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

Citation: *S. N. v. Minister of Employment and Social Development*, 2017 SSTADIS 253

Tribunal File Number: AD-16-1267

BETWEEN:

S. N.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: May 30, 2017

REASONS AND DECISION

DECISION

The appeal is allowed.

INTRODUCTION

[1] This is an appeal of the decision of the General Division of the Social Security Tribunal (Tribunal) issued on August 11, 2016, which determined that the Appellant was ineligible for disability benefits under the *Canada Pension Plan* (CPP), because his disability was not "severe" during his minimum qualifying period (MQP), which ended on December 31, 2015.

[2] Leave to appeal was granted on April 26, 2017, on the grounds that the General Division may have erred in rendering its decision.

OVERVIEW

[3] The Appellant applied for CPP disability benefits on March 24, 2014. In his application, he disclosed that he was 43 years old and a high school graduate. He received culinary training and was most recently employed as a sous-chef for a bakery and restaurant, a job that ended in November 2013 after he fell off a ladder and fractured his right foot.

[4] The Respondent refused the application initially and on reconsideration on the grounds that the Appellant's claimed disability was neither severe nor prolonged as of the MQP. On December 29, 2014, the Appellant appealed these refusals to the General Division.

[5] At the hearing before the General Division on August 9, 2016, the Appellant testified that he had been off his feet for 2½ years and had undergone two unsuccessful surgeries, with a third likely. He said that he experienced ongoing pain, for which his family doctor prescribed Oxyneo and Percocet, which produced side effects such as fatigue and irregular bowel movements. He said that he did not attend physiotherapy or other treatment because he could not afford it. He was not seeing any other specialists besides his orthopedic surgeon. He said that he could not return to work as a sous-chef because it would involve standing for long

periods of time; retraining was not an option for him, as he lacked the funds to be able to attend school. He said that he had dropped off résumés to restaurants and had approached friends with the idea of returning to the restaurant industry to work part-time, but they could not help him.

[6] In its decision of August 11, 2016, the General Division dismissed the Appellant's appeal, finding that, on a balance of probabilities, he was capable of substantially gainful employment as of the MQP. The General Division noted, at paragraph 40 of its decision, that the Appellant had made little attempt to find suitable employment within his limitations:

> Although he testified that he had approached friends about employment in the restaurant/catering industry, it was unrealistic for him to believe that he would be able to do such work, particularly because of his inability to stand for more than 10 minutes at a time. Even more importantly, the Appellant made no attempt to return to school or attempt any re-training for an occupation that would be more suitable to his limitations.

[7] On November 3, 2016, the Appellant's representative filed an application for leave to appeal with the Tribunal's Appeal Division, alleging multiple errors on the part of the General Division. In my decision of April 26, 2017, I granted leave to appeal on the grounds that the General Division may have (i) breached a principle of natural justice by finding that the Appellant failed to undergo treatments without considering the evidence that he could not afford them and (ii) erred in law by failing to apply the test set out in *Villani v. Canada*[1] and by disregarding the Appellant's personal characteristics.

[8] On May 19, 2017, the Respondent submitted a letter in which it consented to the matter being referred back to the General Division for a new hearing by a different member.

[9] I have decided that an oral hearing is unnecessary and that the appeal can proceed on the basis of the documentary record for the following reasons:

(a) The Respondent has agreed to a redetermination of the Appellant's disability claim on its merits;

(b) There are no gaps in the file or need for clarification; and

[1] *Villani v. Canada (Attorney General)*, 2001 FCA 248.

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

THE LAW

[10] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), 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 made in a perverse or capricious manner or without regard for the material before it.

[11] According to subsection 59(1) of the DESDA, the 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 Appeal Division's decision in whole or in part.

[12] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an appellant must:

(a) Be under 65 years of age;

(b) Not be in receipt of the CPP retirement pension;

(c) Be disabled; and

(d) Have made valid contributions to the CPP for not less than the MQP.

[13] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[14] Paragraph 42(2)(*a*) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.

ISSUES

[15] The issues before me are as follows:

(a) Did the General Division breach a principle of natural justice by finding that the Appellant failed to undergo treatments without considering the evidence that he could not afford them?

(b) Did the General Division err in law by failing to apply the test set out in *Villani* and by disregarding the Appellant's personal characteristics?

SUBMISSIONS AND ANALYSIS

[16] The Respondent has now recommended that the Appeal Division refer the matter back to the General Division for a new hearing, pursuant to subsection 59(1) of the DESDA. I agree with the parties that the hearing before the General Division was flawed and is best remedied by a redetermination of the Appellant's CPP disability claim on its merits.

Ongoing Treatment

[17] The Appellant alleges that the General Division incorrectly dismissed his claim for disability benefits because he failed to establish that he was undergoing treatment at the time of the hearing. In doing so, the General Division disregarded the Appellant's testimony, in which he explained that he could not afford to attend treatment, since he was not receiving any income.

[18] Case law has imposed a duty on CPP disability claimants to take all reasonable steps to pursue treatment. I agree that lack of resources may be one reason why a claimant has not followed doctors' orders, particularly if the recommended service is not covered by public health insurance. I note that the General Division mentioned (in paragraphs 12 and 13 of its

decision) the Appellant's testimony that he could not afford physiotherapy or mental health counselling, but it nevertheless drew an adverse inference from his lack of treatment without addressing his stated rationale for that lack of treatment. In paragraph 49 of its decision, the General Division wrote:

> The Tribunal is also mindful of the following decision of the former Pension Appeals Board (PAB): Appellants must show that reasonable and earnest efforts were made to find and maintain employment which can accommodate their limitations. An Appellant's failure to do so undermines his claim because it raises a suspicion that he has simply chosen to adopt a disabled lifestyle in the belief that he is unemployable: F.E. v MHRD (June 17, 2011) CP 26480 (PAB).

[19] This is a case in which the Appellant suffered injuries, not at work, nor in an automobile accident, but on private property, for which there is ordinarily no recourse for compensation other than to sue the homeowner—a lengthy and highly adversarial process with little certainty of success. As a consequence, it appeared that there was no readily accessible source of funds (such as workers' compensation or statutory accident benefits) from which the Appellant might have drawn to pay for therapy that was not covered by the Ontario Health Insurance Plan. Having invoked the phrase "disabled lifestyle," the General Division had a duty of fairness to consider whether the Appellant had substantive reasons for not undergoing some form of therapy. In my view, it failed to do so.

Application of *Villani* Real-World Factors

[20] The Appellant alleges that the General Division erred in law by failing to appropriately apply the facts of his situation to the test set out in *Villani*. The Appellant concedes that the General Division correctly cited *Villani*, noting that the test for severity must be assessed in a "real world context," in which consideration must be given to factors such as age, level of education, language proficiency, and past work and life experience. In this case, the Appellant noted that his only post-secondary education is his training as a sous-chef, his past work experience solely involves physical labour, and he has no computer proficiency. Despite this background, the General Division wrote that "none of the above factors" was relevant. The Appellant submits that General Division did not give appropriate weight, if any, to the fact that

it would be incredibly difficult for him, at his age, to be retrained and find a new job in a field in which he has no experience—particularly one that does not involve a physical component.

[21] I would also allow the appeal on this ground. While the General Division summarized the *Villani* principles in paragraph 39 of its decision, I see little indication that it made a wholehearted attempt to apply them to the Appellant's particular circumstances. The General Division determined that the Appellant's age, level of education, language proficiency, and past work and life experience were irrelevant, but *Villani* dictates that they are always relevant—although the question is to what degree. In this case, the Appellant possesses personal characteristics that might conceivably act as barriers to his continued employment—he is now middle-aged with limited post-secondary education, as well as work experience involving mainly manual skills. It seems to me that these factors were worthy of something more than a one-sentence dismissal.

CONCLUSION

[22] For the reasons discussed above, the appeal is allowed.

[23] Section 59 of the DESDA sets out the remedies that the Appeal Division can give on appeal. To avoid any apprehension of bias, it is appropriate in this case that the matter be referred back to the General Division for a de novo hearing before a different General Division member. I also direct the Tribunal to expunge from the record the General Division's decision dated August 11, 2016.

Member, Appeal Division