



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *T. C. v. Minister of Employment and Social Development*, 2016 SSTADIS 446

Tribunal File Number: AD-16-128

BETWEEN:

T. C.

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: Janet Lew

HEARD ON: October 24, 2016

DATE OF DECISION: November 21, 2016

REASONS AND DECISION

IN ATTENDANCE

Appellant	T. C. Aurelio Acquaviva (paralegal)
Respondent	Sylvie Doire (counsel) Stephanie Pilon and Tania Arrega (paralegals) (observers)

OVERVIEW

[1] This is an appeal of the decision of the General Division dated November 14, 2015. The General Division determined that the Appellant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that he did not have a severe and prolonged disability before the end of his minimum qualifying period on December 31, 2010.

[2] The Appellant filed an Application Requesting Leave to Appeal to the Appeal Division on January 11, 2016. I granted leave to appeal on April 7, 2016, on the ground that the General Division may not have followed *Villani v. Canada (Attorney General)*, 2001 FCA 248 and applied the Applicant's personal characteristics.

[3] This appeal proceeded by videoconference for the following reasons:

- (a) the complexity of the issues under appeal;
- (b) the fact that the appellant is represented;
- (c) the availability of videoconference in the area where the Appellant resides;
and,
- (d) the requirements under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[4] To succeed on this appeal, the Appellant must establish that the General Division erred in law.

ISSUES

[5] There are two issues before me:

- i. whether the General Division erred in law and
- ii. the appropriate disposition of this matter.

GROUND OF APPEAL

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* sets out the grounds of appeal as being limited to the following:

- (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- (c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[7] I granted leave to appeal on the basis that the General Division might have erred in law in failing to consider the Appellant's personal characteristics such as his age, level of education, language proficiency, and past work and life experience.

[8] The Appellant's representative made submissions at the hearing regarding the Appellant's work and medical history following his motor vehicle accident on November 4, 2007. The Appellant suffers from chronic back, right shoulder and knee pain, depression and anxiety. He maintains that, despite undergoing various treatment modalities and his numerous attempts at looking for alternate work, he has been unable to return to the workforce since his accident.

[9] The Appellant's representative endeavoured to adduce evidence from the Appellant during the hearing of this appeal. He also reviewed some of the medical records. He denies that he is seeking a reassessment and contends that his review of the medical evidence addresses the ground of appeal upon which leave to appeal was granted, as the medical evidence establishes that the Applicant meets the *Villani* criteria. Notwithstanding these submissions, I find that they do not specifically address the issue as to whether the General Division considered *Villani*. There is a marked distinction between having the Appeal Division reassess the Applicant's personal characteristics and determining whether the General Division failed to consider the Applicant's personal characteristics. The Appellant essentially is asking that the Appeal Division accept that the General Division failed to follow *Villani* and that I then conduct my own reassessment. However, as the Federal Court held in *Tracey v. Canada (Attorney General)*, 2015 FC 1300, it is not the role of the Appeal Division to reassess the evidence or reweigh the factors considered by the General Division when determining whether leave should be granted or denied.

[10] The Respondent's counsel on the other hand submits that the General Division did in fact consider the Appellant's personal characteristics.

[11] Firstly, the General Division noted the evidence regarding the Appellant's personal characteristics, at paragraphs 9 to 12, where it noted his age, education, literacy level and work experience. Then, the General Division noted the Appellant's submissions. At paragraph 30, the member acknowledged the Appellant's submissions that, "[h]e is not able to work in an alternative job because he has a very low learning capacity and he is illiterate and does not read or write". However, paragraphs 9 to 12 represent the evidence, while paragraph 30 represents the Appellant's submissions. While the General Division member noted the evidence which it considered to be germane to the appeal, that does not necessarily translate into an analysis of that same evidence.

[12] The Respondent's counsel argues that the General Division addressed the Appellant's work history at paragraph 39. Paragraph 39 reads as follows:

[39] The Tribunal finds that even though the Appellant is limited in terms of his disabilities, the evidence does not establish on the balance of probabilities that he lacks the capacity to pursue light or modified duties. In the Appellant's CPP disability benefits self-employment questionnaire, date stamped by the Respondent on April 23, 2014, the Appellant indicated that he operated a business called Obsession Ink from January 2009 to August 2009. He was the owner and he had a supervisory role. He operated the business even though he stated he was illiterate and could not perform any physical activities. He hired three employees to assist him in operating his business. He admitted that he closed his business because it was not doing well financially. There is no evidence on file that the Appellant closed his business due [*sic*] his medical condition.

[13] The Respondent's counsel further argues that the General Division also addressed or at least considered the Appellant's education, training and experience, at paragraph 40.

That paragraph reads:

[40] The Tribunal notes that on July 30, 2009, Dr. Frank, psychologist, noted that the Appellant does not suffer from an impairment as a direct result of injuries sustained in his motor vehicle accident which would cause him a complete inability to engage in employment for which he is reasonably suited by education, training or experiences. He would likely be suited for a low stress job in which he could alternate between standing and sitting. He would likely succeed as a parking lot attendant or a light courier service driver. His psychological clinical picture is not of the quality or severity that would result in a complete inability for the Appellant to engage in employment in which he is reasonably suited.

[14] *Villani* does not restrict a decision-maker as to how he ought to assess an appellant's personal characteristics. Indeed, the Federal Court of Appeal cautioned against interfering with a decision-maker's assessment. At para. 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.

[15] The Appellant argues that the General Division did not consider the Appellant's personal characteristics. Indeed, the General Division did not immediately set out to conduct

a *Villani* assessment after setting out the *Villani* test at paragraph 33 of its decision. However, it is clear from paragraphs 39 and 40 of the decision of the General Division that it did in fact assess the Appellant's personal characteristics in a "real world" context, when it determined that the Appellant's capacity regularly of pursuing any substantially gainful occupation during the minimum qualifying period had been unimpeded by the fact that he is illiterate. Similarly, at paragraph 40, the General Division, by implication, must have taken the Appellant's personal characteristics into account when determining his capacity, by the very language it employed. The General Division used the expression "reasonably suited", when it contemplated whether there was any substantially gainful occupation for which he might be capable regularly of pursuing. The General Division also accepted the medical opinion of a psychologist who considered that the Appellant did not suffer from an impairment which would cause him a complete inability to engage in employment "for which he is reasonably suited by education, training or experiences". The General Division had to have considered the Appellant's personal characteristics, alongside his physical and other limitations or restrictions, in determining his suitability for other substantially gainful occupations. The General Division, for instance, cited two particular occupations – as a parking lot attendant or light courier service driver – which necessarily had to have taken the Appellant's limited education, literacy and language level, and past work experience into account.

CONCLUSION

[16] Given the above considerations, the appeal is dismissed.

Janet Lew
Member, Appeal Division