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

Citation: *S. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 234

Tribunal File Number: AD-15-1590

BETWEEN:

S. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: May 24, 2017

REASONS AND DECISION

OVERVIEW

[1] This case is about whether the General Division applied the proper legal test for "severity" when assessing the Appellant's disability and his eligibility for a Canada Pension Plan disability pension. The Appellant is appealing the General Division's decision rendered on October 2, 2015, which found that his disability was not "severe" on or before the end of his minimum qualifying period on December 31, 2011. It determined that he was therefore not eligible for a disability pension.

[2] The parties agree that this appeal can appropriately be heard on the basis of the written submissions and, accordingly, the appeal before me is proceeding pursuant to paragraph 43(*a*) of the *Social Security Tribunal Regulations*.

ISSUE

[3] In his application for leave to appeal, the Appellant argued that the General Division had made several errors, including failing to consider the totality of the evidence before it. Of these, I granted leave to appeal on the ground that the General Division may have erred in law and, in particular, whether it had conducted a "real world" analysis. The sole issue before me therefore is whether the General Division applied the proper legal test for "severity" under subparagraph 42(2)(*a*)(i) of the *Canada Pension Plan*.

TEST FOR SEVERITY

[4] In the leave to appeal application, the Appellant submitted that:

> In the real world context, referring to *Villani v. Canada (A.G.)*, 2001 FCA 248, the Social Security Tribunal member must keep in mind factors such as ages, level of education, language proficiency and past work and life experience. The appellant was 55 years of age when he applied for this benefit. He has had a grade 12 education from India in Punjabi and has English as Second Language education once arriving in Canada. He has difficulty speaking proficiently in the English language. His work experience throughout his life consisted mostly in the labour intensive market. In the real world context, we submit that

> his chances of returning to any suitable occupation, not necessarily his last employment, on a balance of probabilities are much diminished.

[5] From this, I understood that the Appellant was essentially arguing that the General Division had failed to consider *Villani v. Canada (Attorney General)*, [2002] 1 FCR 130, 2001 FCA 248, in assessing whether the Appellant could be found severely disabled. I granted leave to appeal on the ground that the General Division may have erred in law in making its decision, regardless of whether the error appeared on the face of the record.

[6] The Appellant also relied on *G.B. v. Minister of Employment and Social Development*, 2015 SSTAD 1418, in which the Appeal Division referred to *Garrett v. Canada (Minister of Human Resources Development)*, 2005 FCA 84, where the Federal Court of Appeal determined that the failure to conduct an analysis in accordance with the principles set out in *Villani* constituted an error of law.

[7] *Villani* requires that a decision-maker adopt a "real world" approach, i.e. that he or she considers an appellant's particular circumstances, such as his or her age, education level, language proficiency, past work experience and life experience, when assessing whether that appellant is incapable regularly of pursuing any substantially gainful occupation. The Federal Court of Appeal also stated that the assessment of an appellant's circumstances is a question of judgment with which one should be reluctant to interfere. Hence, if the General Division conducted the "*Villani*" test, and the Appellant simply disagrees with the manner of the assessment, I should refrain from interfering with that assessment.

[8] The Respondent submitted that the General Division had undertaken the *Villani* assessment, noting that it had set out the test at paragraph 68, and that it had expressly referred, at paragraph 12 of the decision, to the Appellant's personal characteristics, such as his age, education, work history, and English language abilities.

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

> 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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> 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)

[10] From this, it is clear that it is insufficient to either point to evidence of an appellant's personal characteristics, or to merely cite *Villani*, without *de facto* determining how those personal characteristics impact an appellant's capacity regularly of pursuing any substantially gainful occupation. While paragraph 12 of the General Division's decision mentioned the Appellant's personal characteristics, the General Division otherwise did not consider how those characteristics impacted the Appellant's capacity regularly of pursuing any substantially gainful occupation. This is the trap into which one can fall when relying on templates, as the Federal Court recently noted in *Canada (Attorney General) v. Thériault*, 2017 FC 405. The General Division's use of templates does not ensure that it will apply the right test.

[11] 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 his capacity regularly of pursuing any substantially gainful occupation in a "real world" context. In this regard, the General Division erred by not fully conducting a "real world" analysis.

[12] However, the Respondent submitted that the "real world" analysis also requires a decision-maker to determine whether an appellant's refusal to undergo recommended treatment options was unreasonable and, if so, that the determination requires an assessment of the impact this refusal might have on an appellant's disability status: *Villani*, at paras. 38, 44 to 46, and 50; *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211, at para. 19. In *Lalonde*, the Federal Court of Appeal held that "the 'real world' context also means that the Board must consider whether Ms. Lalonde's refusal to undergo physiotherapy treatment is unreasonable and what impact that refusal might have on Ms. Lalonde's disability status should the refusal be considered unreasonable."

[13] The Respondent notes that the General Division found that the Appellant had not made reasonable efforts to follow medical advice to alleviate his conditions. At paragraphs 72 and 73, the General Division made the following findings:

> The Tribunal finds that the Appellant did not make reasonable efforts to follow medical advice. The Appellant testified that he began using his Continuous Positive Airway Pressure (CPAP) in 2014. He indicated that he did not use it before because he had issues using the face mask. The Appellant also testified that he always took his medication when he could afford to pay for them. On August 3, 2011 Dr. De Villa noted that the Appellant was not using his CPAP and that is why his sleep apnea was not corrected.
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> On September 19, 2011 Dr. Berlyne noted that the Appellant's asthma was poorly controlled and questioned the Appellant's compliance with his medication. On March 23, 2012 Dr. Berlyne indicated that the Appellant was non-compliant with his CPAP.
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> The Tribunal also notes that a discharge summary from St. Joseph's Health Care indicated that the Appellant left the hospital against medical advice before he was able to obtain samples of inhalers to take home with him and a discharge prescription. He was also non-compliant in regards to the CPAP which would help his sleep apnea.

[14] Given these findings, it is a moot consideration that the General Division had failed to consider the Appellant's personal characteristics. The Appellant was still required to pursue and submit to all reasonable treatment recommendations and, failing that, to provide a reasonable explanation why he could not comply with them. The General Division found that treatment options were available to the Appellant, but that, for whatever reason, he had failed to follow them. The General Division noted that the Appellant faced some financial constraints, which meant that he was unable to consistently and regularly take his medications. Of greater concern for the General Division, however, was the Appellant's non-compliance with using the CPAP machine, which would have helped the Appellant's sleep apnea. The General Division did not consider "issues using the face mask" a reasonable explanation for the Appellant's non-compliance with use of the machine.

[15] It is not enough under *Lalonde* to simply find that the Appellant might have unreasonably failed to comply with treatment recommendations. One must also consider what impact that refusal might have had on the Appellant's disability status. For the General Division, it was apparent that using the CPAP machine would have helped and corrected the Appellant's sleep apnea.

[16] The Appeal Division should not be conducting its own assessment of whether an appellant's non-compliance is reasonable, provided that the General Division is aware of and considers whether an appellant's non-compliance with treatment recommendations is reasonable, and what impact that refusal has on an appellant's disability status. I am satisfied that, in this case, the General Division considered whether the Appellant's non-compliance with treatment recommendations was reasonable and what impact that had on his disability status.

CONCLUSION

[17] Given these considerations, the appeal is dismissed.

Janet Lew
Member, Appeal Division