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

Citation: *A. B. v. Minister of Employment and Social Development*, 2016 SSTADIS 412

Tribunal File Number: AD-16-498

BETWEEN:

A. B.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: October 21, 2016

Canada

REASONS AND DECISION

DECISION

The appeal is allowed.

INTRODUCTION

[1] This is an appeal of the decision of the General Division (GD) of the Social Security Tribunal issued on December 31, 2015, which dismissed the Appellant's application for a disability pension on the basis that she 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, 2007. Leave to appeal was granted on July 12, 2016, on the grounds that the GD may have erred in rendering its decision.

OVERVIEW

[2] The Appellant was 36 years old when she applied for CPP disability benefits on May 30, 2012. In her application, she wrote that she was last employed as receptionist for a firm of chartered accountants in August 2004, when she stopped working due to severe chronic back pain, migraine headaches, fatigue, anxiety and depression. She also indicated that she performed similar work as an independent contractor between August 2007 and January 2008.

[3] The Respondent denied the application at the initial and reconsideration levels on the grounds that her disability was not severe and prolonged as of the MQP date. On June 13, 2013, the Appellant appealed these denials to the GD.

[4] At the hearing before the GD on September 17, 2015, the Appellant testified about her education and work experience. She said that she had suffered from fibromyalgia since the age of 15. She described her symptoms and how they limited her ability to function at home and at work.

[5] In its decision of December 31, 2015, the GD dismissed the Appellant's appeal, finding that, on a balance of probabilities, she did not suffer from a severe disability as of the MQP. Although the GD found the Appellant credible, it noted that her fibromyalgia was not diagnosed

until October 2011—well after December 31, 2007. It also found that her medical conditions were apparently being managed successfully by medication and noted that she was employed at the MQP.

[6] On April 1, 2016, the Appellant's representative filed an application for leave to appeal with the Appeal Division (AD) of the Social Security Tribunal, alleging errors of fact and law on the part of the GD. On July 12, 2016, the AD granted leave on the grounds that the GD may have made errors of mixed fact and law by:

(a) Misapprehending *Villani v. Canada*;[1]

(b) Misapplying the principle from *Inclima v. Canada*[2] and

(c) Mischaracterizing the Appellant's four-month contract between August and December 2007.

[7] I have decided that an oral hearing is unnecessary and the appeal can proceed on the basis of the documentary record for the following reasons:

(a) There are 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. On August 25, 2016, in response to the AD's request, the Respondent's representative filed lengthy submissions defending its position.

[1] *Villani v. Canada (Attorney General),* 2001 FCA 248
[2] *Inclima v. Canada (A.G.),* 2003 FCA 117

THE LAW

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

(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.

[10] According to subsection 59(1) of the DESDA, the AD may dismiss the appeal, give the decision that the GD should have given, refer the matter back to the GD for reconsideration in accordance with any directions that the AD considers appropriate or confirm, rescind or vary the decision of the AD in whole or in part.

[11] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an Appellant must:

(a) Be under 65 years of age;

(b) Not be in receipt of the CPP retirement pension;

(c) Be disabled; and

(d) Have made valid contributions to the CPP for not less than the Minimum Qualifying Period (MQP).

[12] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[13] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable

regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.

ISSUES

[14] The issues before me are as follows:

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

(b) Did the GD misapprehend *Villani* in finding that the Appellant's disability fell short of "severe" in the absence of any barriers related to age, language or education?

(c) Did the GD misapply *Inclima* by giving inadequate consideration to evidence that the Appellant unsuccessfully attempted to hold on to a series of jobs prior to applying for CPP disability benefits?

(d) Did the GD base its decision on an erroneous finding of fact by mischaracterizing the Appellant's four-month contract between August and December 2007 as evidence of capacity, when in fact it was an unsuccessful attempt to return to the workforce offered by a benevolent employer?

(e) If the answer to any of the three preceding questions is yes, what remedy is appropriate in this case?

SUBMISSIONS

What is the appropriate standard of review?

[15] The Appellant made no submissions on this issue.

[16] The Respondent submits that the appropriate standard of review for this appeal should be that of correctness because no deference is due to the GD. The AD is a superior arm of the same tribunal; there is no special expertise or experience which privileges a determination of the GD.

[17] On the granted grounds for appeal, the relevant issue is not the weighing of evidence, but rather the GD having exceeded its jurisdiction by either failing to consider highly relevant

evidence or by making statements of fact with no evidentiary support. Where jurisdiction is concerned, the standard of review is correctness.

[18] The Respondent's submissions discussed in detail the standards of review and their applicability to this appeal, concluding that a standard correctness was to be applied to errors of law, and reasonableness was to be applied to errors of fact and mixed fact and law.

[19] The Respondent noted that the Federal Court of Appeal had not yet settled on a fixed approach for the AD in considering appeals from the GD. The Respondent acknowledged the recent Federal Court of Appeal case, *Canada (MCI) v. Huruglica*,[3] which it said confirmed that the AD's analysis should be influenced by factors such as the wording of the enabling legislation, the intent of the legislature when creating the tribunal and the fact that the legislature is empowered to set a standard of review if it so chooses. It was the Respondent's view that *Huruglica* did not appreciably change the standard to be applied to alleged factual errors; the language of paragraph 58(1)(c) of the DESDA continued to permit a wide range of acceptable outcomes.

[20] The Respondent submits that the AD should not engage in a redetermination of matters in which the GD has a significant advantage as trier of fact. The wording of sections 58 and 59 of the DESDA indicate that Parliament intended that the AD show deference to the GD's finding of fact and mixed fact and law.

Did the GD misapprehend *Villani*?

[21] The Appellant submits that the GD misapplied *Villani* when it concluded that her disability fell short of severe, based on its finding that her personal factors (such as age, language skills, education and work experience) would not preclude her from retraining or finding alternative employment.

[22] The Appellant further submits that if the so-called *Villani* factors are determined to be substantial roadblocks to an applicant's employability at a substantially gainful occupation, then those factors are to be taken into account when assessing whether his or her disability is severe.

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

In this case, the GD appeared to use the absence of any considerations with respect to age, language, education or experience to justify the finding that the Appellant's disability was not severe. It is the *presence* of *Villani* factors which deem limitations as severe. However, the reverse cannot be said to be true: The *absence* of *Villani* factors cannot play a role in determining whether or not limitations are severe.

[23] The Respondent submits that the Appellant must prove the existence of disability prior to the expiry of the MQP and continuously thereafter. In this case, the Appellant provided no medical information prior to the December 31, 2007 MQP. The earliest available report, from October 2010, indicates that the Appellant consulted with an orthopedic specialist, Dr. Gordon Taylor, who diagnosed her with chronic mechanical low back pain and a possible inflammatory component. Treatment recommendations included a seven-day course of Voltaren, spinal manipulative therapy and a soft-tissue rehabilitation program.

[24] In the absence of any medical evidence from prior to the December 31, 2007 MQP, the only remaining factors for the GD to consider were age, education, etc. The GD was correct in determining that the Appellant was not suffering from a severe and prolonged disability which prevented her from working, by December 31, 2007. The GD correctly noted the *Villani* factors but did not deny that medical evidence was still needed to demonstrate severity, as well as evidence of effort to maintain employment.

Did the GD misapply *Inclima*?

[25] The Appellant alleges that the GD misapplied *Inclima* by giving inadequate consideration to evidence that the Appellant unsuccessfully tried a series of jobs prior to applying for CPP disability benefits. The GD took as evidence of work capacity the fact that the Appellant was employed as of the MQP date and faulted her for not seeking accommodation from her last employer or looking for work suitable to her limitations. In doing so, however, the GD ignored the Appellant's long history of taking jobs that proved beyond her capacity as her medical condition continued to deteriorate.

[26] The Appellant claims that she has suffered from disabling factors such as fatigue, chronic pain and anxiety since 1990. She lost her first job in April 1998 due to her functional limitations. She worked again from December 2001 to September 2002 but was "encouraged to

seek alternate employment" due to unreliable attendance. Even at this point, the Appellant did not give up trying to return to the work force. While she could have applied for CPP benefits at any point after 2002, she focused instead on resuming her working life. From February 2003 to August 2004, she worked as receptionist, stopping due to severe back pain. Her last employment was from August to December 2007, when pain and fatigue once again removed her from work. When one reviews the Appellant's work history, it is obvious that her functional limitations have hindered her efforts to maintain employment.

[27] The Respondent submits that the GD correctly noted and applied the correct test for *Inclima* in paragraph 41. Furthermore, the courts have pronounced the following principles when looking at how a claimant's employment is affected by their disability.

- A disability is severe only if a claimant is incapable regularly of pursuing any substantially gainful occupation.[4]
- It is the incapacity, not the employment, which must be proven to be "regular."[5]
- The employment, even if irregular, can be any substantially gainful employment. Disability is not based upon a claimant's inability to perform his or her regular job, but rather any substantially gainful occupation.[6]
- Capacity to perform part-time work, modified activities, sedentary occupations or attend school may preclude a finding of disability as is it is an indication of capacity to work.[7]

[28] The Respondent notes that the Appellant was employed as of December 31, 2007. Her employer at the time, C. K. of Synthesis Designs, wrote a letter to the GD dated June 1, 2014, that she was well-respected and a hard worker. He indicated that he felt the Appellant had the potential to be a permanent member of their team, so much so, that when asked, they provided accommodations that allow her to set her own work hours. Mr. C. K. also indicated in the letter

[4] *Canada* (*Minister of Human Resources Development*) *v. Scott*, 2003 FCA 34
[5] *Klabouch v. Canada* (*Minister of Social Development*), 2008 FCA 33
[6] *Miceli-Riggins v. Canada* (*Attorney General*), 2013 FCA 158
[7] *McDonald v. Canada* (*Human Resources and Skills Development*), 2009 FC 1074

that the Appellant was a good fit, and his team was surprised that she felt unable to continue working with them.

[29] With this letter, in addition to the lack of medical evidence before it, the GD was correct in determining that it was possible for the Appellant to obtain and maintain employment.

Did the GD mischaracterize the Appellant's final work contract?

[30] The Appellant submitted that the GD gave inadequate consideration to whether the Appellant's final job as an office manager and receptionist was meaningful and competitive. The GD noted that her last employer at Synthesis Designs had already allowed her to set her own schedule and work 20-24 hours per week, but it still faulted her for not requesting further modifications. It was not realistic, given commercial realities, to expect any employer, no matter how benevolent, to accommodate a worker who was unable to deliver predictable performance.

[31] The Respondent argues that there is no indication the Appellant's performance expectations were held to a lesser standard. In fact, the only accommodation mentioned in Mr. C. K.'s letter was modified hours. He noted that, while the Appellant did seem to struggle with back issues, they did not seem to affect her job performance, and he would have welcomed her back had she been willing to return.

[32] In *Atkinson v. Canada*,[8] the Federal Court of Appeal held that merely accommodating an individual does not imply that the employer is benevolent. The Court found that for an employer to be considered benevolent, the accommodations it offers must go beyond what would be expected in the marketplace. Furthermore, the Court found that an employer's expectation of employee performance was a key factor in determining whether or not it was benevolent—that is, whether the employer had to change their expectations of the productivity, output or performance from the employee as compared to other employees in the same position.

[33] It is clear that the Appellant was able to perform her job to the same standard as any other person in that position would be able to. As such, the GD was correct to not consider whether this employer could be considered a benevolent employer.

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[8] *Atkinson v. Canada (A.G.),* 2014 FCA 187

ANALYSIS

Standard of Review

[34] 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.*[9] 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 an administrative tribunal often analogized with a trial court. 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.

[35] The *Huruglica* case 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.

[36] 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."

Villani

[37] Having reviewed the GD's decision in detail, I must agree with the Respondent that the GD did not err in its interpretation and application of the *Villani* principles. I note at the outset that the GD's analysis was structured in a way that was likely to confuse readers, leading as it did with a discussion of the Appellant's personal characteristics *before* considering the substance of her claimed impairments. In paragraph 40 of its decision, the GD wrote:

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

> The Appellant was 37 years of age at the time of application. She has a grade XII education with one year of post-secondary attendance at a college/university. The Appellant's work experience comprises of receptionist and office manager duties. The Tribunal finds that she has transferrable skills based on her age, language proficiency and work experience. Therefore, it is the Tribunal's finding that the Appellant is a suitable candidate for retraining or an alternate job suitable to her physical limitations. Hence, based on the *Villani* factors and taking a real world approach, the Tribunal does not find the Appellant to be suffering from a severe medical condition at the time of her MQP of December 31, 2007.

[38] The final sentence of this passage is problematic, giving rise to the impression that the GD found the Appellant's disability short of "severe" merely because she was relatively young, educated and fluent in English. The Appellant's representative himself raised the possibility that the GD "may have simply used an unfortunate choice of terms," and I believe this to be the case.

[39] Under the CPP, an applicant must demonstrate a mental or physical disability that is "severe", rendering him or her incapable regularly of any substantially gainful occupation. The *Villani* decision requires a determination of disability to be made in the context of an applicant's background and circumstances:

> The mandatory requirement that applicants supply the Minister with information related to their education level, employment background and daily activities can only indicate that such "real world" details are indeed relevant to a severity determination made in accordance with the statutory definition in subparagraph 42(2)(a)(i) of the *Plan*… 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 applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere.

[40] If the GD, having found few impediments in the Appellant's background to her continued participation in the workforce, had ended its analysis at paragraph 40, then I might have been inclined to allow the appeal on the ground that it had failed to consider the substance

of the evidence supporting her impairments. However, the GD eventually did turn its attention to the Appellant's claimed medical conditions in paragraph 42, finding, as noted by the Respondent, that the entirety of the available documentary evidence originated after the MQP. Even then, in the absence of medical reports contemporaneous to the MQP, the GD did not simply dismiss the Appellant's claim of disability, but looked at other forms of evidence, including testimony, to assess whether there was some indication of a severe disability prior to December 31, 2007.

[41] In the end, the GD concluded that there was insufficient evidence that the Appellant's condition met the criteria for disability. In doing so, I find that it discharged its obligation to grapple with the available evidence while considering the relevant *Villani* factors, albeit in a sequence that was less than preferable.

Inclima

[42] I allowed leave on this issue because I thought there was an argument that the GD took an unreasonably narrow approach to mitigation. *Inclima* stands for the proposition that 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. In practical terms, this means that once there is a finding of residual capacity, the question then becomes whether the Appellant did everything reasonably possible to remain in the labour market.

[43] There is no question that the Appellant's purported lack of effort to remain employed played a significant part in the GD's decision to deny disability benefits. Paragraph 41 is devoted to a lengthy analysis of the Appellant's activities between August 2007 and January 2008 at Synthesis Design, which proved to be her final employer. Having correctly stated the test for *Inclima*, the GD wrote:

> The Tribunal is not persuaded by the Appellant's argument that fibromyalgia and back pain rendered her incapable regularly of pursuing any substantially gainful occupation at the MQP. She was employed on December 31, 2007. This is evidence of work capacity.

[44] This passage suggests that the GD took the mere fact that the Appellant was technically employed (as opposed to actually working) one or two days after the MQP as *de facto* proof that she had capacity for substantially gainful work as of the end of December 31, 2008. I find this to be an overly reductive approach to assessing the Appellant's final days of employment. While it is true that the Appellant disclosed in her application for benefits that her last day of work was January 1, 2008 (she also testified that she couldn't get out of bed on January 2, 2008), she also gave evidence to the effect that she was struggling with her job as a contract office manager for some time before her resignation. I also note, in passing, that New Year's Day is a holiday for most office workers. Given the fact that the Appellant's last day at work happened to coincide almost precisely with the end of her MQP, I find it curious, and more than a little unforgiving, that the GD did not give consideration in its decision to the possibility that the Appellant may have in fact shown signs of disability prior to the MQP date.

[45] This same restrictive approach is displayed in the GD's treatment of the Appellant's work history as a whole. *Inclima* demands that an applicant for disability benefits make an effort to remain employed, but it does not restrict consideration of that question to just the period after cessation of work. In this case, the GD's discussion on mitigation focused entirely on the Appellant's conduct during her final, part-time, contract position and made no reference to her other similarly short-lived jobs over the previous several years.;

> The onus is on the Appellant to prove that she sought alternatives to managing her job duties as well as her medical conditions, instead of resigning from her position. While it is certainly not the Tribunal's prerogative to suggest what the Appellant should have done, she certainly could have spoken with her employer about managing her situation since Mr. C. K. had accommodated her needs at the time she was hired. The Appellant did not provide any such evidence. Subsequently, the Tribunal finds that she did not satisfy the principle upheld in *Inclima*.

[46] The Appellant's representative submitted that the last five or six years of his client's work history should have been considered as a series of failed work trial—attempts made in vain to remain employed, despite increasing debility.

[47] Given the increasing brevity of her jobs and the pattern of decline apparent in her earnings, I agree that the GD erred in law by failing to give consideration to the Appellant's entire work history in assessing whether she fulfilled her obligation to mitigate her impairments. The Respondent cited the *McDonald* case to argue that the ability to perform part-time work, modified activities or sedentary occupations (and the Appellant's final job seems to have fallen under all these categories), may preclude a finding of disability, as they are indicators of capacity to work. In view, the operative word here is *may*; it is possible that an ability to carry on these kinds of work points to the capacity to do substantially gainful work, but it cannot be said to be conclusive. Further inquiry and measured consideration of the evidence will still be necessary.

[48] I am allowing the appeal on this ground.

Benevolent Employer

[49] The CPP links disability with incapacity to *regularly* to pursue substantially gainful occupation. From this has flowed the concept of the so-called "benevolent employer"—a boss who may be a friend, family member or otherwise sympathetic individual who is willing to overlook commercial imperatives and extend unusual accommodations to an employee whose productivity has been diminished because of health conditions. I recognize that the onus is on an applicant to introduce evidence that they have benefitted from such an employer, but if it has done so, the GD is then under an obligation to meaningfully address it.

[50] The GD's characterization of the Appellant's tenure in late 2007 as a contract office manager at Synthesis Design gives rise to a question of whether it correctly applied case law surrounding benevolent employers. As noted in my decision granting leave, the *Atkinson* case requires evidence of workplace accommodations to be taken into account in assessing disability. However, the Respondent rightly notes that merely accommodating an individual does not mean an employer is benevolent; a key factor in determining benevolence is whether the employer holds the individual to performance standards that are more relaxed than what one would reasonably expect in the marketplace.

[51] Although the GD acknowledged accommodations offered by the Appellant's last employer, it did not explicitly consider whether Synthesis Design was a benevolent employer.

Among the focal points of the evidence was the C. K. letter, which was summarized in detail in the decision. It said that the Appellant worked at Synthesis Design for four months as an office manager and was permitted to set her own hours because she was struggling with back pain and headaches. Even though Mr. C. K. witnessed her strain and discomfort, he was still surprised that she resigned, and he would have been happy to have her back because she was a hard worker and a dedicated employee.

[52] In its analysis, the GD devoted considerable attention to the C. K. letter:

> The employer provided her the option of setting her own schedule and she was able to work 20-24 hours per week. The Tribunal also takes note of the fact that the management at Synthesis wanted to make the Appellant a permanent employee. Ms. D noted in her letter of June 5, 2015 that *"The Appellant described her symptoms being so disabling that she would often need to leave work and go home. Unfortunately, due to far too many sick days, she was forced to resign from her last position".* However, the Tribunal finds that there is no evidence in the letter provided by the employer, Mr. C. K., that the Appellant missed any time due to her medical conditions. He states in his letter that even though he noticed the Appellant to be struggling with her back condition, he was very surprised when she informed them that she could not continue working there anymore [emphasis in original].

The GD clearly placed great significance on the fact that the Appellant left Synthesis Design of her own volition and was not pushed out because of absenteeism or performance issues. I would not interfere with these findings, which appeared to me to be firmly rooted in the evidence. It was within the GD's jurisdiction, as trier of fact, to assign weight to the available evidence and make reasonable inferences from it. Although the GD did not use the words "benevolent employer," the above passage shows that it was nonetheless making an implicit assessment as to whether Synthesis Design received significant value for the wages it paid to the Appellant. In the end, the GD concluded—fairly, in my view—that although it extended accommodations to the Appellant, her last employer was satisfied with her performance and kept her employed mainly for commercial reasons, and not out of charity or unusual generosity.

[53] On balance, I find this ground of appeal has no merit.

CONCLUSION

[54] For the reasons discussed above, the appeal succeeds on the ground that the GD erred in law by giving too narrow an interpretation to the *Inclima* mitigation principle and by ignoring evidence of the Appellant's attempts to work prior to her last job.

[55] Section 59 of the DESDA sets out the remedies that the AD can give on appeal. To avoid any 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.

Member, Appeal Division