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

Citation: *G. D. v. Minister of Employment and Social Development*, 2016 SSTADIS 512

Tribunal File Number: AD-16-723

BETWEEN:

G. D.

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 30, 2016

Canada

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 February 22, 2016, 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), during her minimum qualifying period (MQP), which was determined to end December 31, 2016. Leave to appeal was granted on October 17, 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 12, 2013. She indicated that she was 46 years old and held a Bachelor of Commerce from the University of Toronto. She then earned a Chartered Accountant designation and spent 22 years working at KPMG, most recently in its national tax division. In August 2011, she was involved in a motor vehicle accident, leaving her with neck, back and right shoulder pain. She last worked on a full-time basis in September 2011, and made two unsuccessful attempts to return to a part-time work schedule in April 2012. She said she had not worked, or attempted to work, since then.

[4] The Respondent denied her application at the initial and reconsideration levels on the grounds that her disability was not severe and prolonged. On October 15, 2014, the Appellant appealed these denials to the GD.

[5] At a teleconference hearing before the GD on February 18, 2016, the Appellant testified that, despite pain, she was able to get her three children ready for school in the morning. She continued to drive and perform light housekeeping tasks. She also told the GD that she made a second attempt to return to modified employment in March and April 2015. She reviewed personal tax returns on the clients' premises on Monday and Thursdays. She said she needed to

"space the days" in order to allow recuperation time, and it was necessary for her to sit and stand, as required. In May 2015, she worked for two days a week at home and occasionally at her employer's office preparing reports and summaries in a role similar to that of a senior manager. She continued this eight-hour-per- day job until July 2015, when she stopped for a pre-planned one-month vacation. Upon her return, the employer indicated that no position was available, and in November 2015 she was informed that her employment had been terminated.

[6] In its decision, the GD found that the Appellant's disability fell short of the requisite severity threshold, noting that her orthopedic surgeon felt that she was capable of performing light duties. As well, she demonstrated capacity by working for two full, non-consecutive days per week up to July 2015.

[7] On May 20, 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. In a decision dated October 17, 2016 (reissued with corrections on November 16, 2016), the AD granted leave on the grounds that the GD may have:

(a) Erred in law by misapplying the real world test set out in *Villani v. Canada*;[1]

(b) Erred in fact and law by disregarding the regularity aspect of the test for disability while giving inadequate consideration to the reasons KPMG terminated her employment.

[8] 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

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

[9] The Appellant's position was set out in her application for leave to appeal, supplemented by further submissions dated November 30, 2016. On December 1, 2016, the Respondent filed its submissions arguing that the appeal be dismissed.

THE LAW

[10] 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.

[11] 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.

[12] 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).

[13] 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.

[14] 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

[15] The issues before me are as follows:

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

(b) Did the GD err in failing to apply the "real world" test set out in *Villani*?

(c) Did the GD err in disregarding the regularity aspect of the test for disability while giving inadequate consideration to the reasons KPMG terminated her employment?

(d) If the GD was found to have erred, what remedies are appropriate in this case?

SUBMISSIONS

Overview

[16] I restricted leave to appeal to two grounds and invited further written submissions from the parties. In his letter dated November 30, 2016, the Appellant's representative reiterated his client's claim of disability and provided a lengthy summary of evidence that had already been presented to the GD. As an appeal to the AD is not an opportunity to reargue one's case and ask for a different outcome, I will not address this component of the submissions.

Standard of Review

[17] The Appellant made no submissions on this matter.

[18] 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.

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

[20] 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*,[2] 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.

[21] 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.

Villani **Real World Test**

[22] The Appellant submits that the GD erred in law by failing to apply the provisions set out by the Federal Court in *Villani v. Canada*,[3] which requires the severity of a claimant's disability to be assessed in a real world context that takes into account his or her employability in the labour market. Paragraph 33 of *Villani* indicates that the severity of an individual's disability also depends on the realities of a commercial enterprise, which was not a factor considered by

[2] *Canada (Minister of Citizenship and Immigration) v. Huruglica,* 2016 FCA 93.
[3] *Villani v. Canada (Attorney General),* 2001 FCA 248.

the GD. In this case, the GD focused only on the Appellant's age, level of education, language proficiency and past work and life experience.

[23] In *M. (C.) v. Canada (MHRSD),*[4] a 53 year old married woman with four children who held a four-year degree in early childhood education became a daycare worker for special needs children. She developed chronic pain in her lower back, neck, hip, leg, fingers and elbows, as well as depression, which restricted her to reduced working hours. In applying the principles of *Villani*, the court found that claimant's impairment was "severe," because in the real world, "regular" employment meant showing up for work every day.

[24] The Appellant maintains that her lack of employability in a real world context is demonstrated by her dismissal by KPMG, as it offered her no meaningful work within her medical restrictions. It is therefore realistic to postulate that, given the Appellant's documented difficulties with chronic pain and inability to work consecutive days, no employer would remotely consider hiring her.

[25] The Respondent submits that the GD correctly applied the test as set out in *Villani*. As noted by the Federal Court of Appeal in *Canada (MHRD) v. Rice,*[5] the severity requirement must be examined in light of the particular circumstances of the applicant. However, the court went on to note that the capacity of the individual to be employed, regardless of the state of the labour market, is determinative of severity under the CPP.

[26] According to *Bungay v. Canada (AG),*[6] *e*employability is not to be assessed in the abstract, but rather in light of "all of the circumstances." The circumstances fall into two categories: (i) the claimant's background (age, education level, language proficiency, and past work and life experience) and (ii) the claimant's medical conditions. In paragraph 22 of its decision the GD correctly stated the *Villani* real world test and correctly noted that not everyone with a medical condition who is unable to return to a pre-injury level of employment is entitled to a disability pension.

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[4] *M. (C.) v. Canada (Minister of Human Resources* & *Skills Development),* 2007 C.E.B. & P.G.R. 8559.
[5] *Canada (MHRD) v. Rice*, 2002 FCA 47.
[6] *Bungay v. Canada (Attorney General)* 2011 FCA 117.

[27] The Respondent maintains that evidence before the GD clearly showed that the Appellant does not have a severe and prolonged disability. She is young and educated and, while she did require accommodations, she was able to return to work two days a week, for eight hours a day. She had no issues with performing activities of daily living, and there was no impact on her social life. Furthermore, at her hearing, the Appellant testified that she was searching for a part-time job within her profession. If so, then she did not believe that her medical condition prevented her from being substantially and gainfully employed.

Regularity

[28] The Appellant submits that the GD based its decision on an erroneous finding of fact when it found, in paragraph 26 of its decision, that the Appellant continued to demonstrate the capacity to work part time after she was terminated from her job. In fact, the evidence shows that her employer only accommodated her temporarily, allowing her to work non-consecutive days from her home. KPMG ultimately concluded that her medical condition precluded her from working not only as a senior manager, but also any position, as indicated in its letter of November 30, 2015—a document referenced by the GD in its decision.

[29] In considering the Appellant's capacity for part-time work, the GD found that "her employment stopped not due to her inability but because her pre-accident employer did not have suitable work to accommodate her restrictions." In doing so, the Appellant alleges, the GD failed to accurately represent KPMG's reasons for termination and properly apply this evidence to the law. Citing frustration of contract for terminating her employment, KPMG stated that it was unable to identify any positions in which her medical restrictions could be accommodated. In fact, KPMG identified the Appellant's incapacity for *regular* work as the reason it terminated her employment.

[30] In *MSD v. Schuurmans*,[7] the Pension Appeals Board determined that a person suffering from a chronic disease with intermittent and unpredictable symptoms may be considered disabled. In that case, the claimant's Crohn's disease prevented her from holding regular work. It found the impairment severe because merely attempting to work further aggravated the

[7] *Minister of Social Development v. Schuurmans* (2006) CP23478 (PAB).

applicant's condition. The term "regularly" was defined in *Chandler v. MHRD*[8] as being "capable of going to work as often as is necessary with predictability being the essence."

[31] With respect to this test, the GD based its decision on an erroneous finding of fact that "the Appellant continued to demonstrate the capacity to work part time when she was terminated in November 2015" (paragraph 26). The material before the GD did not in fact demonstrate that the Appellant had the capacity to work part-time when she was terminated. Her employer temporarily accommodated her by permitting her to work non-consecutive days from her home. Ultimately, however, KPMG concluded "that her medical condition precluded her from working not only in her current position as a senior manager but also any position," and as a result terminated her employment.

[32] The material before the GD demonstrated that the Appellant's capacity to work was unpredictable, as she was unable to work outside normal office hours and could only work for two non-consecutive days per week with allowance to work from home. She was clearly not capable of "going to work as often as is necessary with predictability."

[33] The Respondent submits that the GD did not make an erroneous finding of fact. The letter of dismissal from KPMG states that the Appellant could not be accommodated because it would cause hardship for the company. The Appellant's dismissal was not due to her medical condition.

[34] The Federal Court of Appeal has held that a disability is severe if it impairs an applicant from earning a living. The determination of disability is premised on an applicant's ability to perform any work, and not on an inability to perform their regular job.[9]

[35] As per the Federal Court of Appeal's decision in *Inclima v. Canada*,[10] "…an applicant who seeks to bring himself 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, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of a health condition."

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[8] *Chandler v. MHRD* (1996), CP4040 (PAB).
[9] *Klabouch v. Canada (Social Development)*, 2008 FCA 33.
[10] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

[36] In the letter of dismissal, the Appellant was told that KPMG had made attempts to accommodate her medical work restrictions but was unable to find suitable positions. Furthermore, accommodating the Appellant's medical restrictions would be a hardship to KPMG. The evidence before the GD is that at the time she was dismissed from KPMG, the Appellant had the capacity to work two non-consecutive days a week, at eight hours per day. She believed she had the capacity to work at the time of the hearing, as she was looking for employment in her field. Moreover, there was no evidence that she was prevented from retraining, or looking for a job outside of her current field, by her medical condition.

[37] Given the Appellant's medical conditions and the lack of evidence that she made sufficient effort to explore alternative employment, the GD's conclusion that her disability fell short of "severe" on or prior to the hearing date of February 18, 2016 was not made in a perverse or capricious manner without regard to the material before it

ANALYSIS

Standard of Review

[38] 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.*[11] 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.

[39] 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.

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

[40] 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

[41] This a is a case in which the classic *Villani* factors—age, education, language skills and past work and life experience –do not assist the Appellant's disability claim and may in fact hurt it. The Appellant is a native English speaker who has a university degree and professional designation with more than two decades experience working for a multinational accounting firm. In the absence of impairments, an individual with this profile can only be described as eminently "employable," but however well qualified the claimant, the *Villani* test still requires consideration of the "whole person," including all of her particular circumstances.

[42] The Respondent cited *Rice* to argue that consideration of employability cannot include socio-economic factors such as labour market conditions. It should be noted that *Rice* involved an individual living in a small community whose primary industry, fishing, was in steep decline. By contrast, the Appellant in this case is not arguing that prevailing economic conditions make it that much more difficult for someone with a disability get a job; she lives in the Greater Toronto Area, the centre of the Canadian financial services industry, where she was employed for 22 years and would presumably be able to secure, in fairly short order, at least some kind of clerical job, based on her qualifications alone. In short, there is no suggestion here that economic conditions have prevented her from working, only her claimed physical impairments.

[43] That said, employability is intimately linked with what employers demand and what they are willing to accept. Indeed, while socio-economic factors are irrelevant to a finding of disability, commercial imperatives are not—a view endorsed by *Villani* when it quoted with approval the earlier Federal Court of Appeal decision *Leduc v. MNHW*:

> 33. The "real world" approach was first adopted by the Board in *Leduc, Edward v. Minister of National Health and Welfare* (1988), C.E.B. & P.G.R. 8546 (P.A.B.). In that case, the Board found for the applicant on the following basis [at page 6022]:
>
> > The Board is advised by medical authority that despite the handicaps under which the Appellant is suffering, there might exist the possibility that he might be able to pursue some unspecified form of substantially gainful employment. In an abstract and theoretical sense, this might well be true. However, the Appellant does not live in an abstract and theoretical world. He lives in a real world, people [sic] by real employers who are required to face up to the realities of commercial enterprise. The question is whether it is realistic to postulate that, given all of the Appellant's well-documented difficulties, any employer would even remotely consider engaging the Appellant. This Board cannot envision any circumstances in which such might be the case. In the [page149] Board's opinion, the Appellant, Edward Leduc, is for all intents and purposes, unemployable.

[44] The GD found that the Appellant was "employable" largely because it found she was capable of regular work. I will now examine whether this finding is supported by the record.

Regularity

[45] The Appellant alleges that the GD committed what amounts to an error of mixed law and law by in effect disregarding the circumstances surrounding her dismissal from KPMG, placing insufficient emphasis on the "regular" aspect of the statutory test for severity.

[46] Having reviewed the decision, I am compelled to agree. There was evidence, which was accepted by the GD, indicating that the Appellant made at least two attempts to return to her job at KPMG—two weeks of modified duties in April 2012 and several months in various capacities from March to July 2015, when she left for a month-long vacation. On her return, she was informed that no position would be made available to her. In paragraph 28 of its decision, the GD aptly cited case law (including *Schuurmans* and *Chandler*) to equate regularity with predictability and the capacity to go to work as often as is necessary. In the end, one of the main factors influencing the GD's decision appears to have been what it found was the Appellant's supposed ability to perform part-time employment—an eight-hour day, on non-consecutive days twice a week—between May and July 2015.

[47] While regularity is undoubtedly an important component of the disability definition, it is not the only component—a claimant must also be incapable of "substantially gainful" work. It is true that the Appellant managed to work fixed, but limited, hours for nearly four months, but the fact remains that her return to KPMG did not end well. While the GD acknowledged the Appellant's loss of her job, it obscured the cause, finding in paragraph 26 that she was dismissed for reasons other than incapacity:

> Her employment stopped not due to her inability but because her pre-accident employer did not have suitable work to accommodate her medical restrictions.

[48] In my view, by leaving it at that, the GD based its decision on an erroneous finding of fact without regard for the record. In fact, the preponderance of evidence indicates that KPMG ended her employment precisely because of her "inability." Someone who had presumably once been a valued employee (after all, she was with the firm for more than 20 years) was now reduced to working no more than 16 hours per week, some of it from home, performing tasks that did not rise to her qualifications. KPMG could not offer her "suitable work" to accommodate her restrictions because it would not have been economically feasible to do so, as was made clear by its November 30, 2015 letter of termination:

> Unfortunately, we have not been able to identify any such positions in which your medical restrictions could be accommodated without KPMG incurring undue hardship… Based on the medical information provided by your physician, it appears that you will continue to be subject to your current medical restrictions for an undetermined period of time, and KPMG simply does not have positions in Tax in which you could do meaningful work subject to these medical restrictions.

[49] All employers demand value from their employees, and KPMG concluded that the Appellant's impairments made it uneconomic to pay her a "substantially gainful" salary—or any salary at all. Nevertheless, despite the fact that an accounting firm—the very exemplar of a white-collar, information-based employer—could find no place for the Appellant, the GD went on to find that she was still employable:

> [27] Although the Appellant may have been underemployed given her education and work history while accommodated by her pre-accident employer, she was physically and psychologically capable of

> employment. Given the Appellant's ability to perform the basic duties of her accommodated employment in 2015, the Tribunal finds that these jobs are considered to be substantially gainful employment.

[50] The GD saw evidence of continued residual capacity in the Appellant's activities of daily living, but these are not determinative of an ability to function in a commercial workplace. The GD also pointed to medical reports endorsing her return to part-time work, but it must be noted that they were prepared at the beginning of her final work trial, which we can now see in hindsight was unsuccessful. However, the most significant factor in the GD's decision to deny the Appellant disability benefits was her supposed ability to maintain a part-time position in the months leading up to July 2015—a finding that, in my view, gave inadequate consideration to the realities of the labour market. In the end, the Appellant showed herself unable to hold a wholly sedentary job consisting of two non-consecutive eight-hour shifts per week, yet this was taken to be evidence of capacity to maintain "substantially gainful" employment. *Villani* cautions against considering "hypothetical" occupations without due consideration of a claimant's particular circumstances. In this case, I find it a challenge to conceive of even a hypothetical occupation that would have accommodated the Appellant's physical restrictions more than the one for which she had already been deemed unfit.

CONCLUSION

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

[52] 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