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

Citation: *Minister of Employment and Social Development v. J. W.,* 2016 SSTADIS 408

Tribunal File Number: AD-15-1122

BETWEEN:

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

Appellant

and

J. W.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

HEARD ON: September 12, 2016

DATE OF DECISION: October 18, 2016

Canada

REASONS AND DECISION

IN ATTENDANCE

Appellant	Laura Dalloo (counsel)
	Nadia Atcha (articling student) and
	Justine Seguin (articling student)

OVERVIEW

[1] This is an appeal of the decision of the General Division dated July 14, 2015. The General Division determined that the Appellant had a severe and prolonged disability by the end of her minimum qualifying period on December 31, 2009 and that she therefore was entitled to a Canada Pension Plan disability pension. The Appellant filed an Application Requesting Leave to Appeal to the Appeal Division on October 16, 2015. Leave to appeal was granted on November 4, 2015, on several grounds.

[2] The hearing of this matter was originally scheduled for a videoconference hearing on March 8, 2016 but was adjourned to April 21, 2016. The matter was rescheduled to September 12, 2016. The Appellant filed a letter with the Social Security Tribunal on September 12, 2016, indicating that the Respondent had just informed the Appellant that she had been involved in an accident and would be unavailable to attend the hearing of the appeal. The Respondent requested – through the Appellant's office - that the hearing proceed in her absence as she could not locate any additional supporting evidence and she had nothing further to add (AD8). In light of the parties' respective positions, it is in the interests of justice that this matter proceed without further delay.

[3] The Respondent did not address any of the grounds of appeal in her submissions of November 23, 2015. Rather, she endeavoured to explain the absence of medical records. She also described her medical and treatment history. However, these are not relevant to the issues raised in this appeal.

ISSUES

[4] The issues before me are as follows:

1. Did the General Division err in law?
2. Did the General Division base its decision on erroneous findings of fact that it made in either a perverse or capricious manner or without regard for the material before it?
3. Were the reasons of the General Division sufficient?
4. What is the appropriate disposition of this appeal?

ERRORS OF LAW

[5] The Appellant submits that the General Division erred in law as follows, that it:

(a) failed to ensure that there was any objective medical evidence at or around the end of the minimum qualifying period;

(b) failed to apply *Villani v. Canada (Attorney General),* 2001 FCA 248, in not assessing the Respondent's personal characteristics in a "real world context";

(c) failed to apply *Inclima v. Canada (Attorney General),* 2003 FCA 117, in not determining whether the Respondent's efforts to obtain and maintain employment were unsuccessful because of her disability.

[6] I will address each of these issues separately.

(a) Objective medical evidence

[7] The Respondent completed a questionnaire for disability benefits, in which she identified "drop attacks seizures", irritable bowel syndrome and depression as her primary illnesses or impairments which prevented her from working. She claimed that she had been unable to work since January 2006 because of her medical condition (GT1- 100 to GT1-108).

[8] The Appellant submits that the General Division erred in relying solely on the Respondent's oral evidence to establish disability, as she was required to provide objective medical evidence: *Villani,* at para. 50 and *Warren v. Canada (Attorney General),* 2008 FCA 377 at para 4. The Appellant argues that the Respondent has failed to prove that she was severely disabled, as there is little or no objective medical evidence at the relevant time. The Appellant claims that there are significant gaps in the medical records and that there is no evidence that she stopped working in 2006 for medical reasons.

[9] A review of the hearing file before the General Division indicates that there are a cluster of early medical records between November 2000 and March 2002. The Respondent described that in or about May 2000, she had developed what she described as episodes of memory loss, which would result in anxiety and then "seizures", resulting in falls. These episodes appeared to be triggered by stress or "fearsome confrontation[s]", as described by an internist in November 2001 (GT1-73). These incidents were investigated. A neurologist was of the opinion that her condition was psychogenic in origin (GT1-50). The internist concluded that the events were a conversion reaction and that as there was no evidence of pathology, it would have to be approached as a psychic phenomenon (GT1-51). The internist also indicated that, although the Respondent spoke about repeated injuries with her falls, physical examinations failed to validate these claims.

[10] The diagnosis of a conversion disorder was confirmed by a psychiatrist in March 2002 (GT1-52 to GT1-71). The psychiatrist also diagnosed the Respondent with a panic disorder-remitted, history of major depressive disorder, and psychosocial stressors. She also acknowledged the Respondent's complaints of repeated falls.

[11] The hearing file also contained two medical reports that were prepared closer towards the end of the minimum qualifying period. The first of these was a patient treatment update dated December 12, 2007 from a podiatrist, and the second, a consultation report dated August 8, 2008 from a gynaecologist. The Respondent presented with stress incontinence; she was interested in pursuing surgery to address this. The gynaecologist noted that the family physician had investigated the Respondent for a dissociative order and that it was stable (GT1-77).

[12] The next set of medical records fall after the end of the minimum qualifying period. None of these address the Respondent's medical status at the end of her minimum qualifying period.

[13] In November 2011, the Respondent was seen at Richmond General Hospital for pancreatitis secondary to biliary stones, following a sudden onset of right upper quadrant pain, which she had experienced for the past three days. Although the pre-admission comorbidities were identified as possible irritable bowel syndrome and gastroesophageal reflux disease, there is no indication that either these or the pancreatitis were extant by the end of her minimum qualifying period.

[14] Similarly, the consultation report dated February 20, 2012 of the gastroenterologist does not address the Respondent's medical history at the end of the minimum qualifying period, other than to report that she had a bladder suspension approximately five years ago (GT1-82) and had "drop attacks" for about "11 years", which apparently "defied extensive investigations for seizures, syncope, etc." This would, to some extent, address the Respondent's condition at the minimum qualifying period, as it suggests that she had been continuing to experience the "drop attacks" since they were documented early on. However, they do not speak to the severity of her disability.

[15] The gastroenterologist noted the Respondent's report that, over three years ago, she had been diagnosed with irritable bowel syndrome and was placed on medication. In other words, it is inconclusive that the irritable bowel syndrome itself was a contributing factor to the severity of the Respondent's disability at the end of her minimum qualifying period.

[16] Finally, there were medical reports dated November 19, 2011 and May 2, 2012 from the Respondent's family physician. However, the Respondent did not become a patient of Dr. Desai-Ranchod until approximately May 2, 2010 – after the end of the minimum qualifying period - and Dr. Desai-Ranchod therefore could not speak to the severity of the Respondent's disability at the relevant time.

[17] The General Division member wrote that the medical evidence generally accords with the Respondent's testimony. At the same time, the member acknowledged that there were gaps

in the medical evidence. The member was satisfied that the Respondent suffered from seizures from 2000 to present with no period of absence. The member found that her testimony was generally confirmed by the medical report of "Dr. Rushod" who indicated that the Respondent continued to suffer from seizures in December 2011.

[18] I could find no reports of Dr. Rushod, despite two separate references to him in the decision. Presumably the report of "Dr. Rushod" is that of Dr. Desai-Ranchod. Although Dr. Desai-Ranchod is of the opinion that the "drop attacks" or "pseudo- seizures" can occur at any time, and that the Respondent is severely restricted, her opinion is of limited utility. For one, she did not begin to see the Respondent until after the end of her the minimum qualifying period. Secondly, there is no indication in her very brief medical report whether she had conducted her own investigations or if her opinion was based on a set of assumptions. She also does not indicate whether she had the extensive medical file for review and had thus based her opinion on that review. Simply put, she was not in a position to give a firsthand opinion on the severity of the Respondent's disability at the end of the minimum qualifying period.

[19] The gastroenterologist wrote that the Respondent had had "drop attacks" for about "11 years". This could establish that the Respondent experienced drop attacks in or around the end of her minimum qualifying period, but this by no means establishes severity, as the report says little about the frequency, severity or impact of these "drop attacks" on the Respondent. The extensive investigations referred to by the gastroenterologist would have provided the "best evidence" of the Respondent's condition at the end of the minimum qualifying period, and should have been produced.

[20] As the Federal Court of Appeal held in both *Villani* and *Warren,* some objective medical evidence is required to establish the severity of an applicant's disability. The objective medical evidence before the General Division fell far short of meeting this requirement.

(b) *Villani*

[21] The Appellant argues that the General Division was required to apply the *Villani* test. The Appellant submits that, in this case, as the Respondent is 43 years old, has labour-relations

experience, is college educated and has transferable skills, the "real world context" and her capacity regularly of pursuing any substantially gainful occupation is broader.

[22] The General Division recognized that the severe criterion must be assessed in a "real world context". The member cited *Villani,* and also explained that 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.

[23] Despite setting out the test for severity of disability, there is no indication within the decision that the General Division considered any of the Respondent's personal characteristics or the "real world context". Yet, it is unclear from any of the authorities cited whether a *Villani* analysis is required when the decision-maker determines a claimant disabled, after having considered the medical evidence and any evidence of employment efforts and possibilities. As I have already determined that the General Division erred in law, I need not determine whether it was also required to analyze *Villani*.

(c) *Inclima*

[24] The Appellant submits that the General Division failed to apply *Inclima,* in not determining whether the Respondent's efforts to obtain and maintain employment were unsuccessful because of her disability. The Appellant maintains that there was evidence suggesting the Respondent retained the capacity for sedentary work at least in 2002 and 2011.

[25] In *Inclima,* the Federal Court of Appeal held that an applicant who seeks to bring himself (or herself) within the definition of severe disability must not only show that he (or she) has a serious health problem but, where there is evidence of work capacity, also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.

[26] The General Division did not refer to *Inclima.* The test arises when there is evidence of work capacity. At paragraph 40 of its decision, the General Division found that the Respondent's "seizures" were such that they prevented her from engaging in any form of meaningful employment. From this, it appears that the General Division found that the Respondent lacked the requisite capacity and from this perspective, it would have been unnecessary to apply

Inclima. However, for the reasons which I have set out above, as the General Division did not appropriately assess the severity of the Respondent's disability, it is unclear whether the Respondent may or may not have had the requisite capacity such that *Inclima* should have been applied.

[27] The Appellant argues that the General Division failed to recognize that the Respondent had some residual capacity. While I recognize that the March 2002 report of the psychiatrist suggests that the Respondent retained at least some residual capacity, this report was prepared several years prior to the end of the minimum qualifying period.

Therefore, it may not have been reflective of the severity of the Respondent's disability at that time and whether it was considered then to be of indefinite duration. It is not appropriate, in any event, for me to assess the evidence and make any findings as to whether the Respondent might have had some residual capacity, as that is beyond the scope of this appeal.

ERRONEOUS FINDINGS OF FACT

[28] The Appellant submits that the General Division based its decision on several erroneous findings of fact made in a perverse and capricious manner or without regard for the evidence before it :

(a) as early as 2002, the Respondent had been advised not to work;

(b) the Respondent had attempted to return to work several times, but was unable to continue because of pain and seizures;

(c) the Respondent had suffered seizures from 2000 to the present; and

(d) the medical evidence generally accorded with the Respondent's testimony.

[29] Given the overlapping issues between (a) and (b) and between (c) and (d), I will discuss them together.

(a) and (b) - Work considerations

[30] The Appellant claims that there is no documentary evidence to support these findings and that the testimony of the Respondent was unclear. The Appellant filed an affidavit sworn on October 16, 2015, by Stéphanie Pilon, a paralegal. Ms. Pilon transcribed portions of the audio-recording of the hearing before the General Division.

[31] In the leave decision, the Appeal Division member concluded that the hearing file and the partial transcription of the hearing supported the Appellant's arguments on the issues of the Respondent's return to work efforts and any advice against working.

[32] The Respondent stopped working in 2006. The documentary evidence after 2006 does not indicate whether the Respondent had been advised against working, nor indicate that she might have attempted to return to work. However, I have listened to portions of the audio-recording and these two issues were specifically addressed by the General Division member:

> Q: Did your doctor advise you not to work? (at 28:42)
>
> A: Ahh, yes. Doctor Morris Gordon at the time, yes.
>
> Q: Doctor who, sorry? Doctor Morris Gordon?
>
> A: Yes.
>
> Q: Can you tell me ... go ahead ...
>
> A: The one that, the one that eliminated all of the organic, umm, medical, umm, things and then, yeah, and then came to the point that he just didn't know what to do, and so I had to find another physician. But yes, that's when I, when I stopped working.
>
> Q: Ok, so Doctor Morris Gordon advised you not to continue working. He was your GP right?
>
> A: He's pardon?

Q: Was he your GP?

A: He was my GP, yes.

Q: Approximately when did he advise you to stop working? (27:34)

A: I would be lying if I guessed. I don't even… Sorry I don't even recall ...

Q: Ah ... the year?

A: Oh the year? Oh, it was probably before 2009. (27:49)

Q: And was it 2008 or? (27:55)

A: Ahh, probably 2002. (27:59)

[33] In regards to the Respondent's efforts to return to work, this too was addressed in the Respondent's testimony before the General Division, commencing at 28:08 of the audio-recording.

Q: 2002. And did anything change since then that would have enabled you to continue working?

A: You know ... the thing was that... umm. Yeah I guess just working. Working through it all I did make attempts, like I tried to go back a few times but the, the, drop attacks and the psychological impact and the physical impact of having them. Umm, it just, it just did not allow me to be on the premises and, and being fully functional at work. As much as I would have really liked that to be, it just didn't. .. it wouldn't. .. and what I was doing prior to, is not something that could really be modified. I was managing staff so.

Q: So the, the attacks prevented you from going back to work? A:I'm sorry you're going to have to repeat that again?

Q: The attacks prevented you from going back to work?

A: Yes. Yes…

[34] The Appellant urges me to reject this evidence, as it is uncorroborated by any documentary evidence and as the Respondent acknowledges that she has a poor recollection and could not provide particulars, such as when she attempted a return to work. However, this calls into question the quality and reliability of that evidence, and it calls for a reassessment, which is beyond the scope of this appeal.

[35] The Appellant also notes that the Respondent's *curriculum vitae* indicates that she is a freelance interpreter for the hearing impaired (GT1-33), which suggests that she continues to work. The Appellant argues that this contradicts the Respondent's evidence that she lacks capacity and has not worked since approximately 2002. However, a review of the *curriculum vitae* indicates that the Respondent last worked as a freelance interpreter in 1999 (GT1-32). I do not see that the fact that the Respondent is a qualified interpreter contradicts her evidence that she was advised against working after 2002, or that she attempted to return to work multiple times.

[36] The audio-recording clearly indicates that the Respondent testified that she had "probably" stopped working in 2002 and that she had attempted to return to work " a few times" but she could not return due to the "psychological impact and the physical impact of having [the drop attacks]".

[37] The Appellant had been invited to attend the teleconference hearing before the General Division, but it chose to rely solely on its written submissions. By its absence, the Appellant relinquished the opportunity to test the Respondent's evidence and to subject her to any cross-examination, and to some extent, it also served to undercut the Appellant's arguments against the Respondent's evidence.

[38] Hence, in the absence of any evidence to the contrary on these issues, it was open to the General Division to accept the Respondent's testimony on these two succinct points and to draw findings based upon that evidence. The Appellant has not shown me any evidence which contradicts the Respondent's testimony. It is not sufficient that the Respondent demonstrates a poor recollection, that the family physician failed to address the work issues in any medical records, that the overall evidence is weak, or that the General Division might have posed borderline leading questions. While these might present other evidentiary problems, nonetheless

the General Division was entitled to rely on the Respondent's evidence, as imperfect as it may have been, in the absence of any evidence to the contrary.

(c) and (d) - Medical evidence

[39] The Appellant claims that the General Division erred in finding that the Respondent "suffered from seizures" and "[t]he medical evidence provides objective evidence that [she] has suffered seizures since 2000 that have continuously caused her injury …", at paragraphs 37 and 43 of its decision. The Appellant argues that the Respondent could not have suffered seizures since 2000, as the evidence confirms the diagnosis of a "conversion disorder". The leave decision indicates that the Appellant's focus was misplaced, and that it ought not to have focused on the diagnosis of the Respondent's condition, but rather, the timing and frequency of these "seizures" or what the Respondent describes as "drop attacks".

[40] The medical practitioners generally agree that the Respondent has a conversion disorder, although the Respondent's current family physician described this as "drop attack seizures", in her letter of May 2, 2012 (GT1-48). A psychiatrist also described them as "pseudo-seizures". I see that in its review of the medical evidence, the General Division member noted that the internist diagnosed the Respondent with a conversion reaction; however, given that the Respondent and her current family physician are prepared to describe her condition as "seizures", notwithstanding the formal diagnoses by medical specialists, likely nothing turns on this point. I do not see it as a basis upon which the General Division formed its decision.

[41] Given the apparent underlying psychogenic nature of the Respondent's condition, there is no measurable, objective evidence that she experiences seizures, but it seems that the General Division in this case defined objective medical evidence as documentary evidence.

[42] The Appellant claims that there is no supporting evidence that the Respondent has had "seizures from 2000 to present with no period of absence" and that it is contrary to the medical reports. In particular, the neurologist opined that the Respondent's "blackouts" "dramatically decrease with anti-depressant medication" (GT1-50) and her family physician was of the opinion in May 2012 that the drop attacks had partially responded to Naltrexone 9 mg bid (GT1-48). While the Respondent may have seen some improvement with anti-depressant medication and

Naltrexone 9 mg bid, this is by no means conclusive that she could not have experienced seizure-like episodes since 2000 "with no period of absence".

[43] The General Division indicates that its finding that the Respondent has continued to continuously suffer from seizures since 2000 to present, was largely based on the Respondent's oral evidence, as well as the medical report of Dr. "Rushod", who I presume is Dr. Desai-Ranchod. In her brief letter of May 2, 2012, the family physician was not definitive as to when these "drop attack seizures" might have commenced. She indicated that the Respondent had been investigated years ago for "drop attack seizures", which, in the face of the Respondent's testimony regarding her condition, could be interpreted that she has had these "seizures" continuously from "years ago" (GT1-48). I note also that there is a gastroenterologist's consultation report dated February 28, 2012 in which he writes that the Respondent has generalized musculoskeletal aches and pains which she attributes to falls and "for about 11 years she has had some type of "drop attacks" …" (GT1-82). With these two reports, and against the backdrop of the Respondent's testimony, the General Division could reasonably have made findings that the Respondent has had seizures since 2000.

[44] The Appellant also claims that the General Division erred in finding, at paragraph 36 of its decision, that the "medical evidence generally accords with that of the testimony of the [Respondent]". However, given the very general subjective nature of this statement, it is difficult to know precisely what medical evidence and what portions of the Respondent's testimony the General Division contemplated, although perhaps some guidance can be found in the paragraphs following the statement. These largely speak to the onset of the conversion disorder and its continuous nature. In that regard, there is some medical evidence which documents the Applicant's complaints that she had the disorder for a considerable period. Therefore, although I agree with the Appellant that the documentary record is relatively thin and although the General Division could have interpreted the records and arrived at different conclusions than it had, I do find that there was some evidentiary basis upon which the General Division could make its findings and upon which it could form its decision.

(e) "Seizures"

[45] The Appellant argued that the General Division based its decision on other erroneous findings of fact, which had not been advanced in the course of its leave application.

[46] The Appellant further contends that there is no supporting evidence for the General Division's finding that the Respondent had experienced at least one seizure at work. However, the affidavit of Ms. Pilon indicates that the Respondent believes that she had at least one incident, although she could not recall when, as she found it "embarrassing [she] think[s] beyond belief". While the Respondent's recollection was admittedly weak, it was open for the General Division to accept this evidence. I do not find that it made an erroneous finding of fact.

[47] The Appellant further contends that the General Division erred in finding that the Respondent suffered from 12 to 15 seizures a month in 2009, and that these seizures caused various injuries such as torn muscles and concussions (paragraph 38).

[48] The Respondent testified that she could not recall specific incidents (page AD1- 175 and 22:37 of audio-recording). However, I see from the Appellant's transcription of the audio-recording that there is evidence that the Respondent testified that she had from "about twelve to fifteen" per month in 2009, although it was clearly based on an estimate.

> Q: Thinking again to the period in and around 2009, how often would you say that the seizures umm, occurred in and around that time?
>
> A: Umm, you know based on most of my documentation it can usually averages out to about twelve to fifteen of them a month, umm but now oh sorry you just wanted to know for 2009. About then, it was about twelve to fifteen of them per month.

[49] Hence, I find that there was an evidentiary basis upon which the General Division could make findings regarding the frequency of her "seizures".

SUFFICIENCY OF REASONS

[50] The Appellant submits that the reasons for a decision should be understandable, sufficiently detailed and provide a logical basis for the conclusion. In *R. v. Sheppard*, 2002 SCC 26 at para. 22, the Supreme Court of Canada held that the duty to give reasons "may be said to be owed to the public rather than to the parties to a specific proceeding" and that it is through reasoned decisions that the "general public become aware of the rules of conduct applicable to their future activities." The Appellant argues that the decision of the General Division is deficient in this regard, as it failed to address the key factual and legal issues. The Appellant argues that, although the General Division recited some of the evidence, it failed to analyze the medical and other evidence in a meaningful way, resulting in reasons that were deficient.

[51] The Appellant argues that the General Division should have, at the very least, analyzed the severe criterion in the "real world context", the medical evidence including any gaps, the Appellant's submissions (contained in the initial and reconsideration decisions and accompanying materials), and why it preferred the Respondent's subjective evidence over the expert medical opinions. The Appellant contends that the General Division should have explained why the absence of medical reports about the Respondent's psychological condition from 2003 to 2009 appear to have had no impact on the decision-making process, and should have also determined the date of onset of disability.

[52] The Appeal Division should guard against concluding that a decision of the General Division is deficient by virtue of the fact that the General Division did not conduct its analysis in the same manner or if it arrived at a different outcome than which it might have, or if the decision appears brief. These considerations alone do not render a decision insufficient.

[53] In *R. v. R.E.M.*, [2008] 3 SCR 3, 2008 SCC 51, the Supreme Court of Canada set out the test for sufficient reasons, and stated that "[w]hat is required is a logical connection between the "what" … and the "why"… the "path" taken … must be clear from the reasons … But it is not necessary that the judge describe every landmark along the way." The test is a functional one. The Supreme Court of Canada determined that a decision-maker is not obliged to discuss all of the evidence on any given point, provided the reasons show that he or she grappled with the "substance of the live issues" at the proceedings. The trial judge in that case had allegedly failed

to reconcile some of the evidence and had failed to explain some of the evidence. However, when considered in the context of the record as a whole, they did not render the reasons deficient.

[54] The Federal Court of Appeal determined in *Whiteley v. Canada (Minister of Social Development)*, 2006 FCA 72, that the Court "must be in a position to determine whether the [Pension Appeals] Board understood the state of the law and whether it applied it to the facts of the case". The Federal Court of Appeal indicated that the Board was required to analyze the law and the evidence in a meaningful way and that it was not enough to simply relate the evidence before it. The Pension Appeals Board described the evidence "for some twenty paragraphs" and then immediately concluded that the appellant had not discharged the onus on her to prove that her disability was severe and prolonged. *Whitely* is factually distinguishable, as the General Division member did undertake a more lengthy and detailed analyses than had the Board in *Whiteley*.

[55] The General Division was required to explain how it determined that the Respondent was severely disabled by the end of her minimum qualifying period. Although ultimately the General Division member erred in law in its analysis on whether the Respondent could be found severely disabled (as he did not address the "real world context" articulated in *Villani*¸ nor examine whether there was objective medical evidence at the relevant time), when considered in the context of the record as a whole, the decision overall was not deficient as a result.

[56] In the proceedings before me, it is evident that the General Division was impressed with the Respondent and that it found her credible and her evidence consistent. It is clear that the General Division accepted the evidence of the Respondent unreservedly, over any gaps in the medical evidence, and that it found that there was sufficient objective medical evidence to corroborate the Respondent's testimony.

[57] The Appellant urges me to read the conclusions together and find that they fall within a range of reasonable outcomes, and that if they do not, that I find that the reasons are insufficient. However, this suggests conducting a standard of review analysis, and as the Federal Court of Appeal held in *Canada (Attorney General) v. Jean*, 2015 FCA 242, an administrative tribunal

must “refrain from borrowing from the terminology and the spirit of judicial review in an administrative appeal context”.

DISPOSITION

[58] The Appellant submits that the appropriate disposition is to remit the matter to a different member of the General Division. Given the errors of law which have been identified, I concur that this matter be returned to a different member of the General Division for a redetermination.

Janet Lew
Member, Appeal Division