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

Citation: *Minister of Employment and Social Development v. A. M.,* 2017 SSTADIS 111

Tribunal File Number: AD-16-296

BETWEEN:

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

Appellant

and

A. M.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Meredith Porter

DATE OF DECISION: March 21, 2017

REASONS AND DECISION

INTRODUCTION

[1] This is an appeal of the decision of the General Division of the Social Security Tribunal (General Division) issued on November 18, 2015, which granted the Respondent's application for a disability pension on the basis that he had been found to be disabled, for the purposes of the *Canada Pension Plan* (CPP), during or before his minimum qualifying period (MQP) which was determined to end on December 31, 2012. Leave to appeal was granted on June 27, 2016, on the ground that the General Division might have erred in rendering its decision.

[2] This appeal proceeded based on the documentary record without an oral hearing for the following reasons:

a) There were no gaps in the file or there was no need for clarification.

b) Written submissions submitted by both the Appellant and the Respondent were complete, wholesome and clear

c) The form of hearing respected the requirements under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

ISSUES

[3] The issues before me are as follows:

a) What standard of review applies when reviewing decisions of the General Division?

b) Did the General Division err in law by failing to apply the principles set out in *Inclima v. Canada (A.G.),* 2003 FCA 117, and did it fail to properly assess whether the Respondent had been unsuccessful in obtaining and maintaining employment as a result of his medical condition?

c) Did the General Division err in law by failing to apply the principles set out in *Villani v. Canada (A.G.)*, 2001 FCA 248, and did it fail to direct its attention specifically to whether the Respondent, given his background and medical condition, was incapable regularly of pursuing any substantially gainful occupation?

d) Did the General Division err in law by failing to provide reasons for preferring medical evidence of Dr. Peacock over the medical reports of specialists and other practitioners?

e) Did the General Division err in law by failing to rely on *A.K. v. MHRSD* (September 2, 2009), CP 25905 (PAB), in determining the total hours of demonstrated work capacity, and did it fail to consider both the hours of work for which the Respondent might be available for work and the number of hours that the Respondent had to spend studying and preparing for class?

THE LAW

[4] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) the only grounds of appeal are 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.

[5] According to subsection 59(1) of the DESD Act, the Social Security Tribunal Appeal Division (Appeal Division) may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate, or confirm, rescind or vary the decision of the General Division in whole or in part.

SUBMISSIONS

Standard of Review

[6] The Appellant made no submissions on this issue.

[7] The Respondent submitted that that the appropriate standard of review for this appeal should be that of reasonableness, relying on *Dunsmuir v. New Brunswick,* 2008 SCC 9, and *Smith v. Alliance Pipeline Ltd.,* 2011 SCC 7.

[8] The Respondent submitted that case law directs administrative tribunals, such as the Appeal Division, to look to the CPP, as the Tribunal's home statute, for guidance regarding the appropriate standard for review on questions of fact, questions of mixed fact and law, and on questions of law. In all instances, the standard for review is that of "reasonableness".

Application of the *Inclima* Principles

[9] The Appellant submitted that the General Division had failed to state the criteria set out by the Federal Court of Appeal in *Inclima*, and that it had also failed to properly apply the criteria and, in doing so, committed an error of law:

> [38]…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 that health condition.

[10] The Appellant has submitted that the General Division, upon finding that the Respondent had work capacity, failed to further consider whether efforts made by the Respondent to obtain and maintain employment had failed as a result of his health condition.

[11] The Appellant submitted that, based on the record, the Respondent actually made no efforts to return to work despite objective medical evidence of his capacity to do so.

[12] The Respondent submitted that, contrary to the submissions of the Appellant, the *Inclima* principles had been properly applied by the General Division. Specifically, the Respondent states the following:

a) Once found to have some work capacity, the Respondent was found not to have the capacity to regularly pursue a substantially gainful occupation.

b) The reasons set out in the decision of the General Division reflect consideration of the *Inclima* principles by the decision maker.

c) The evidence supporting the finding that the Respondent had been incapable of substantially gainful occupation was well established in the record.

d) Dr. Peacock confirmed that the Respondent had been incapable of pursuing a substantially gainful occupation.

e) The General Division accepted evidence of the Respondent's ability to work only 4–6 hours per week and, in light of this evidence, the decision is ultimately consistent with the *Inclima* principles.

Application of *Villani*

[13] The Appellant has submitted that the General Division failed to consider the "real world" criteria set out in *Villani* when determining whether the Respondent had suffered a "serious and prolonged disability" that rendered him "incapable regularly of pursuing any substantially gainful occupation".

[14] Further, *Villani* also requires the consideration of objective medical evidence and efforts to find employment or employment possibilities. The General Division failed to apply these criteria in determining that the Respondent had been disabled.

[15] The Respondent has submitted that the General Division did not apply technical legal principles and was not formalistic in its determination that the Respondent had been disabled.

[16] The Respondent further submitted that the General Division had correctly tailored its reasons to the Respondent and that it had taken a common-sense, real-world approach in its decision.

Failure to Provide Reasons

[17] The Appellant submitted that there had been contradictions in the medical evidence submitted on behalf of the Respondent and, where the General Division had preferred certain evidence over reports of specialists and other health practitioners, the General Division had failed to provide reasons for doing so.

[18] The Respondent submitted that the medical reports provided had not reflected any contradictions with any of the attending health professionals.

[19] The Respondent further submitted that the requirement to provide reasons was only in circumstances where medical evidence included multiple, competing expert opinions.

Erroneous Finding of Fact

[20] The Appellant has submitted that the General Division made an erroneous finding of fact in determining that the Respondent had not been able to work for more than 10 hours per week. The Appellant submitted that the General Division should have further considered the travel time and study time, in addition to actual class time, when determining the maximum hours that the Respondent could work. This mistake resulted in an error of fact made in a perverse and capricious manner, pursuant to paragraph 58(1)(*c*) of the DESD Act.

[21] The Respondent submitted that there had been no evidence put before the General Division on which it could allocate a reasonable amount of time for travel and study, as suggested by the Appellant.

[22] Further, the Respondent argues that if there was evidence on which the General Division could allocate study time, the level of activity required to study does not equate with the activity level required for attending classes or working at a sedentary job.

ANALYSIS

Standard of Review

[23] The DESD Act—not the CPP, as submitted by the Respondent—is the home statute for the Social Security Tribunal. However, the position of the Respondent regarding the standard of review is that, for all grounds enumerated under subsection 58(1) of the DESD Act, the standard for review is one of reasonableness. With respect, the Appeal Division does not agree with this position.

[24] Some administrative tribunals, like Umpires under former section 115 of the *Employment Insurance Act*, were previously governed by the standards of review set out by the Supreme Court of Canada in *Dunsmuir*. In previous decisions from the Federal Court of Appeal, the Court directed that, in matters involving alleged errors of law or failure to observe principles of natural justice, the applicable standard was to be correctness. The correctness standard reflects a lower threshold of deference afforded to an administrative tribunal. In matters where erroneous findings of fact were alleged, the standard was held to be reasonableness, which reflects a greater degree of deference, or a reluctance, to interfere with findings of the original decision maker tasked with hearing factual evidence.

[25] Because of *Dunsmuir*, the Federal Court of Appeal determined in *Canada (Minister of Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, that administrative tribunals, such as the Immigration and Refugee Board in that case, should not use standards of review that had been designed to be applied by appellate courts. Instead, administrative tribunals must look first to their home statutes for guidance in determining their role.

[26] The Federal Court of Appeal in *Canada (A.G.) v. Jean* (2015 FCA 242) clarified, in *obiter*, that the Social Security Tribunal should not impose a standard of review analysis to appeals before it, but that it should determine whether appeals should succeed based on the grounds enumerated in section 58 of the DESD Act.

[27] In addition to the grounds enumerated in section 58, section 59 of the DESD Act provides the decisions that Appeal Division members may make. Appeal Division members may dismiss the appeal, give the decision that the General Division ought to have given, refer

the matter back to the General Division, or confirm, rescind or vary the decision of the General Division.

Application of the *Inclima* Principles

[28] The test for determining disability under the CPP has been articulated by the Federal Court of Appeal in *Villani* v. *Canada (A.G.)*, 2001 FCA 248:

> 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** […] (emphasis added)

[29] The Federal Court of Appeal further articulated the *Villani* principles in *Inclima*, stating that applicants seeking to demonstrate that they suffer from a severe disability under the CPP must adduce evidence of a serious health problem and must also show that efforts to obtain and maintain employment have failed because of that health problem. It is not the applicant's inability to do his or her particular job that matters, but rather any "gainful employment" at all (*Klabouch v. Canada (Social Development)*, 2008 FCA 33).

[30] The Appellant has submitted that the General Division failed to set out the proper test, as stated above, and that it also failed to apply the test to the circumstances of the Respondent in this case. The Appeal Division finds merit to this argument.

[31] In paragraph 52 of the decision, the General Division found the Respondent had a capacity to work, stating:

> [52] The Tribunal acknowledges the Respondent's submission and agrees that on the face of the evidence the Appellant did have capacity to work.

Upon determining the existence of work capacity, the General Division proceeded to apply the principles set out in *A.K. v. MHRSD* (September 2, 2009), CP25905 (PAB), with respect to the amount of time that the Respondent had claimed he was capable of working per week. The applicant in *A.K.* was found capable of working 12 hours per week at $12.83 per hour, and this capacity was not considered to be a "capacity regularly to pursue a substantially gainful

occupation". In paragraph 51 of the General Division decision, the 10 hours that the Respondent had claimed he could work were compared to those of the applicant in *A.K.*, and the General Division subsequently found that that amount of time was not indicative of substantially gainful employment. The approach taken by the General Division is not sufficient for several reasons. If the General Division intended to apply the approach taken by the Pension Appeals Board in *A.K.*, despite the fact that this decision is not a precedent but can be persuasive, the General Division should have first, in consideration of all of the medical evidence submitted, assessed the credibility of the Respondent's assertion that he could work only 10 hours per week. The General Division should have also considered the hourly wage attainable by the Respondent. Finally, in determining a disability under the CPP, there is no indication that the General Division attributed meaning to each word in the definition of "severe" under the CPP as suggested in *Villani*.

[32] A proper application of the relevant case law principles would dictate that the General Division should first consider, based on all of the evidence, whether there is a capacity to work. Then, once work capacity is found to exist, the General Division should determine whether there was evidence that the Respondent had made efforts to obtain and maintain "any truly remunerative occupation" (*Villani*). Where the Respondent had made efforts to obtain and maintain employment, the General Division should have determined whether those efforts were unsuccessful due to the Respondent's health condition (*Inclima*).

[33] The General Division failed to consider whether the Respondent had made efforts to obtain alternative employment opportunities suitable to his health condition. In failing to consider this notion, the General Division also failed to demonstrate any meaningful application of the *Inclima* principles, which the General Division was required to do. This is an error of law.

Failure to Apply the "Real World" Context of *Villani*

[34] *Villani* sets out the test for determining disability under the CPP. According to *Villani*, the test for determining the severity of a disability is not that a disability be "total" but that the disability should be assessed in a "real world" context. Factors such as the age of the applicant, education level, language proficiency, past work experience and life experience should be

considered in determining whether an applicant is disabled under the CPP. Applicants for disability pension under the CPP are required to produce objective medical evidence of their disability. (*Warren v. Canada (A.G.)*, 2008 FCA 377)

[35] The Appellant submits that the General Division failed to consider the capacity of the Respondent to work in a "real world" context and that it failed to consider the particular circumstances of the Respondent. Contrary to the submissions of the Appellant, the Respondent argues that "the General Division was clearly guided by the personal circumstances of [the Respondent]".

[36] From the evidence, the Respondent was 33 years old during his MQP. He had completed high school, a three-year automotive technology course and was attending university on a full-time basis. At the time of his hearing, the Respondent was married and had a teenage son. On review of the General Division decision, the Appeal Division agrees that, although this information is cited as evidence before the General Division, there is no indication that the General Division actually considered this evidence in its analysis when determining the severity of the Respondent's disability and subsequent capacity to work.

[37] The Appellant further argues that objective medical evidence was provided that not only indicated that the Respondent had a capacity to do any work during the MQP, but also that the Respondent had a capacity to do his chosen work as an auto mechanic during his MQP. The Appellant cites several medical reports, information and X-rays that do not support a disability finding under the CPP.

[38] The Appeal Division notes that in paragraph 49 of the General Division decision it states "The Tribunal carefully considered the Respondent's arguments and the evidence on file, including the particular reports set out by the Respondent."

[39] It is not sufficient to simply state that the evidence has been carefully considered. The careful consideration of relevant evidence must be evident in reading the decision. Determining a person's employability must be assessed in light of all of the circumstances, including the *Villani* principles and the applicant's medical condition assessed in its totality (see *Bungay v.*

Canada (A.G.), 2011 FCA 47). There is no indication that the General Division assessed the Respondent's employability in light of all of the circumstances. This is an error of law.

Failure to Provide Reasons

[40] The Appellant has submitted that the General Division based the finding of a severe disability on the evidence of Dr. Peacock and the oral evidence of the Respondent. In the General Division's reasons for granting the Respondent's application, there is no mention of the other medical reports, information or X-rays submitted by other attending health care professionals.

[41] The Respondent argues that there are no contradictory medical reports, so the General Division did not err by relying on the opinion of Dr. Peacock. The Respondent also provides a detailed summary of medical opinions derived from the records filed. The Respondent has also argued that no one, other than medical professionals trained to do so, should draw conclusions from medical tests.

[42] With respect to the issue of providing reasons in decisions of either the General Division or the Appeal Division, it is noted that members of the General Division and members of the Appeal Division are required by statute to provide reasons for decisions made. (See DESD Act subsections 54(2) and 59(2))

[43] In addition, the Federal Court of Appeal stated in *Canada (A.G.) v. Fink*, 2006 FCA 354:

> [6] In its reasons, the Board appears to recite a selective summary of the evidence and then states a conclusion. The Board does not analyse, accept, reject or otherwise explain why it prefers any of the medical or expert opinion evidence over others which it is required to do […]
>
> [7] In my analysis, the Board committed an error warranting the intervention of this Court because it found without any analysis that Ms. Fink had satisfied the disability test under paragraph 42(2)(*a*) of the CPP.

[44] The General Division appears to have made this same error. It is not sufficient to refer to evidence as acceptable and reliable without providing adequate reasons for making that

finding. The General Division is allowed to prefer certain evidence, but must provide reasons for doing so.

[45] The General Division did not provide reasons for preferring Dr. Peacock's evidence over evidence of other health care professionals, which contradicted Dr. Peacock's evidence. There is also a void of reasons for finding that the Respondent was working at his maximum capacity in 2012. The General Division merely states that this was the case. The Appeal Division finds this to be an error of law.

Erroneous Finding of Fact

[46] The Appellant has raised the issue of attendance at school by the Respondent and has argued that the General Division should have equated attendance at school, including travel and study time, with a capacity to work. There is no indication that the General Division considered attendance at school in determining capacity to work, but it considered only that it was not until the Respondent had returned to school that there was evidence of diminished work capacity.

[44] The "real world" context set out in *Villani* requires that the particular circumstances of each applicant for a disability pension under the CPP be contemplated. The Federal Court of Appeal relates each applicant's own particular circumstances, such as his or her age, education level, language proficiency, past work experience and life experience, to disability determinations.

[45] In reviewing the Respondent's overall capacity, it appears that the General Division did not consider the particular details or demands that the Respondent might have encountered in both attending school and preparing for class, or in travelling to school when required to do so. Attending school is not always equated with work capacity, but conversely, one cannot outright conclude that schooling can never be seen as demonstrating some capacity. It will always depend upon the factual circumstances of each case (*McDonald v. Canada (Human Resources and Skills Development)*, 2009 FC 1074).

[46] The General Division did not view the Applicant's schooling in isolation or as being the determinative factor in assessing severity. The Appellant argues that, factually, the General Division should have considered that the Respondent had been able to attend classes without

accommodation until the 2013 academic year. The Appeal Division notes that the evidence submitted indicates that the classes attended by the Respondent declined over the period of time from September 2012 when the Respondent had initially enrolled. By 2013, the Respondent was still considered a full-time student, but the number of classes in which he was enrolled had declined from five to three and, by 2013, the Respondent was receiving several accommodations in order to attend school as well. The issue as to whether these factors were considered and weighed by the General Division is not evident in the decision. The issue of whether the hours preparing for class and travelling to class was a live issue to the General Division, as the issue is noted in paragraph 48 of the decision. However, simply acknowledging a relevant issue but failing to provide reasons for how the issue is ultimately determined is an error of law.

[47] The Respondent has submitted that there was no evidence before the General Division regarding such factors as the Respondent's travel and study time in addition to class time. The only evidence before the General Division was the number of hours that the Respondent had been required to attend classes. The Appeal Division agrees with this submission. Where the Appellant wishes to rely on evidence of work capacity, such evidence must be put forward to the General Division to consider. The submission of new evidence, whether actual or speculative, is not a ground of appeal contemplated by section 58 of the DESD Act.

CONCLUSION

[48] The Appeal Division finds that the General Division erred in law by failing to cite and meaningfully apply the principles in *Inclima*. The General Division also erred in failing to properly cite and apply the *Villani* principles. The General Division erred in how it applied *A.K.* to the circumstances of this case, and it subsequently failed to apply both *Villani* and *Inclima* in the context of determining whether the Respondent had a capacity for any "truly remunerative occupation".

[49] The Appeal Division finds that the General Division made an error of law by failing to consider factors associated with the Respondent's attendance at school and to provide reasons for determining that the additional preparation and travel time suggested by the Applicant was not determinative of some work capacity.

DECISION

[50] The appeal is allowed.

[51] In light of the basis for allowing this appeal, pursuant to section 59 of the DESD Act, the Appeal Division refers the matter back to the General Division for redetermination by a different member of the General Division.

Meredith Porter
Member, Appeal Division