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

Citation: *G. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 502

Tribunal File Number: AD-16-692

BETWEEN:

G. S.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: December 22, 2016

REASONS AND DECISION

DECISION

[1] The appeal is allowed.

INTRODUCTION

[2] This is an appeal of the decision of the General Division (GD) of the Social Security Tribunal issued on April 12, 2016, which dismissed the Appellant's application for a disability pension on the basis that he did not prove that his disability was severe, for the purposes of the *Canada Pension Plan* (CPP), prior to his minimum qualifying period (MQP) of December 31, 2016. Leave to appeal was granted on October 13, 2016, on the grounds that the GD may have erred in rendering its decision.

OVERVIEW

[3] The Appellant submitted an application for CPP disability benefits on July 29, 2013. He did not disclose his level of education but indicated that he was 50 years old and had worked at Canada Post until April 2013, when he left because of "anxiety, anger and authority issues." He also complained of back pain.

[4] The Respondent denied the application at the initial and reconsideration levels on the grounds that the Appellant's disability was not severe and prolonged as of the MQP date. On June 13, 2014, the Appellant appealed these denials to the GD

[5] At the teleconference hearing before the GD on January 18, 2016, the Appellant testified that he had a grade 12 education as well as some military training. He started working for Canada Post in either 2004 or 2006 and stayed there for about nine or ten years. He stopped working for Canada Post because his bosses were abusive. He said that he was depressed and anxious and experienced panic attacks. He also had a history of abusing alcohol and had been diagnosed with syphilis, which affected the vision in his right eye.

[6] In its decision, the GD found that the Appellant's disability fell short of the requisite severity threshold, noting that none of his specialists had reported any severe diagnostic

findings. While the GD accepted that he had been deeply affected by his negative experience working for Canada Post, it was not persuaded that his mental health conditions precluded him from regularly pursuing any substantially gainful occupation. It also found that the Appellant had not been fully compliant with all of his physicians' treatment recommendations.

[7] On May 16, 2016, the Appellant's representative filed an application for leave to appeal with the Appeal Division (AD) of the Social Security Tribunal alleging the following errors on the part of the GD:

(a) Failing to consider Dr. Mariam Vania's April 17, 2015 report;
(b) Failing to consider the August 29, 2012 MRI of the low back;
(c) Failing to consider Dr. Degala Krishnaprasad's September 25, 2012;
(d) Failing to consider Dr. Jean-Claude Bisserbe's September 30, 2013, report;
(e) Failing to consider Appellant testimony that he was depressed, tired and in pain;
(f) Failing to apply the "real world" legal test in *Villani v. Canada.*[1]

[8] On October 13, 2016, having considered all of the Appellant's allegations, I thought there was an arguable case that the GD may have erred in law by failing to apply the *Villani* principle. Leave to appeal was granted solely on that ground.

[9] I now 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.

[10] The Appellant's submissions were set out in his application for leave to appeal, supplemented by way of a letter dated November 2, 2016. The Respondent filed its submissions on November 28, 2016.

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

THE LAW

[11] 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

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.

[12] 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.

[13] 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).

[14] 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.

[15] 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.

SUBMISSIONS

[16] Leave to appeal was restricted to the sole ground that GD may have erred in failing to apply the legal test in *Villani,* which requires a tribunal to adopt a "real world" analysis in determining whether a claimant is employable. Given his age and lack of education and transferable skills, the Appellant claims he is effectively unemployable and should be found disabled for purposes of the CPP.

[17] In his letter dated November 2, 2016, the Appellant's representative reiterated the submissions on *Villani* but also submitted three new grounds of appeal, none of which were specifically pleaded at leave:

(a) At paragraph 40 of its decision, the GD concluded that the Appellant did not abstain from alcohol and attend drug addiction counselling. However, he testified at the hearing that they were no longer an issue. For some unstated reason, the GD did not accept this evidence, although it could not have possibly assessed the Appellant's credibility in a teleconference hearing.

(b) At paragraph 41, the GD found that that the Appellant did not pursue psychotherapy, as suggested by Dr. Vania. However, the Appellant testified at the hearing that he had attended some counselling sessions but did not feel that they were helping him. Again, without providing any reasons, the GD did not accept his evidence.

(c) At paragraph 41, the GD found that there was little evidence to show that the Appellant's disability was of a long, continued or an indefinite duration. This conclusion is unsupportable given the fact that the Appellant stopped working on April 25, 2013.

[18] In its submissions, the Respondent cited *Lalonde v. Canada (MHRD)*[2] for the proposition that consideration of impairment in a "real world" context must also include consideration of whether a claimant has followed medical advice. The Respondent added: "In the present case, the SST-GD considered the real world context through their analysis of the

[2] *Lalonde v. Canada (MHRD),* 2002 FCA 211.

Appellant's compliance with treatment recommendations and found that the refusal to follow the treatment was not supported by reasonable explanation."

[19] The Respondent pointed to reports from Dr. Krishna, Dr. Rogers and Dr. Sonia in support of the GD's conclusion that the Appellant failed to follow recommendations to attend, respectively, drug addiction counselling, detox and regular psychotherapy.

[20] Even though the *Villani* real world test implies a review of factors such as age, education, and work experience, there is jurisprudence to support that this aspect of the analysis is not always necessary. In *Giannaros v. Canada (MSD)*,[3] the appellant similarly failed to follow recommended treatment, leading the Pension Appeals Board to conclude that he did not suffer from a severe and prolonged this ability. The Federal Court of Appeal held that, having found the Appellant did not mitigate his impairments, there was no need to apply the real world approach and that no reviewable error occurred by not considering the Appellant's personal characteristics.

ISSUES

[21] The issues before me are as follows:

(a) Is the AD obliged to consider fresh grounds of appeal submitted after leave has already been granted?

(b) Did the GD err in law by failing to apply *Villani*?

ANALYSIS

Standard of Review

[22] 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.*[4] In matters involving alleged errors of law or failure to observe principles of natural justice, the applicable standard was held to be correctness, reflecting a lower threshold of deference deemed to be owed to a first-level administrative tribunal. In matters where erroneous findings of fact were

[3] *Giannaros v. Canada (Minister of Social Development)*, 2005 FCA 187.
[4] *Dunsmuir v. New Brunswick*, [2008] SCR 190, 2008 SCC 9.

alleged, the standard was held to be reasonableness, reflecting a reluctance to interfere with findings of the body tasked with hearing factual evidence.

[23] The Federal Court of Appeal decision, *Canada (MCI) v. Huruglica*,[5] 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.

New Grounds of Appeal

[24] Although I allowed leave to appeal on only one of the grounds contained in the Appellant's May 16, 2016 application for leave, the Appellant's representative submitted three new grounds in his letter of November 2, 2016.

[25] I am mindful that the AD has previously permitted appellants to raise new grounds of appeal after leave to appeal has been granted.[6] However, in those cases, unlike this one, the AD did not employ language at the leave stage specifically intended to restrict the grounds on which the appeal would be heard on its merits. Moreover, I am reluctant to entertain new lines of argument where no explanation for the delay was offered and there is obvious reason why they could not have been submitted earlier. In my view, if I were to consider the Appellant's three additional submissions, I would in effect be extending his time to mount an appeal and thereby doing an injustice to other applicants for leave in similar positions.

Villani

[26] The *Villani* decision requires a determination of disability to be made in the context of an applicant's personal background:

> [38] Each word in [subparagraph 42(2)(a)(i)] must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, occupations which a

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

[6] *P.M. v. Minister of Employment and Social Development*, 2016 SSTAD 12; *D.D. v. Minister of Employment and Social Development*, 2016 SSTADIS 344.

> decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.it follows from this that the hypothetical

[27] The Respondent argues that the *Villani* real word analysis need not involve a review of the Appellant's personal characteristics if it can be shown that he did not pursue all reasonable treatment recommendations. For this, it relies on the a paragraph of the Federal Court of Appeal decision *Lalonde*, which I think it useful to quote in its full context:

> [17] This "real world" context requires that the Board give meaning to each of the words in subparagraphs 42(2)(a)(i) and (ii) of the Act. The "real world" context presupposes that the Board consider the particular circumstances of Ms. Lalonde, her age, education level, language proficiency and past work and life experience. The Board cited some of those elements. It noted that Ms. Lalonde was 54, that she had only a grade 7 education, and that she had successfully completed a one-year course as a nurse's aide. But it did not draw any inferences from those facts by reference to the law that it was required to apply.
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> [18] The "real world" context, as stated in paragraph 43 of *Villani* (see also paragraph 37), requires that the Board consider the words "regularly", "substantially" and "gainful" that are found in the definition of severe. Thus, to meet that definition, Ms. Lalonde must be incapable of "regularly... pursuing any substantially gainful occupation." According to the decision of this Court in *Rice*, the particular economic conditions in the area where Ms. Lalonde lives cannot, however, be considered.
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> [19] The "real world" context also means that the Board must consider whether Ms. Lalonde's refusal to undergo physiotherapy treatment is unreasonable and what impact that refusal might have on Ms. Lalonde's disability status should the refusal be considered unreasonable.
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> [20] The Board therefore did not determine whether Ms. Lalonde's physical disability was "severe and prolonged". That constitutes an error of law (*Housen v. Nikolaisen*, [2002] S.C.J. No. 31, 2002 SCC 33, paragraphs 8, 26 and 27) and vitiates the validity of the decision.

[28] *Lalonde* is frequently cited for the proposition that a proper *Villani* analysis must consist of more than just a *pro forma* recitation of a claimant's personal characteristics; the decision-maker must also assess whether those characteristics would pose a hindrance to the claimant's employability, given his or her impairments. *Villani* itself says nothing about the relevance of a claimant's willingness to follow medical advice, but *Lalonde*, even if only in passing, suggests

that treatment mitigation is a factor in determining whether the claimed disability is severe. By this logic, whether a claimant has sought treatment is a valid indicator of whether he or she actually needs it. One can reasonably infer that an individual who has refused recommended treatment does not need it and, by implication, suffers from a disability that falls short of severity.

[29] I find nothing in this part of the Respondent's submissions controversial, and the GD was within its jurisdiction to base a finding of non-severity on the Appellant's failure to accept reasonable treatment. However, the Respondent then argued that the GD was permitted to dispense with consideration of the *Villani* factors by application of the *Giannaros* case, which reads in part:

> [14] I now turn to the applicant's last submission, which is based on our Court's decision in *Villani*, supra. Specifically, the applicant argues that the Board erred in omitting to consider her personal characteristics, such as age, education, language skills, capacity to retrain, etc. In my view, in the circumstances of this case, this last submission cannot possibly succeed. In *Villani*, supra, at para. 50, our Court stated unequivocally that a claimant must always be in a position to demonstrate that he or she suffers from a severe and prolonged disability which prevents him or her from working:
>
> > [50] This restatement of the approach to the definition of disability does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation". Medical evidence will still be needed as will evidence of employment efforts and possibilities. Cross-examination will, of course, be available to test the veracity and credibility of the evidence of claimants and others.
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> [15] As the Board was not persuaded that the applicant suffered from a severe and prolonged disability, as of December 31, 1995, there was, in my view, no necessity for it to apply the "real world" approach.

[30] The Respondent argues that *Giannaros* relieves a tribunal of the need to consider the *Villani* factors where it has already decided an applicant's disability falls short of severe, but I am reluctant to endorse so expansive an interpretation of this case. First, *Villani* itself suggests that the real world analysis must be an integral part of the severity assessment:

> [46] What the statutory test for severity does require, however, is an air of reality in assessing whether an applicant is incapable regularly of pursuing any substantially gainful occupation. Naturally, decision-makers already adopt a certain measure of practicality in their severity determinations. As an obvious example, the scope of substantially gainful occupations suitable for a middle-aged applicant with an elementary school education and limited English or French language skills would not normally include work as an engineer or doctor.

[31] Second, to adopt the approach recommended by the Respondent would be to excuse disregard for the *Villani* factors by virtue of GD simply declaring a disability "non-severe," and I doubt that was the intention of the Federal Court of Appeal in *Giannaros*. Third, I am guided by a succession of subsequent cases[7] from the same court that have made it clear that some form of *Villani* analysis is an indispensable component of a severity assessment.

[32] Against this backdrop, having reviewed the decision against the available evidence, I must agree with the Appellant that the GD erred in law in rendering its decision. While the GD noted aspects of the Appellant's background in the summary of evidence—he was in his fifties at the time of the hearing and is a high school graduate with a history of low-skilled, manual labour—I saw no attempt to meaningfully apply them to his employment prospects. Instead, the GD's analysis, which did not even contain a *pro forma* recitation of *Villani*, was comprised entirely of a discussion of the Appellant's failure to pursue treatment, followed by a finding that his disability was not "prolonged." While these are important considerations, they should have been discussed in the context of the Appellant as a whole person. In short, it was incumbent on the GD to take a hard look at the real-world employability of a person with this Appellant's profile.

CONCLUSION

[33] For the reasons discussed above, the appeal succeeds on the ground for which leave was allowed.

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[7] *Klabouch v. Canada (Social Development)*, 2008 FCA 33; *Bungay v. Canada (Attorney General)*, 2011 FCA 47; *D'Errico v. Canada (Attorney General)*, 2014 FCA 95.

[34] 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