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

Citation: *B. D. v. Minister of Employment and Social Development*, 2017 SSTADIS 44

Tribunal File Number: AD-15-1578

BETWEEN:

B. D.

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

DATE OF DECISION: February 15, 2017

REASONS AND DECISION

OVERVIEW

[1] This case is about whether the General Division properly assessed whether the Appellant's disability was "severe" for the purposes of determining eligibility for a Canada Pension Plan disability pension. The Appellant is appealing the decision of the General Division rendered on October 6, 2015, which found that her disability was not severe on or before the end of her minimum qualifying period on December 31, 2010. It determined that she therefore was not eligible for a disability pension.

[2] Having determined that no further hearing is required, the appeal before me is proceeding pursuant to paragraph 43(*a*) of the *Social Security Tribunal Regulations.*

ISSUE

[3] The sole issue before me is whether the General Division applied the "*Villani"* test in assessing whether the Appellant's disability was severe.

"VILLANI" TEST

[4] The Appellant submits that the General Division erred as it did not apply *Villani v. Canada (Attorney General),* 2001 FCA 248, by considering the Appellant's personal characteristics such as her age, level of education, language proficiency and past work and life experience. She notes that she has a grade 10 education from India, is not proficient in the English language and has largely worked in labour-intensive positions.

[5] The Respondent acknowledges that the General Division did not specifically mention *Villani* but suggests that this is a mere oversight which does not constitute an error, as it otherwise considered all of the *Villani* factors: *Garrett v. Canada (Minister of Human Resources Development),* 2005 FCA 84 at para. 3. The Respondent submits that it clearly and reasonably applied the *Villani* principles by specifically mentioning the Appellant's personal characteristics, such as her age, level of education and past work and life experience. The Respondent argues that the Appellant's circumstances simply do not

support a finding that, in the "real world", she would be unable to engage in any employment, given that her personal factors would assist her in finding employment suitable to her medical condition.

[6] The Respondent claims that the General Division provided a thorough analysis of the Appellant's medical evidence and testimony in light of the *Villani* factors. The Respondent notes, for instance, that at paragraph 9, the General Division indicated that the Appellant is fluent in Punjabi and Hindi and she speaks English, although has a hard time interpreting.

[7] The Respondent claims that the General Division considered the Appellant's level of education in paragraphs 10, 24, 25 and 26. The General Division noted that the Appellant trained in sewing; that in 2009 or 2010, she had completed a six or eight months English as a second language (ESL) program that ran five days a week; that from 2010 to 2011, she took an advanced aesthetics course in massage for six or eight months, five days a week; and that in 2011, she completed a training program at a salon.

[8] The Respondent further claims that the General Division also considered the Appellant's past work and life experience. The General Division set out the evidence regarding the Appellant's work history at paragraphs 10, 11 and 62. At paragraph 62, the General Division equated "the daily time" spent on the Appellant's coursework with "a work day schedule". The General Division determined that the "concentration and effort required to complete [the ESL and aesthetics] courses … comparable to the efforts required at a paying job".

[9] The Respondent contends that the General Division's assessment of the Appellant's circumstances ought to be seen as a question of judgment, not to be interfered with by the Appeal Division. Counsel argues that it is sufficient to meet the *Villani* test if the General Division assessed and considered the Appellant's personal circumstances in the "real world" context in determining how those factors impacted upon her capacity regularly of pursuing any substantially gainful occupation. On this basis, counsel asserts that the Appellant's case is distinguishable from *Bungay v. Canada (Attorney General),* 2011 FCA 47, as there, the

Pension Appeals Board had not considered the *Villani* factors at all or in any detail in Ms. Bungay's case.

[10] Finally, the Respondent submits that the decision of the General Division is overall reasonable and contains no reviewable errors that would permit the intervention of the Appeal Division.

ANALYSIS

[11] It is implicit in the Respondent's submissions that the General Division was required to conduct an analysis under *Villani.* The decision of the Federal Court of Appeal indicates that the statutory test for severity be applied with some degree of reference to the "real world" and that a decision-maker must consider an applicant's particular circumstances, such as age, education level, language proficiency and past work and life experience. *Bungay v. Canada* confirmed that a decision-maker must consider these details, when it wrote:

> [11] [. . .] Further, aside from brief mention of the applicant's work history, there is no mention of her age, education level, language proficiency and past life experience at all or in any detail as required by *Villani*, *supra*.

[. . .]

> [14] The dissenting member charged herself properly as to the law as set out in *Villani* (at paragraph 14):
>
> > The *Villani* (2001 FCA 248 (CanLII), [2002] 1 F.C. 130) test and the case law requires the Tribunal and this Board to examine an individual's entire physical condition, age, level of education, employability and so on.

[12] In *Bungay*, the Federal Court of Appeal allowed the application for judicial review. It quashed the decision of the Pension Appeals Board, ordering that a new panel of the Pension Appeals Board "reconsider [the] matter applying the *Villani* test".

[13] In *Garrett*, the Federal Court of Appeal held that the Pension Appeals Board had failed to cite the *Villani* decision or conduct their analysis in accordance with its principles. It determined that this constituted an error of law. The Federal Court of Appeal wrote:

> In particular, the majority failed to mention evidence that the applicant's mobility problems were aggravated by fatigue and that she would have to alternate sitting and standing; factors which could effectively make her performance of a sedentary office or related job problematic. This is the 'real world' context of the analysis required by *Villani*.

[14] I agree with the Respondent's submissions that the General Division was not required to expressly mention *Villani*. However, the fact that a decision-maker does not cite or mention *Villani* suggests that it might have failed to turn its mind to the *Villani* analysis.

[15] The *Villani* test is discharged when the General Division *de facto* considers an appellant's personal circumstances in a "real world" context. This is achieved when the General Division determines how those factors impact upon an appellant's capacity regularly of pursuing any substantially gainful occupation. It is insufficient to either point to evidence of an appellant's personal characteristics, or to merely cite *Villani*, without further determining whether and how those personal characteristics impact or influence an appellant's capacity regularly of pursuing any substantially gainful occupation.

[16] It is generally not sufficient to mention an appellant's personal characteristics in the evidence section, as generally no analysis is conducted as to how those characteristics might impact upon an appellant's capacity. Typically one would expect the evidence section of a decision to contain only a summary of the evidence, leaving an assessment of that evidence to the analysis section of a decision. Each case, however, must be assessed on its merits, as there may be some blurring of lines between the evidence and the analysis from time to time.

[17] Notwithstanding the submissions of the Respondent, I do not see that the General Division conducted a *Villani* assessment, as there is no consideration of the "real world" context in which the Appellant finds herself. The General Division analyzed the medical evidence but does not appear to have given any consideration as to how her personal

characteristics might have impacted or affected the employability component of the severity test articulated by the Federal Court of Appeal.

[18] The Respondent argues that as the decision of the General Division is overall reasonable, the Appeal Division should defer to the General Division. The Federal Court of Appeal, however, rejects a standard of review approach for an appellate administrative tribunal such as the Appeal Division: *Canada (Attorney General) v. Jean*, 2015 FCA 242 and *Maunder v. Canada (Attorney General),* 2015 FCA 274. The Federal Court of Appeal cautions against borrowing from the terminology and the spirit of judicial review in an administrative appeal context, and counsels an administrative appellate body such as the Appeal Division to look to its enabling statute. It notes that when the Appeal Division hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), its mandate is conferred to it by sections 55 to 69. In *Jean,* the Federal Court of Appeal held that the Appeal Division was required to determine whether the General Division "erred in law in making its decision, whether or not the error appears on the face of the record". The Federal Court of Appeal stated that there was "no need to add to this wording the case law that has developed on judicial review".

[19] In *Canada (Minister of Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, the Federal Court of Appeal indicated that "one must seek instead to give effect to the legislator's intent". The Federal Court of Appeal indicated that the determination of the role of a specialized administrative body is "purely and essentially a question of statutory interpretation" (at paragraph 46). This approach requires us to analyze the words of the DESDA in their entire context, "in their grammatical and ordinary sense harmoniously" with the scheme of the DESDA and its purpose and object.

[20] Adopting the approach set out by the Federal Court of Appeal requires me to consider the evolutionary path of the DESDA, its purported purpose and object, and the wording of subsection 58(1) of the DESDA. I conclude that some measure of deference must be accorded by the Appeal Division to the General Division on findings of fact. However, I find that no deference is to be accorded where there are errors of law or where any erroneous findings of fact, upon which the General Division bases its decision, are made

in a perverse or capricious manner or without regard for the material before it. Again, that was not the situation before me, as I find that the General Division erred in law by not assessing the Appellant's disability in a "real world" context.

CONCLUSION

[21] The appeal is allowed and the matter returned to the General Division for a redetermination.

Janet Lew
Member, Appeal Division