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

Citation: *A. E. v. Minister of Employment and Social Development,* 2016 SSTADIS 311

Tribunal File Number: AD-15-270

BETWEEN:

A. E.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: August 12, 2016

Canada

REASONS AND DECISION

OVERVIEW

[1] This is an appeal of the decision of the General Division dated January 9, 2015, which determined that the Appellant was not eligible for a disability pension under the *Canada Pension Plan.* It found that his disability was not "severe" by the end of his minimum qualifying period of December 31, 2009.

[2] The Appellant requested leave to appeal on May 13, 2015. The time for filing a leave application was extended and the Appellant was subsequently granted leave to appeal on the grounds that the General Division:

(a) may not have fully considered all of the Appellant's personal circumstances, pursuant to *Villani v. Canada (Attorney General),* 2001 FCA 248 ("*Villani*"); and

(b) erred in law by referring to vague categories of labour and concluding that because there was some suggestion that he could perform some unspecified sedentary job, this qualified as "any" occupation under the *Canada Pension Plan.*

[3] Having reviewed the written submissions of the parties (including those dated March 3, 2016 of the Appellant) and having determined that no further hearing is required, this appeal is proceeding pursuant to subsection 43(a) of the *Social Security Tribunal Regulations*.

ISSUES

[4] The issues before me are as follows:

1. Did the General Division err on any of the grounds upon which leave to appeal was granted, or did the General Division err on any other grounds?

2. What is the appropriate disposition of this matter?

GENERAL DIVISION DECISION

[5] The General Division held that the severe criteria must be assessed in a real world context, pursuant to *Villani*. The General Division indicated that this involved considering factors such as an appellant's age, level of education, language proficiency and past work and life experience. The General Division wrote:

> In this case, in deciding that the Appellant's disability was not severe, the Tribunal considered that, although he was 60 years old as of the MQP, he has an excellent education and good work experience.

[6] The General Division did not indicate in its analysis section what work experience or level of education the Appellant had attained, but noted at paragraph 13 that the Appellant holds a master's degree in mechanical engineering and has certificates for gas fitter and heat loss/heat gain designer. The General Division noted that the Appellant had worked in Egypt, although it did not seek any details of this employment. The General Division also noted that the Appellant was the owner/operator of a heating and air-conditioning repair and service business in Canada from February 1989 to January 1, 2007.

[7] The General Division noted that the family physician was of the opinion that the Appellant had suffered from severe osteoarthritis since 2003 and that he had become totally disabled from performing his job or any employment that required standing, which it found suggested that the Appellant retained the capacity for other work within his limitations (paragraph 25). The General Division also found that he had not shown that he had made genuine efforts at obtaining and maintaining employment.

ISSUE 1: "REAL WORLD" ANALYSIS

[8] The medical evidence before the General Division was that the Appellant is precluded from physically demanding occupations or any which required standing and kneeling, not just his ordinary occupation. From that, the General Division concluded that the Applicant must retain some work capacity. The General Division indicated at the outset

(paragraph 23) that it was guided by the *Villani* "real world" analysis when it assessed the severity of the Appellant's disability.

[9] At paragraph 23, the General Division wrote:

> [23] The severe criterion must be assessed in a real world context (*Villani* v. *Canada* (*A.G.*), 2001 FCA 248). This means that when deciding whether a person's disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. In this case, in deciding that the Appellant's disability was not severe, the Tribunal considered that, although he was 60 years old as of the MQP, he has an excellent education and good work experience.

[10] The Appellant's counsel acknowledges that the General Division found the Appellant to be well-educated, having a university degree, and that he had some practical work experience. However, she argues that the General Division failed to apply the *Villani* principles to the Appellant's circumstances as it should have also appreciated factors such as his declining short-term memory, limited language and communication skills, dated educational attainments and limited Canadian work experience. She noted that the Appellant earned an engineering degree over 30 years ago in Egypt, and would have to undergo extensive retraining for his degree to be recognized in Canada. She also argues that the Appellant in fact had very limited work experience and that the only employment he held in Canada was operating a heating and air conditioning repair and service business. She explains that the work was physical in nature, and that the Appellant was forced to take this employment as he was unable to obtain work in the engineering field due to his lack of Canadian credentials. The Appellant's counsel also argues that the Appellant is not proficient in the English language. She argues that the General Division did not actually apply a "real world" context to its analysis and that had the General Division correctly applied the *Villani* principles, it would have been apparent that the Appellant is incapable of regularly pursuing any usual or customary employment, which actually exists, is not illusory, and is of real importance.

[11] The Appellant's counsel argues that in order to correctly apply the statutory test for severity, the words "regularly pursuing any substantially gainful occupation" should be

interpreted to mean "any usual or customary employment, which actually exists, is not illusory, and is of real importance", and should NOT be interpreted as "requiring that an applicant be incapable at all times of pursuing any conceivable occupation". She argues that to do otherwise would negate the very purpose of the legislation, be unsupportable "on the plain language of the statute", and would "defeat the obvious objectives of the [*Canada Pension*] *Plan*".

[12] The Respondent's counsel urges me to reject the Appellant's submissions, as they rely in part on evidence which had not been before the General Division.

[13] I agree that an appeal before me forecloses the possibility of introducing any new evidence. As set out by the Federal Court in *Canada (Attorney General) v. O'keefe,* 2016 FC 503 at para. 28, an appeal to the Appeal Division does not allow for new evidence and is limited to the three grounds of appeal listed in section 58. Setting aside this issue, however, I do not see anywhere in the decision of the General Division that it so narrowly and strictly defined the test for severity, as the Appellant suggests. The General Division readily acknowledged that the Appellant would not be able to return to not only his former occupation, but also to any physically demanding positions, particularly any which required standing and kneeling. The General Division noted the Appellant's submissions that he it was difficult for him to walk, bend and lift, and that his short-term memory had deteriorated. The General Division relied on Dr. Hinnawi's opinions of September 20, 2010 and October 13, 2011 that the Appellant is totally disabled from performing his own job or any job that required standing or kneeling. These medical opinions did not rule out other occupations which did not require kneeling or standing and from this, the General Division inferred that the Appellant retained the capacity for other work within his limitations. The General Division even noted the Appellant's own plans to return to work in this regard, suitable to his medical condition and education (GT1-60).

[14] In *Villani,* the Federal Court of Appeal enunciated that the test under the *Canada Pension Plan* is in relation to any substantially gainful occupation, and that a finding of severity is not appropriate where an applicant is merely disabled from pursuing his ordinary occupation.

[15] The Federal Court of Appeal indicated that there should be a reluctance to interfere with a trier of fact's assessment of an applicant's circumstances. At paragraph 49, Isaac J.A. wrote:

> [49] Bearing in mind that the hearing before the Board is in the nature of a hearing *de novo*, as long as the decision-maker applies the correct legal test for severity – that is, applies the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) he or she will be in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantially gainful occupation. The assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere.

[16] If the General Division considers an appellant's personal circumstances, one generally ought not to interfere with that assessment, even if, on the face of it, it might not be as comprehensive as desired, or appears to waver on being merely perfunctory. At this juncture, if I were to consider the Appellant's declining short-term memory, dated educational attainments, limited English language skills and Canadian work experience, this would, in essence, amount to undergoing a reassessment of the evidence. Yet, the General Division indicated that it had specifically considered the Appellant's educational attainments and prior work experience. I cannot presume that the General Division failed to reflect upon these features. It did, after all, specifically refer to them. As the trier of fact, the General Division was in the best position to "judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantial gainful occupation".

[17] In this particular case, the General Division undertook the *Villani* analysis required of it when it considered the Appellant's education and prior work experience. I am therefore not persuaded that the General Division failed to conduct its analysis in accordance with the *Villani* principles.

ISSUE 2: "VAGUE CATEGORIES OF LABOUR"

[18] Leave to appeal was granted on the basis that the General Division may have erred in law by referring to vague categories of labour and concluding that, because there was some suggestion that he could perform some unspecified sedentary job, this qualified as

"any" occupation under the *Canada Pension Plan.* There is, however, considerable overlap between this ground for granting leave to appeal and the preceding one, particularly as it is based on the "real world" analysis required under *Villani*. In other words, one cannot consider what substantially gainful occupations which the Appellant might be capable of pursuing regularly without an "air of reality". Indeed, the Appellant had initially considered this "second" ground under one subheading, that the General Division had failed to conduct a "real world" analysis.

[19] The Appellant's counsel suggests that the General Division should have specified the types of sedentary occupations which it considered the Appellant capable regularly of pursuing. The Federal Court of Appeal indicated that that is unnecessary. It wrote:

> [47] In other cases, however, decision-makers ignore the language of the statute by concluding, for example, that since an applicant is capable of doing certain household chores or is, strictly speaking, capable of sitting for short periods of time, he or she is therefore capable in theory of performing or engaging in some kind of unspecified sedentary occupation which qualifies as "any" occupation within the meaning of subparagraph 42(2)(a)(i) of the *Plan*.

[20] It would be misreading *Villani* to require a decision-maker to set out the types of occupations which an applicant might be capable regularly of pursuing. The underlying principle behind *Villani* is that a decision-maker is required to conduct a "real world" analysis.

[21] In *Villani,* the Pension Appeals Board placed considerable weight on the statements of the applicant's family physician that the applicant (at least prior to October 1998) was totally disabled only from "all physical work and work involving prolonged standing or repetitive use of his hands". The Federal Court of Appeal noted that the Pension Appeals Board had explained the statutory definition of a "severe" disability under the *Canada Pension Plan* as "<u>any</u> occupation … It is <u>any</u> occupation, even though the applicant may lack education, special skills, or basic language". It also noted that the Board had relied on *Davies v. Canada (Minister of Human Resources Development)* (1999), 177 F.T.R. 88, [1999] F.C.J. No. 1514 (QL) (F.C.T.D.) in which the Federal

Court had articulated that the *Canada Pension Plan* did not provide for the consideration of age or education under subsection 42(2) and that the only issue was whether an applicant was capable of obtaining some type of substantially gainful employment, not necessarily anything related to his previous job. In setting aside the decision of the Pension Appeals Board, the Federal Court of Appeal dismissed this strict approach to the severity requirement and held that the legal test for severity must be applied with some degree of reference to the "real world". However, as the Federal Court of Appeal indicated, medical evidence will still be needed, as will evidence of employment efforts and possibilities.

[22] It is clear in *Villani* that any reference to "vague categories of labour" was made against the backdrop of assessing an applicant's personal circumstances in a "real world" context.

ISSUE 3: EFFORTS TO OBTAIN EMPLOYMENT

[23] In his application requesting leave to appeal, the Appellant argued that the General Division had failed to apply the legal principles set out in *Boyle v. Minister of Human Resources Development* (June 10, 2003), CP18508 (PAB). That decision of the Pension Appeals Board stands for the proposition that, that, depending upon their circumstances, appellants who exhibit some capacity should not be required to obtain and maintain employment. As my colleague granted leave to appeal on the ground that the General Division may have failed to apply the principles set out in *Villani*¸ she did not determine whether the appeal had a reasonable chance of success on this further ground. The Appellant nonetheless continued to pursue this ground in the course of this appeal.

[24] The General Division determined that the Appellant retained some work capacity and, as a consequence, required him to show that efforts at retraining or seeking and maintaining employment were unsuccessful by reason of his health condition. It cited *Inclima v. Canada (Attorney General),* 2003 FCA 117.

[25] The Appellant argues that he did not exhibit any capacity prior to the end of his minimum qualifying period and, as such, he should not have been under any obligation to adduce evidence of any efforts to look for work. Further, that even if he had some measure

of work capacity, as he was self-employed as a heating and air-conditioning repairman, he should not have been required to establish that efforts at obtaining and maintaining employment were unsuccessful because of his health condition, as work was always available to him.

[26] In *Boyle,* the Pension Appeals Board concluded that it was unnecessary for the claimant to retrain or seek other employment, as a job with an accommodating employer was always open to him. For almost three years, his employer had made great efforts to accommodate Mr. Boyle's work limitations. Similarly, in *P.R. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 1, another decision upon which the Appellant relies, the General Division determined that it was reasonable that the claimant did not undertake any efforts to seek other employment. The claimant P.R. could return to his employment, where he had an accommodating employer who made every effort to provide him with work suitable to his disability.

[27] I find that neither *Boyle* nor *P.R.* have any applicability, given the factual circumstances of this matter. The General Division determined that although the Appellant was unable to do any physically demanding work, the Appellant exhibited some work capacity, particularly if it did not involve standing or kneeling. More significantly, there is no evidence that the Appellant's former self-employment is able to provide the type of accommodations which had been available to Mr. Boyle or P.R.

PROLONGED

[28] The General Division did not address the issue as to whether the Appellant's disability could be considered prolonged because it did not find his disability to be severe. The Appellant suggests that this issue be considered for the purposes of this appeal. In that regard, his counsel reviewed the medical records.

[29] I make no findings on this issue. As I have indicated above, the General Division, as the primary trier of fact, is in the best position to assess whether the Appellant's disability is prolonged.

[30] In any event, the test for disability is two-part and if a claimant does not meet one aspect of this two-part test, then he will not meet the disability requirements under the legislation. As the General Division indicated, it is unnecessary to undertake an analysis on the prolonged criterion when the Appellant has not established that he is severely disabled. In *Klabouch v. Canada (Social Development),* 2008 FCA 33 at para. 10, the Federal Court of Appeal stated that:

> . . . The two requirements of paragraph 42(2)(a) of the [*Canada Pension Plan*] are cumulative, so that if an applicant does not meet one or the other condition, his application for a disability pension under the [*Canada Pension Plan*] fails.

CONCLUSION

[31] The appeal is dismissed for the reasons set out above.

Janet Lew
Member, Appeal Division