acute care nurse until March 2010, when recurring back pain forced her to leave her job for a final time. She claims that she has been unable to work since then.

[4] At the hearing before the GD in February 2015, the Appellant testified about her schooling and work history. She also gave evidence about her injuries and the treatment she has received. She told the GD that she had attempted a variety of therapies, including medication, physiotherapy and alternative treatment, but none had produced any lasting and beneficial effect. Her preferred method of pain management was to avoid activities that led to pain.

[5] In its decision dated March 11, 2015, the GD found that the Appellant had not made any effort to attempt alternative work within her limitations. It also found that she had not mitigated her impairments by making sufficient effort to pursue available treatment options.

[6] On June 29, 2015, the Appellant filed an Application for Leave to Appeal with the Appeal Division (AD) of the Social Security Tribunal alleging numerous errors on the part of the GD. On October 6, 2015, the AD granted leave on two grounds:

(a) The GD may have erred in failing to provide sufficient reasons for its conclusion that the Appellant had capacity to work;

(b) The GD may have erred by incorrectly or inadequately applying the test from *Villani v. Canada*.[1]

[7] On April 11, 2016, the AD decided that an oral hearing was unnecessary and the appeal would proceed on the basis of the documentary record for the following reasons:

(a) There were no gaps in the file or need for clarification;

(b) The form of hearing respected the requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[8] The Appellant's submissions were set out in her Application for Leave to Appeal and Notice of Appeal. Her representative made further submissions on November 13, 2015. Having requested and received an extension of the filing deadline, the Respondent's submissions were filed on December 2, 2015.

THE LAW

[9] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) the only grounds of appeal are that:

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

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

(c) The GD 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.

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

STANDARD OF REVIEW

[10] Until recently, it was accepted that appeals to the AD were governed by the standards of review set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*[2]. In matters involving alleged errors of law or failure to observe principles of natural justice, the applicable standard was held to be correctness, reflecting a lower threshold of deference deemed to be owed to a first-level administrative tribunal. In matters where erroneous findings of fact were alleged, the standard was held to be reasonableness, reflecting a reluctance to interfere with findings of the body tasked with hearing factual evidence.

[11] The Federal Court of Appeal decision, *Canada (MCI) v. Huruglica*[3], has rejected this approach, holding that administrative tribunals should not use standards of review that were designed to be applied by appellate courts. Instead, administrative tribunals must look first to their home statutes for guidance in determining their role.

ISSUES

[12] The issues before me are as follows:

(a) What standard of review applies when reviewing decisions of the GD?

(b) Did the GD err in failing to provide sufficient reasons for its determination that the Appellant retained work capacity?

(c) Did the GD incorrectly or inadequately apply the test from *Villani v. Canada*?

(d) If the GD is found to have erred, what are the appropriate remedies?

SUBMISSIONS

(a) What standard of review should be used?

[13] Both the Appellant's and Respondent's submissions on this issue were made prior to *Huruglica*, which was released on March 29, 2016.

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[2] *Dunsmuir v. New Brunswick*, [2008] SCR 190, 2008 SCC 9

[3] *Canada (Minister of Citizenship and Immigration) v. Huruglica*, 2016 FCA 93

[14] The Appellant invoked *Dunsmuir* in submitting that for questions of fact, law and mixed fact and law relating to the interpretation of the tribunal's own statute, the appropriate standard of review is reasonableness. The appropriate question is whether the decision of the tribunal is within the range of possible, acceptable outcomes which are defensible on the facts and the law.

[15] The Respondent's submissions discussed in comprehensive detail the standards of review and their applicability to this appeal, concluding that a standard of correctness was to be applied to errors of law, and reasonableness was to be applied to errors of fact and mixed fact and law. In this case, the sole issue is whether the GD may have erred in law in requiring the Appellant to meet a higher standard of proof than the balance of probabilities. The Respondent submits that this is a question of law and the correctness standard applies.

(b) Did the GD err in failing to provide sufficient reasons?

[16] The Appellant submits that the GD did not provide sufficient reasons in concluding that she has work capacity. She alleges that, after summarizing medical reports that documented the Appellant's impairments, the GD quoted the ratio from *Inclima v. Canada*[4]: "Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition." It then went directly into an analysis of whether the Appellant made sufficient effort at working, but at no point did it present any analysis of whether she had work capacity, raising the apprehension that the GD either disregarded the evidence or simply began with the proposition that the Appellant retained some work capacity. However, as no discussion on this matter was presented, there is no way to know whether the GD made an assessment of the evidence or correctly applied the legal test. Counsel relies on *Canada v. Quesnelle*[5] for the proposition that failing to provide an analysis or reasons for a finding is an error on which a decision may be overturned. In that case, the Federal Court of Appeal held that, "in the absence of any indication in the Board's reasons that it engaged in a meaningful analysis of the evidence, its decision cannot stand."

[17] The Respondent submits that the GD's reasons are entirely adequate under the circumstances. As required by law, the GD provided written reasons for its decisions, which

[4] *Inclima v. Canada (A.G.),* 2003 FCA 117
[5] *Canada (Minister of Human Resources Development) v. Quesnelle,* 2003 FCA 92

confirm that it considered and weighed the medical evidence and Appellant's testimony. It understood the applicable law and analyzed the evidence in a meaningful way. The GD did not err in reaching its conclusion, and its reasons reveal no misstatements of the law.

[18] The Respondent notes that that Appellant claimed to be disabled by one medical condition, mechanical low back pain, and no evidence regarding that condition was ignored. Citing *Simpson v. Canada*[6], it suggested that "a tribunal need not refer in its reasons to each and every piece of evidence before it but is presumed to have considered all the evidence."

[19] The Appellant's case is distinguishable from *Quesnelle* because the GD did not have before it a "very considerable body of apparently credible evidence" to suggest the Appellant is disabled. In addition, the courts since *Quesnelle* have determined that the quality of the tribunals' reasons alone provide insufficient grounds to disturb a tribunal decision on judicial review. On appeal, the GD's reasons must be read together with the record and the outcome to determine whether the decision is reasonable. To evaluate whether the reasons are sufficient, the AD should look at the circumstances of the preceding in which they arise and the ultimate decision on the merits.

[20] It would be wrong to conclude, as the AD's Leave to Appeal Decision put it, that the GD "did not undertake any analysis of the medical records or evidence" to show how it came to the finding that the Appellant had some work capacity. In paragraphs 5-9, the GD correctly identified the MQP and outlined the applicable legal test for a disability pension. The GD then reviewed the Appellant's testimony on paragraphs 9-19 and evaluated it in paragraph 31. Paragraphs 20-25 reviewed all the medical documents, which confirmed that a recurring back injury was the sole basis of the claim. Paragraphs 27 and 29 indicate that the Appellant's work capacity was considered. Paragraphs 30 and 31 show the GD addressed the issue of whether the Appellant's back injury resulted in a "severe" disability prior to the MQP. Paragraph 31 is clear and unambiguous. As noted by the GD, the Appellant did not see her family doctor until two years after she stopped working and did not pursue referrals to specialists or seek pain medication. In the GD's words, "these factors are not consistent with the condition of such severity as to have prevented all work.

[6] *Simpson v. Canada (AG)*, 2012 F.C.J. No. 334

[21] In the circumstances, the Appellant was required to show that her efforts at obtaining and maintaining employment were unsuccessful by reason of her health condition. Since no evidence of this nature was offered, it was entirely reasonable for the GD to apply the dicta of *Inclima* and ultimately find her not disabled for CPP purposes.

(c) Did the GD incorrectly or inadequately apply the test from Villani v. Canada?

[22] The Appellant acknowledges that the GD referred to the correct legal test as set out by *Villani*, but alleges it erred in suggesting that the only factors to consider when assessing severity of a disability were age, education, language proficiency and past work and life experience. It failed to consider that these are not the only factors *Villani* set forth as criteria to consider. In setting out the "real world" approach, *Villani* requires a tribunal to determine whether an applicant, in the circumstances of his or her background and medical condition, is capable regularly of pursuing any substantially gainful occupation.

[23] The Appellant submits that even if her education, age, language and work experience make her a candidate for gainful employment, her medical condition does not. The GD applied *Villani* too narrowly and in doing so made an error of law because it failed to take into the consideration the medical evidence and the Appellant's testimony about her pain and limitations.

[24] The Respondent submits that the GD's reasons illustrate that it understood the *Villani* principle and considered the Appellant's personal characteristics in assessing whether or not her disability was severe. In paragraph 29 of the decision, it concluded that the Appellant "would not be limited by her age, education or life experience such that her ability to retrain for light duty work would be adversely affected."

[25] The Appellant's concerns regarding the GD's consideration of *Villani* are unfounded because a claimant's medical condition is not a personal characteristic. For a claimant to be found disabled, he or she must first demonstrate a serious and potentially impairing medical condition; only then does a tribunal assess the severity of the claimed disability in the context of the *Villani* factors, which are tied to the claimant's personal characteristics.

[26] Contrary to paragraph 26 of the Appellant's Application for Leave to Appeal, the record contains little evidence that the Appellant was disabled by mechanical low back pain. As was held in *Simpson v. Canada*, assigning weight to the evidence is the province of the trier of fact, and in this case the GD was within its jurisdiction to make finding that the Appellant's back pain did not prevent her from performing sedentary work.

[27] Having made that determination, the GD correctly applied *Villani* in then finding that the Appellant "would not be limited by her age, education or life experience such that her ability to retrain for light duty work would be adversely affected." The Respondent submits that the GD's next sentence, "As such the *Villani* case is not applicable to the present circumstances," was clearly a "slip of the pen." When the GD's reasons are reviewed in tandem with the evidence, it becomes clear that the GD considered and reasonably applied the Appellant's personal characteristics to the Appellant's impairments in a "real world context," as demanded by *Villani*.

(d) What are the appropriate remedies?

[28] Acknowledging the range of remedial powers conferred on the AD by section 59 of the DESDA, the Appellant asks that the decision be rescinded and the matter referred back to the GD for reconsideration.

[29] The Respondent asks that the decision of the GD be confirmed.

ANALYSIS

(a) Standard of Review

[30] Although *Huruglica* deals with a decision that emanated from the Immigration and Refugee Board, it has implications for other administrative tribunals. In this case, the Federal Court of Appeal held that it was inappropriate to import the principles of judicial review, as set out in *Dunsmuir*, to administrative forums, as the latter may reflect legislative priorities other than the constitutional imperative of preserving the rule of law. "One should not simply assume that what was deemed to be the best policy for appellate courts also applies to specific administrative appeal bodies."

[31] This premise leads the Court to a determination of the appropriate test that flows entirely from an administrative tribunal's governing statute:

> … the determination of the role of a specialized administrative appeal body is purely and essentially a question of statutory interpretation, because the legislator can design any type of multilevel administrative framework to fit any particular context. An exercise of statutory interpretation requires an analysis of the words of the IRPA [*Immigration and Refugee Protection Act*] and its object… The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent in respect of the relevant provisions of the IRPA and the role of the RAD [Refugee Appeal Division].

[32] The implication here is that the standards of reasonableness or correctness will not apply unless those words or their variants are specifically contained in the founding legislation. Applying this approach to the DESDA, one notes that paragraphs 58(1)(a) and (b) do not qualify errors of law or breaches of natural justice, suggesting the AD should afford no deference to the GD's interpretations.

[33] The word "unreasonable" is nowhere to be found in paragraph 58(1)(c), which deals with erroneous findings of fact. Instead, the test contains the qualifiers "perverse or capricious" or "without regard for the material before it." As suggested by *Huruglica*, those words must be given their own interpretation, but the language suggests that the AD should intervene when the GD bases its decision on an error that is clearly egregious or at odds with the record.

(b) Sufficiency of Reasons

[34] It is a well-established principle of procedural fairness that a decision-maker must adequately analyze the evidence and provide a meaningful written explanation for why it reached its conclusions. In this case, it is alleged that the GD failed to provide sufficient reasons for its finding that the Appellant had some capacity to work.

[35] The analysis undertaken by the GD in assessing the severity of the Appellant's disability consists of four paragraphs: Paragraph 29 deals with *Villani;* paragraph 30 deals with *Inclima* and the Appellant's efforts to obtain and maintain employment; paragraph 31 deals with the Appellant's efforts to mitigate her condition by seeking treatment; and paragraph 32 consists of a one-sentence conclusion that the Appellant failed to meet the burden of proof in showing that she had a severe disability on or before her MQP.

[36] I am not suggesting that brevity in and of itself constitutes insufficiency; one must also delve into the substance of the reasons to determine whether a decision-maker has truly grappled with the evidence. In this case, however, I must agree with the Appellant that a crucial component of analysis was omitted. The majority of the GD's analysis was occupied with issues of mitigation—whether the Appellant made sufficient effort to overcome her impairment by seeking alternative employment and by pursuing appropriate treatment. The analysis barely referred to the Appellant's back injury, nor did it refer to her testimony describing her pain and limitations or to any of the several reports that documented her condition or assessed her functionality.

[37] In paragraph 30, the GD cited *Inclima*: "Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition." However, nowhere in the GD's analysis did it attempt to establish that there was in fact work capacity. The GD's analysis seemed to start with the premise that the Appellant retained some ability to work and proceeded from there into a brief discussion on the secondary issue of whether she had attempted alternative work within her limitations.

[38] The Respondent also submitted that there was "very little evidence" to show the Appellant was disabled around the MQP, although it did acknowledge there were nine reports documenting investigations or treatment for the Appellant's back pain. The Respondent argued that the GD's decision did not breach natural justice because it was reasonable in the context of the evidence. Indeed, much of the Respondent's brief amounted to a recapitulation of the evidence in a bid to demonstrate that the outcome produced by the GD was justifiable, but it is not my role as member of the AD to retry the evidence. I can only note deficiencies in the GD's decision-making process, and in this case, I find that the GD's reasons do not permit me to retrace the steps it took in reaching its conclusion.

[39] The Respondent distinguishes *Quesnelle* from the case at hand because the GD did not have a "very considerable body of apparently credible evidence" to suggest the Appellant was disabled. To evaluate whether the reasons are sufficient, it submits, one must look at the circumstances of the proceeding in which they arise and the ultimate decision on its merits.

Again, the Respondent is inviting the AD to do what the GD manifestly did not do: assess the evidence and make a finding on residual capacity. In attempting to show that the GD analyzed the evidence, the Respondent dissected the decision, noting the many paragraphs that referred to the Appellant's testimony and the available medical reports. However, while I agree that a decision must be read as a whole, in this case the bulk of the GD's reasons amounted to mere summaries—of law, testimony, medical reports and parties' submissions. In its brief analysis, the GD did not refer to the substantive contents of any of the medical reports and cursorily alluded to the Appellant's testimony, but again only in the context of her purported failure to pursue alternative work. The Respondent is correct to note that a tribunal is presumed to have considered all the evidence, but in this case I find that presumption is rebutted by the absence of any real analysis of the Appellant's residual capacity.

[40] In my view, the GD erred in law by improperly applying the principle from *Inclima* and breached a rule of natural justice by failing to provide sufficient reasons for its finding of residual capacity. I am allowing the appeal on these grounds.

(c) Villani

[41] The Appellant submits that, while the GD may have cited *Villani*, it did not correctly apply the test as set out by Federal Court of Appeal. In assessing severity, it argues, a tribunal must consider factors such as an appellant's age, education, language proficiency and past work and life experience, but it must also keep in mind his or her medical condition:

> This approach requires the Board to determine whether an applicant, in the circumstances of his or her background and medical condition, is capable regularly of pursuing any substantially gainful occupation (*Villani, supra*).

[42] In this case, the Appellant submits that he GD applied *Villani* too narrowly and in doing so made an error of law because it failed to take into the consideration the medical evidence and the Appellant's testimony about her pain and limitations.

[43] This claimed ground, as with the previous one, is rooted in the alleged inadequacy of the GD's reasons. I have already faulted the GD for failing to consider the medical evidence in finding residual capacity for the purposes of applying *Inclima*, but this is a different matter. As discussed in the Leave to Appeal decision, it is unlikely that *Villani* contemplated that a

claimant's medical conditions were to be equated with personal characteristics, and the Appellant's back pain cannot be assessed on the same plane as her age, education, work experience etc.

[44] That said, *Villani* is first and foremost a decision about how to assess the *severity* of a claimed disability, and one cannot do that without starting at the medical evidence. While, as noted above, the GD itemized every report in its decision, it did not engage with that evidence in an effort to measure its effect on the Appellant's functionality. Similarly, while the GD referred to the details of the Appellant's personal profile, it did not address their impact on her ability to find work in the "real world," except to flatly state that "she would not be limited by her age education or life experience" if she were to retrain for light work. It concluded that *Villani* was "not applicable" in the circumstances, an overtly categorical statement that the Respondent attempted to dismiss as a "slip of the pen." I cannot agree: the GD may have been awkwardly attempting to make the point that a woman in her fifties with a good education and professional work experience would be expected to cope with sedentary work if she suffered from mild back pain; the point, however, is that the GD did not say any of these things, leaving the reader to wonder whether the correct test was applied.

[45] I find that the GD erred in law by inadequately considering all of the factors that underlie *Villani*. I am allowing the appeal on this ground.

(d) Remedy

[46] I would allow the appeal on the grounds of insufficiency of reasons and failure to properly apply *Inclima* and *Villani*. To avoid any potential for an apprehension of bias, it is appropriate in this case that the matter be referred back to the GD for a *de novo* hearing before a different GD Member.

CONCLUSION

[47] For the reasons set out above, the appeal is allowed and the matter referred to the GD for a full reconsideration of whether the Appellant can be found disabled under the CPP.

Member, Appeal Division