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

Citation: *D. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 42

Tribunal File Number: AD-15-1328

BETWEEN:

D. 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

DATE OF DECISION: February 15, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] The Appellant seeks to overturn a decision of the General Division rendered on September 16, 2015, which determined that she was not eligible for a disability pension under the *Canada Pension Plan*, as it found that her disability was not "severe" on or before the end of her minimum qualifying period on December 31, 2008.

[2] Having determined that no further hearing is required, the appeal proceeded under paragraph 43(*a*) of the *Social Security Tribunal Regulations.*

ISSUES

[3] The following issues are before me:

a. Is new evidence admissible on an appeal to the Appeal Division?

b. Did the General Division base its decision on an erroneous finding of fact, namely that there were no medical reports prepared contemporaneously with the Appellant's minimum qualifying period, without regard for the material before it?

c. Did the General Division err in failing to mention *Villani v. Canada (Attorney General),* 2001 FCA 248, and in failing to conduct its analysis in accordance with the "*Villani"* test?

d. If the response to either question b. or c. is "yes", what is the appropriate disposition of this appeal?

GROUNDS OF APPEAL

[4]Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal. It reads:

> 58. (1) The only grounds of appeal are that
>
> (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

ISSUE A: NEW EVIDENCE

[5] The Appellant filed a prescription profile, dated January 13, 2016, in support of this appeal. The General Division did not have a copy of this 2016 prescription profile. This correspondence did not address any of the grounds of appeal, particularly those upon which leave to appeal had been granted.

[6] It has now become well-settled law that new evidence does not constitute a ground of appeal. As the Federal Court recently held in *Marcia v. Canada (Attorney General)*, 2016 FC 1367:

> [34] New evidence is not permissible at the Appeal Division as it is limited to the grounds in subsection 58(1) and the appeal does not constitute a hearing *de novo*. As Ms. Marcia's new evidence pertaining to the General Division's decision could not be admitted, the Appeal Division did not err in not accepting it (*Alves v Canada (Attorney General)*, 2014 FC 1100 at para 73).

[7] As the prescription profile does not address any of the grounds of appeal, I am unprepared to find that it is admissible for the purposes of this appeal.

ISSUE B: MEDICAL REPORTS

[8] The Appellant submits that the General Division erred in finding that there were no medical reports prepared contemporaneously with the end of the Appellant's minimum

qualifying period of December 31, 2008, despite the fact that there were reports dated September 28, 2007 (at page GD2-279 of the hearing file), January 4, 2008 (GD2-276) and May 15, 2008 (GD2-273), from Dr. King of the Upper Limb Clinic.

[9] As I indicated in my leave decision, the General Division did not suggest that there were no medical reports prepared around the end of December 2008. The member had qualified his findings at paragraph 53 to indicate that he was referring to those medical reports that suggested the Appellant was incapable regularly of pursuing any substantially gainful occupation. In other words, the General Division found that there were no medical reports that indicated a severe disability. Given this qualifier, I do not find that the General Division erred in finding that there were no medical reports prepared contemporaneously with the end of the minimum qualifying period that established she was incapable regularly of pursuing any substantially gainful occupation.

[10] However, I granted leave, as it was not apparent that the General Division had considered the September 28, 2007, January 4, 2008, and May 15, 2008 medical reports. It appeared that there could be an arguable case that the General Division member ought to have expressly considered these reports, given that they were the records that were prepared the closest in time to the end of the minimum qualifying period. I queried whether there might be any significance in the fact that the General Division largely did not analyze the medical evidence around this timeframe, to the same extent to which it analyzed the medical evidence prior to and well after the minimum qualifying period, other than for the pain management report. I indicated that this fact might be sufficient to rebut the general presumption that a decision-maker considered all of the evidence before it, particularly as the General Division appeared to have undertaken a relatively detailed analysis of the pre- and post-minimum qualifying medical records. I did not assess the probative value of these medical records during the leave stage.

[11] The Respondent is of the position that is unnecessary for a tribunal to refer to each and every piece of evidence before it in its reasons, as it is presumed to have considered all the evidence: *Simpson v. Canada (Attorney General),* 2012 FCA 82 at para. 10. The Respondent argues that, in this particular case, the General Division did in fact consider the

medical evidence around the end of the Appellant's minimum qualifying period of December 31, 2008, to the same extent to which it analyzed the medical evidence prior to and well after this date. The Respondent points to the following:

- Paragraphs 15 and 49, which indicate that the Appellant had received 10 sessions of cognitive behavioural therapy in 2008;

- Paragraph 16, which indicates that the Appellant had testified that she has been on pain relief prescription medication since 2008;

- Paragraph 20, which refers to a psychologist's report of May 20 (*sic*), 2008 to the Workplace Safety and Insurance Board, regarding the Appellant's attendance in a pain management program from January 24, 2008 to April 15, 2008. (The report is dated May 30, 2008 and can be found at pages GD2-268 to 272);

- Paragraph 21, which notes that the Appellant had x-rays done on July 13, 2009, that showed degenerative disc disease with secondary osteoarthritis at L5-S1;

- Paragraph 12, which indicates that the Appellant had epidural steroid injection for back pain in September 2009;

- Paragraph 22, which refers to a medical report dated September 8, 2009 of an anesthesiologist;

- Paragraph 23, which refers to a CT scan of the Appellant's lumbar spine performed on September 14, 2009; and

- Paragraph 9, which refers to the Appellant's Questionnaire for Disability Benefits dated August 21, 2012.

[12] Of the paragraphs cited by the Respondent, the only one that fell within the analysis section of the decision is paragraph 49, which simply states that the Appellant underwent a

psychological assessment and completed 12 sessions of cognitive behavioural therapy in 2008.

[13] The general presumption that a decision-maker has considered all of the evidence before him can be rebutted, if an applicant can establish that the evidence was of such probative value that the decision-maker ought to have analyzed it. Generally, deference should be paid to the General Division in its assessment of the facts, and one should be vigilant against so readily displacing this presumption. Here, the Appellant did not particularize the factors nor explain the probative value of the evidence allegedly overlooked by the General Division, other than to suggest that the evidence necessarily was probative because of its contemporaneous nature to the end of the minimum qualifying period.

[14] The September 28, 2007 report speaks to the Appellant's depression, which Dr. King believed was causing the Appellant difficulty in coping with her chronic pain problems involving her hand, wrist, and forearm. The physician queried whether the Appellant's pain management could be better optimized, but he determined that the first step would be to deal with the Appellant's mood and he was therefore going to refer the Appellant to Dr. Shapiro for an opinion and treatment. Although he did not consider her a candidate to attempt a return to the workplace, ultimately he was of the opinion that early consideration for vocational rehabilitation should be considered.

[15] I do not consider the September 28, 2007 report to be "contemporaneous" with the end of the minimum qualifying period, given that it was prepared in 2007, more than one year before the end of the minimum qualifying period. There was certainly other evidence that addressed the Appellant's depression and chronic pain problems that were not only closer in time to the end of the minimum qualifying period but would have held greater probative value.

[16] Dr. King prepared the three reports. I find that there is considerable overlap between the three reports of Dr. King, such that it was unnecessary for the General Division to specifically mention each of them.

[17] In the most recent report, dated May 15, 2008, Dr. King confirmed that the Appellant had ongoing pain involving her right and left upper extremities. She was noted to be developing symptoms on the left side now. New medication for treatment of her low back was apparently helping with her back but was not helping her wrist. The Appellant was awaiting rescheduling of an appointment to be seen at the pain clinic. Dr. King was of the opinion that medical management would be the primary method of treatment. While he did not see the need for the Appellant to return to see him at the clinic, he was of the opinion that she should be seen by a pain specialist sooner rather than later, although it is unclear whether he was aware that the Appellant had participated in a pain management program at Encompass Health Systems Inc. between January 24, 2008 and April 15, 2008. Dr. King expressed pessimism that she would be able to return to useful gainful employment. At the same time, he indicated that job retraining modification should be considered without repetitive use of either arm, as should limited lifting of no more than two pounds.

[18] The General Division did not mention these three reports but did refer to the psychologist's and nurses' pain management report of May 30, 2008. This report gave a pre-program and post-program DSM-IV diagnoses of major depressive episode – moderate, chronic right forearm pain, stress associated with several factors and global assessment of functioning scores. The report addressed program objectives and psychotherapeutic intervention and approach and also provided a summary of the results of psychometric testing. The psychologist and nurses were unable to provide a more definitive prognosis for the Appellant at that time, as the Appellant's emotional state was impacted by her mother's terminal illness. They recommended that if the Appellant were unable to return to her previous employment due to ongoing physical limitations, it would appear to be potentially beneficial to work with her towards developing retraining activities.

[19] In my view, there is considerable overlap between the three reports of Dr. King and the pain management report of May 30, 2008. Given that, I am not satisfied that the General Division failed to consider the three reports, although the member may not have expressly referred to them. Without establishing that the evidence was of such probative value that the decision-maker ought to have analyzed it, I am not satisfied that the presumption that a

decision-maker has considered all of the evidence before him has been displaced in the facts of this case.

ISSUE C: VILLANI

[20] The Appellant submits that the General Division erred as it did not mention *Villani v. Canada (Attorney General),* 2001 FCA 248, and as it is unclear whether it conducted its analysis in accordance with the *Villani* principles.

[21] *Villani* requires that a decision-maker adopt a "real world" approach, i.e. that he take into account an appellant's particular circumstances, such as his age, education level, language proficiency and past work and life experience, when assessing whether an appellant is incapable regularly of pursuing any substantially gainful occupation. The Federal Court of Appeal also went on and stated that the assessment of an appellant's circumstances is a question of judgment with which one should be reluctant to interfere.

[22] The Respondent acknowledges that the General Division did not cite *Villani* but argues that that alone does not constitute an error. The Respondent argues further that although *Villani* may not have been expressly cited, the General Division correctly set out the law and did in fact conduct the *Villani* analysis by considering the Appellant's age, level of education, language proficiency and past work and life experience. The Respondent asserts that the General Division provided a "thorough analysis of the Appellant's medical evidence and testimony in light of the *Villani* factors, including age, education, training, work and life experience", at paragraph 8 of its decision. The Respondent also notes that the General Division recounted the Appellant's work history, at paragraph 11, and her retraining efforts from November 2008 to July 2012. The Respondent maintains that the General Division "clearly applied the *Villani* factors by specifically mentioning the Appellant's age, level of education and past work and life experience". The Respondent contends 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 her personal characteristics.

[23] The Respondent submits that where the General Division considers an Appellant's personal circumstances in determining how they impacted upon her capacity regularly of pursuing any substantially gainful occupation, the assessment is one with which the Appeal Division should not interfere.

[24] The *Villani* "analysis" referred to by the Respondent in paragraphs 8 and 11, falls under the heading "Evidence", as opposed to the heading "Analysis" and is as follows:

> [8] The Appellant testified on her own behalf. She was forty-seven years old at her MQP and fifty-four years old at the hearing. She has a grade twelve education, a diploma in retail management and cosmetology, an office clerk diploma, and a certificate in Customs administration. The Appellant last worked as a cashier in a grocery store from August 5, 2012, until August 29, 2012, and has not worked since.
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> [11] The Appellant's previous work history included self-employment as a Scentsy Consultant part time from March 2011 until May 2012. She worked in an automotive parts facility from 1996 to 2006, which included repetitive use of her arms, including lifting and carrying. She stopped working in 2006 because of tendinitis in her wrists, which was determined to have been work related, and which resulted in payment to her Workplace Safety & Insurance Board (WSIB) benefits from 2006 to the present. The Appellant's work history prior to 1996 included employment as a bartender and customer service representative in various retail facilities.

[25] The parties agree on the law, but disagree as to whether the General Division in fact conducted a *Villani* assessment.

[26] Although the General Division did not cite or make any reference to *Villani*, I agree that that fact alone does not establish that the General Division could not have otherwise applied its principles. However, in not citing the decision, this tends to add some weight to the argument that it therefore did not focus on or consider *Villani.*

[27] In *Villani,* the Federal Court of Appeal set out guiding principles as to how disability under the *Canada Pension Plan* ought to be defined, and how to conduct a disability assessment. At paragraphs 38 and 39, the Federal Court of Appeal stated:

> [38] This analysis of subparagraph 42(2)(a)(i) strongly suggests a legislative intention to apply the severity requirement in a "real world" context. Requiring that an applicant be incapable *regularly* of pursuing any *substantially gainful* occupation is quite different from requiring that an applicant be incapable *at all times* of pursuing *any conceivable* occupation. Each word in the subparagraph 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, it follows from this that the hypothetical occupations which a 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**.
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> [39] I agree with the conclusion in *Barlow, supra* and the reasons therefor. The analysis undertaken by the Board in that case was brief and sound. It demonstrates that, on the plain meaning of the words in subparagraph 42(2)(a)(i), Parliament must have intended that the legal test for severity be applied with some degree of reference to the "real world". It is difficult to understand what purpose the legislation would serve if it provided that disability benefits should be paid only to those applicants who were incapable of pursuing any conceivable form of occupation no matter how irregular, ungainful or insubstantial. Such an approach would defeat the obvious objectives of the *Plan* and result in an analysis that is not supportable on the plain language of the statute.
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> (My emphasis)

[28] From this, it is clear that it is insufficient either to point to evidence of an appellant's personal characteristics, or to merely site *Villani,* without *de facto* determining how those personal characteristics impact upon an Appellant's capacity regularly of pursuing any substantially gainful occupation. While paragraphs 8, 11, 13 to 14 and 38 of the General Division's decision speak to the Appellant's personal characteristics, they give no consideration as to how they impact upon the Appellant's capacity regularly of pursuing any substantially gainful occupation. A review of the analysis section of the decision indicates that the General Division analyzed the medical evidence, but there is no accompanying analysis – either in the evidence or analysis sections - as to how the Appellant's personal characteristics impacted her capacity regularly of pursuing any substantially gainful occupation in a "real world" context. In this regard, the General Division erred by not conducting a "real world" analysis.

[29] This is not to suggest that, had the Appellant's personal characteristics clearly been taken into account, that she would have necessarily been found disabled for the purposes of the *Canada Pension Plan,* but without this analysis having been undertaken, it cannot be said that the General Division properly determined whether she was disabled for the purposes of the *Canada Pension Plan* by the end of her minimum qualifying period.

ISSUE D: DISPOSITION

[30] Irrespective of my findings on the grounds of appeal, the Respondent argues that, as the decision of the General Division is overall reasonable and falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law, the appeal should be dismissed.

[31] The Federal Court of Appeal, however, rejects this approach for an appellate administrative tribunal such as the Appeal Division: *Canada (Attorney General) v. Jean,* 2015 FCA 242 (CanLII) and *Maunder v. Canada (Attorney General),* 2015 FCA 274 (CanLII), and cautions that administrative tribunals refrain from borrowing from the terminology and the spirit of judicial review in an administrative appeal context. The Federal Court of Appeal counsels 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 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".

[32] 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.

[33] 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.

[34] Given the considerations above, the appeal is allowed and the matter returned to the General Division for a redetermination.

Janet Lew
Member, Appeal Division