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

Citation: *M. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 207

Tribunal File Number: AD-16-297

BETWEEN:

M. B.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Shirley Netten

HEARD ON: April 19, 2017

DATE OF DECISION: May 4, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

M. B., the Appellant
M. Lucas, the Appellant's representative
R. Koo, the Respondent's representative

INTRODUCTION

[1] On November 16, 2015, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable to the Appellant.

[2] An application for leave to appeal the General Division decision was filed with the Tribunal's Appeal Division. Leave to appeal was granted on September 9, 2016, with respect to possible errors of law in the analysis of whether the Appellant suffers from a severe disability.

[3] This appeal was heard by way of teleconference, for the purpose of hearing oral submissions. Both parties were represented, and there was to be no testimony. This method of proceeding is consistent with the Tribunal's obligation to proceed informally and expeditiously, while respecting the requirements of fairness and natural justice, set out in s. 3(1) of the *Social Security Tribunal Regulations*.

GROUND OF APPEAL

[4] The ground of appeal upon which leave was granted is found in s. 58(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA):

> b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record.

[5] *Canada (Minister of Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, held that the standards of review applicable to judicial review of decisions made by administrative decision-makers are not to be automatically applied by specialized administrative appeal bodies.

Rather, such appellate bodies are to apply the grounds of appeal established within their home statutes. In this respect, I agree with the Respondent's submission that, based on the unqualified wording of s. 58(1)(*b*) of the DESDA, no deference is owed to the General Division on errors of law.

DISCUSSION

[6] By way of background, the Appellant applied for a disability pension in June 2013, soon after a workplace accident of May 30, 2013 in which he sustained traumatic fractures of the jaw, ribs and right humerus, requiring multiple surgeries. Unfortunately, the Appellant did not have workers' compensation coverage. At that time the Appellant was 52 years old, he had a grade 10 education, and his employment history largely consisted of hauling scrap metal, doing home renovations, and roofing, as a self-employed contractor. The Medical Report accompanying the application for benefits references low back pain for several years, managed with over-the-counter medications, in addition to the recent traumatic injuries. Subsequent medical evidence on file mainly addresses the Appellant's treatment and rehabilitation with respect to the jaw and right arm, as well as therapy for the neck and back.

[7] The following findings of fact, drawn from the member's assessment of the evidence, may be discerned within the analysis portion of the General Division decision:

- The Appellant has limitations of his right arm, right shoulder, neck and back;
- He was able to work for many years despite a longstanding back condition;
- He has functional shoulder movement with good strength;
- He takes no medication for pain;
- He did only heavy physical work before his accident;
- He has some capacity for work; he is not incapable of lighter work;
- He has been taking classes (including a computer course and courses toward his GED) to upgrade his skills; and

- He has not applied for any type of work since his accident.

[8] The General Division concluded that the Appellant should be capable of less physical work in future, should have suitable skills to be able to seek and maintain some sort of employment, and did not suffer from severe pathology or impairment that would prevent him from seeking and maintaining suitable gainful employment at the date of the hearing. The member thus found that the Appellant's disability was not severe.

[9] Leave to appeal was granted on the basis of two potential errors of law:

> … the General Division did not relate its conclusion back to *Villani* and did not show how it came to the conclusion that the Applicant should be capable of doing less physical work in the future; and
>
> It is not clear… how the General Division applied *Klabouch* nor is it clear how it arrived at the conclusion that the Applicant does not suffer from any severe pathology or impairment that would prevent him from seeking and maintaining suitable gainful employment at the time of his hearing.

[10] The legal concept of severe disability is defined in the CPP, and refined in the case law. The statutory definition found in s. 42(2)(*a*)(i) is as follows:

> … a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation.

[11] In the leading case of *Villani v. Canada (Attorney General)*, 2001 FCA 248, the Federal Court of Appeal held that each word of the statutory definition must be given meaning, and must be considered in a "real world" context. The test involves an aspect of employability, which "cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience." The scope of substantially gainful occupations thus may vary, depending upon personal circumstances as well as functional limitations.

[12] Consistent with the statutory requirement that an applicant be incapable regularly of pursuing any substantially gainful occupation *by reason of* his or her disability, the Court in *Villani* further held that

> … [not] 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.

[13] Following from *Villani*, the Federal Court of Appeal held in *Inclima v. Canada (Attorney General)*, 2003 FCA 117 that a claimant must show that he or she has a serious health problem and, 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." Similarly, in *Klabouch v. Canada (Social Development)*, 2008 FCA 33, the Federal Court of Appeal confirmed that it is capacity to work rather than diagnosis that determines the severity of disability. Furthermore, an applicant must adduce "not only medical evidence in support of his claim that his disability is "severe" and "prolonged", but also evidence of his efforts to obtain work and to manage his medical condition."

[14] An applicant's failed attempt at suitable work or retraining due to his or her medical condition, in the context of his or her personal characteristics, serves to demonstrate his or her inability to engage regularly in any substantially gainful occupation. Without such evidence, it may not be clear why an applicant is not working in any such occupation; factors irrelevant to the test for severe disability may be at play, such as a lack of motivation or effort, an unwillingness to consider less rewarding or remunerative options, an inaccurate perception of employability, and socioeconomic conditions. As noted recently by the Federal Court of Appeal in *Miceli-Riggins v. Canada (Attorney General)*, 2013 FCA 158, the test for severity is difficult to meet:

> As is well-known, the test under paragraph 42(2)(*a*) of the Plan is difficult to meet. A disability is "severe" only if the person is not regularly able to pursue any substantially gainful employment. The severity is judged not by the severity of the disease or ailment afflicting the claimant. Rather, it is judged according to whether the claimant is unable to work.

> And the "unable to work" standard is most difficult to meet. In order to meet it, the claimant must demonstrate more than just an inability to perform his or her former job. Instead, the claimant must show that he or she cannot engage in "substantially gainful employment." This includes modified activities at the claimant's usual workplace, any part-time work whether at the claimant's usual workplace or elsewhere, or sedentary jobs.

[15] The Appellant's representative relies upon two examples of the application of the "real world" approach. The decisions themselves, made by the Pension Appeals Board and the Tribunal's General Division, are not binding upon me, but may be persuasive.

[16] In *Leduc v. Minister of National Health and Welfare* (January 29, 1988), CP 1376 (PAB) (cited with approval in *Villani*), Mr. Leduc suffered from an incurable medical problem consisting of chronic dumping syndrome and intermittent blackouts, such that he could not drive and could seldom be left alone. In granting a disability pension, the Pension Appeals Board wrote:

> He lives in a world, peopled 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.

[17] In the General Division decision of *G. D. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 3, the member found that there had been significant damage to G.D.'s lumbar spine, with nerve root involvement, producing debilitating back and leg pain. The member ultimately determined that G.D. had a severe disability, applying the following analysis:

> The question arises, then, whether he was capable of some alternative type of work that might have accommodated his pain. Applying the *Villani* criteria, the Tribunal was hard pressed to imagine what else the Appellant could do, given his age, education and work experience. Now 57 years of age, the Appellant does not even have the equivalent of a High School education and has done nothing else in his working life except low-skilled manual labour. He would be an unlikely candidate for a job in the retail sector and is probably too old to acquire new, marketable skills.
>
> …

> In the opinion of the Tribunal, the Appellant's ongoing symptoms of back and leg pain are adequately supported by medical evidence and render him unfit for any sort of employment. Taking a "real world" approach, it is difficult to imagine how a person of the Appellant's age, given his one-dimensional vocational experience, would be able to retrain or secure alternative employment with such physical debilities.

[18] In the appeal at hand, the General Division member noted that, in accordance with *Villani*, he must "keep in mind factors such as age, level of education, language proficiency, and past work and life experience." Having previously outlined the Appellant's age, educational level and vocational background, he emphasized in his analysis the Appellant's demonstrated ability to upgrade his skills. The member further referenced *Inclima* and *Klabouch*, outlining the need for employment efforts as well as the focus on capacity to work rather than diagnosis.

[19] While the General Division member could have structured his decision more clearly, it is nevertheless possible to discern his reasoning, including his application of the law to the facts as found. In consideration of the decision as a whole, I agree with the Respondent that the General Division did not err in law in making its decision.

[20] I note first that there has been no suggestion on the Appellant's part that the decision focused upon medical diagnosis rather than capacity to work, which would have been contrary to *Klabouch* (among other decisions). The reference to *Klabouch* near the end of the analysis, without further discussion, makes the purpose of the citation unclear, but it is nevertheless evident that the member focused upon the Appellant's functional abilities and work capacity in his analysis. The Appellant's initial submissions in this respect dispute the application of the definition of severity in the real world context (discussed further below), rather than the application of *Klabouch* itself.

[21] As for *Villani*, the General Division member clearly considered the Appellant's level of education and work history, as he addressed both the history of heavy physical work and academic upgrading in his analysis. In the member's view, however, these challenges were surmounted by an ability to retrain for lighter work. While not repeated in the analysis section, the member was certainly aware of the Appellant's age (cited earlier in the decision), and I find it implicit that the member did not consider the Appellant's age to be a barrier to retraining or

lighter employment. This was not a situation in which the claimant was in his last few working years. I note that the Appellant's representative also referred to "reduced language skills" in her written submissions; however, there was no evidence of this before the General Division, and no indication in the file documentation that any other *Villani* factors would affect the Appellant's employability.

[22] In her submissions, after reviewing the evidence on the Appellant's range of shoulder motion and deltoid atrophy, the Appellant's representative argued that the Appellant has severe pathology that would impact his activities and his ability to find and maintain employment, supporting a determination of severe disability. I note, however, that the General Division decision recognized that the Appellant had limitations. The member did not conclude that these would not impact the ability to work, but rather found, after having considered a range of factors, that the Appellant was not prevented from (*i.e.* incapable of) pursuing suitable, gainful employment. In this respect, the Appellant's representative appeared to be re-arguing the case and asking for a different outcome, rather than substantiating an error of law.

[23] Moreover, I do not agree with the Appellant's representative's submission that a correct application of the law would lead to the conclusion that "an employer would not even remotely consider engaging [the Appellant] as an employee due to his impairments but also due to his age and education level." The scope of substantially gainful occupations available to the Appellant is undoubtedly narrower than prior to his 2013 workplace accident, given the new limitations on the use of the right upper extremity above shoulder level, together with ongoing but manageable back and neck pain. However, a narrowed scope of employment possibilities does not equate to an inability to pursue any substantially gainful occupation in the real world. Such a conclusion is not self-evident based upon the Appellant's accepted functional restrictions and personal characteristics, nor was there persuasive supportive evidence before the General Division to this effect (such as unsuccessful efforts to retrain or maintain lighter work).

[24] The Appellant's representative asserts that "his age of 56 impacts his ability to acquire new marketable skills," yet the General Division member found as a matter of fact, in consideration of the evidence before him, that the Appellant was capable of upgrading to develop such skills. The Appellant was only 52 years old at the time of his application, he had

completed the bulk of his post-accident rehabilitation by the age of 53, and by the date of hearing he had undertaken three separate initiatives to improve his employability. While *Leduc* and *G.D.* may be persuasive examples of the application of a "real world" analysis, the Appellant's situation is not analogous to that in *Leduc*, where the claimant had greater limitations, or to *G.D.*, where the claimant had a history of only low-skilled manual labour and was found to be an unlikely candidate for a retail job and likely too old to acquire new skills.

[25] I acknowledge that the member could have articulated his conclusions in a manner that more clearly demonstrated his application of the statutory test. For example, the language of "suitable gainful employment" requires careful reading (based upon the analysis as a whole) to conclude that the member did not misstate "substantially gainful" but rather was referring to employment that is both suitable (*i.e.* consistent with his functional limitations and ability to retrain) and remunerative. Nevertheless, I am satisfied that in reaching his conclusions, the member applied the law to the facts as found, by appropriately considering the *Villani* factors, the Appellant's functional limitations, his ability to upgrade his skills, the absence of supportive medical evidence for an inability to work, and the lack of employment efforts. I find no error of law in this respect.

CONCLUSION

[26] Having determined that the General Division did not err in law in making its decision, I dismiss the appeal.

Shirley Netten
Member, Appeal Division