



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 379

Tribunal File Number: AD-16-1331

BETWEEN:

J. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: July 27, 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 of Canada (Tribunal) issued on August 26, 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, 2011.

[2] Leave to appeal was granted on June 8, 2017, on the ground that the General Division may have erred in rendering its decision.

OVERVIEW

[3] The Appellant applied for CPP disability benefits on August 6, 2014. In his application, he disclosed that he was 57 years old and holds a Bachelor of Arts. For more than 12 years, he worked as a self-employed taxicab driver, a job that he gave up in November 2011 because of increasing back pain, among other health issues.

[4] The Respondent refused the application initially and on reconsideration on the grounds that the Appellant’s claimed disability was not severe as of the MQP. On June 24, 2015, the Appellant appealed these refusals to the General Division.

[5] In a letter dated July 6, 2016, the General Division notified the Appellant that no hearing would be held and that his case would proceed based on the written record. On August 4, 2016, the Appellant’s representative registered his objection to appeal going forward by this format and requested that a hearing be held, either in person or by videoconference, for the following reasons:

- The General Division is an adjudicative body that decides individual and fact-driven cases through an adversarial process. Greater procedural protections are required where, as in this case, appealing to the Appeal Division is not as of right and leave to appeal must be granted. If it is granted, new evidence cannot be provided at that point and appellants must rely on evidence adduced at the first instance.
- Procedural protections are even more important in a situation like the Appellant's, where he has applied for, and been refused, a major source of income replacement based on being disabled. A decision on CPP disability eligibility has a significant impact on claimants who have already been disadvantaged by their impairments.
- If the General Division was to properly determine the extent of the Appellant's disability, then it was also required to assess the impact of the Appellant's illnesses on him. The only way to have done this was to ensure that the Appellant was able to explain it in his own words. Efficiency in proceedings does not trump the necessity for natural justice.
- The subject matter of this appeal—illness and disability—is sensitive, and the Appellant would benefit from a face-to-face meeting to discuss such issues. In addition, the General Division would benefit from personally observing the Appellant.

[6] The Appellant did not receive a response to his objection prior to the August 12, 2016 deadline to file documents, so his representative proceeded to file written submissions on the substantive question of whether he suffered from a severe and prolonged disability.

[7] On August 26, 2016, the General Division issued its decision. It dismissed the appeal, finding little objective medical evidence in support of the Appellant's claim that both his physical and psychological health resulted in a disability. The decision did not address the Appellant's prior submissions on the appropriate form of hearing.

[8] On November 30, 2016, within the specified time limitation, the Appellant's representative submitted an application requesting leave to appeal to the Appeal Division. In my

decision of June 8, 2017, I granted leave to appeal, finding a reasonable chance of success on all of the claimed grounds.

[9] On July 21, 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.

[10] 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
- (c) This form of hearing respects the requirement under the *Social Security Tribunal Regulations* (SST Regulations) to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

THE LAW

Canada Pension Plan

[11] 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.

[12] 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.

[13] 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.

Department of Employment and Social Development Act

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.

[14] 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 General Division's decision in whole or in part.

Social Security Tribunal Regulations

[15] Section 21 of the SST Regulations states that the General Division may hold a hearing by one of several methods, including written questions and answers, teleconference, videoconference or personal appearance.

ISSUES

[16] The issues before me are as follows:

- (a) Did the General Division fail to observe a principle of natural justice by electing not to hold an oral hearing and proceeding instead by way of a documentary review?

- (b) Did the General Division err in law by failing to properly apply the “real world” test as set out in *Villani v. Canada*,¹ which requires an assessment of disability severity to be made in the context of an applicant’s age, education and work experience?

SUBMISSIONS

Alleged Violation of Appellant’s Right to be Heard

[17] The Appellant submits that, because of the nature of his illness and in view of the General Division’s finding that the objective medical record was insufficient, oral testimony was an absolutely essential component to the determination of his appeal. By denying his right to testify either in person or by videoconference, the General Division failed to observe a fundamental principle of natural justice.

[18] The Appellant reiterated his argument that the hearing before the General Division should have proceeded in person or, at the very least, by way of a videoconference. One of the General Division’s central reasons for dismissing the appeal appears to be that it found little supportive objective medical evidence to substantiate the opinion of the Appellant’s family doctor. As such, it was essential that the Appellant himself be permitted to offer testimony. Medical evidence by itself should not determine whether a claimant suffers from a severe and prolonged disability, particularly where the predominant symptoms are pain-related. Consideration must also be given to the subjective nature of disability and, in most cases, that requires an assessment of testimony. An oral hearing would have enabled the Appellant to discuss the intensity and frequency of his symptoms, as well as the real-world context of his difficulties in returning to work. The Appellant notes that the Appeal Division has often confirmed this approach, as did its predecessor, the Pension Appeals Board, which went so far as to say that the nature and credibility of an appellant’s oral evidence may be of sufficient probative value to outweigh the absence of any objective clinical medical evidence.

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

Alleged Failure to Apply *Villani*

[19] The Appellant submits that the General Division erred in law by failing to properly apply the “real world” test as set out in *Villani*, which requires a decision-maker to specifically consider an applicant’s age, education and work experience in assessing the severity of the claimed disability. In this case, the General Division found that the only factor relevant to the Appellant’s employability was his age, and it offered no analysis as to how it was relevant to the decision. The Appellant submits that his work experience should have been given consideration, as he had claimed that he was not just incapable of performing physical work, but also sedentary jobs such as his previous occupation as a limousine driver. The Appellant acknowledges that the General Division summarized his work history early in its decision, but it played no role in its analysis.

ANALYSIS

[20] The Respondent has now recommended that the Appeal Division refer the matter back to the General Division, on the sole ground that the Appellant’s procedural fairness interests may have been denied. I agree with the parties that the proceeding before the General Division was flawed and is best remedied by a redetermination of the Appellant’s CPP disability claim on its merits.

Form of Hearing

[21] The Appellant alleges that, in electing to hear his appeal exclusively by way of documentary review instead of permitting some form of testimony, the General Division breached a principle of natural justice by denying him his right to present a full case. I am ordinarily reluctant to interfere with the General Division’s discretionary authority to decide on an appropriate form of hearing, but in this case I believe there is cause to make an exception.

[22] The *SST Regulations* give the Tribunal’s two branches wide discretion to hold a hearing as they see fit. Section 21 permits the General Division to hold a hearing by one of several methods, including written questions and answers, teleconference, videoconference or personal appearance. Use of the word “may” in the text, in the absence of qualifiers or conditions, suggests that the General Division has discretion to make this decision. However, such

discretion must be exercised in compliance with the rules of procedural fairness. The Supreme Court of Canada has pronounced on this issue in *Baker v. Canada*,² which held that a decision affecting an individual's rights, privileges or interests is sufficient to trigger the application of the duty of fairness. The concept of procedural fairness, however, is variable and it is to be assessed in the specific context of each case. *Baker* then set out a non-exhaustive list of factors to be considered in determining the duty of fairness required in a particular case, including the nature of the decision being made, the importance of the decision to the individual affected, the legitimate expectations of the person challenging the decision and the choices of procedure made by the agency itself, particularly when the legislation gives the decision-maker the ability to choose his or her own procedure.

[23] In this case, I do not doubt that the Appellant would regard his appeal for disability benefits as important and therefore worthy of something approaching a "full" hearing, complete with oral testimony. As the Appellant's representative has noted, a hearing before the General Division is ordinarily the final opportunity for the evidence in a disability claim to be assessed on its merits. This is a case that was founded on claims of chronic back pain and diminished energy following a myocardial infarction (MI). While medical conditions are often diagnosed by means of laboratory tests and imaging results, the subjective intensity of the Appellant's symptoms and their effect on his vocational capacity during his MQP cannot be documented so easily and, in my view, would be best relayed by means of unfiltered oral testimony.

[24] As Chief Justice Dickson of the Supreme Court noted in an earlier case involving the Immigration Appeal Board (now the Immigration and Refugee Board):³

I should note, however, that even if hearings based on written submissions are consistent with the principles of fundamental justice for some purposes, they will not be satisfactory for all purposes. In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. Appellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person [...] I find it difficult to conceive of a situation in

² *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC).

³ *Singh v. Minister of Employment and Immigration*, [1985] 1 SCR 177, 1985 CanLII 65 (SCC).

which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.

[25] In paragraph 1 of its decision, the General Division offered a number of *pro forma* reasons for electing to conduct an on-the-record hearing:

- (a) The member has decided that a further hearing is not required.
- (b) The issues under appeal are not complex.
- (c) There are no gaps in the information in the file and there is no need for clarification.
- (d) Credibility is not a prevailing issue.
- (e) This method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

[26] In my view, except in those few cases where the law unequivocally precludes eligibility, credibility is, on some level, almost always an issue in CPP disability claims, which often depend on the applicant's subjective reports of symptomatology. The Appellant, like many in his position, argues that he is disabled despite what some of the medical reports may suggest, and he submits that his oral evidence would have been a relevant and valuable supplement to the documentary record. I am satisfied that the General Division's refusal to hear his testimony has given rise to a breach of procedural fairness.

Villani

[27] The Appellant argues that the General Division erred in law by failing to apply the "real world" test. In my view, this submission also has merit. While the General Division correctly summarized the *Villani* principle in its decision, it does not appear that it applied it to the Appellant's particular circumstances. Paragraph 22 of its decision reads:

The severe criterion must be assessed in a real world context [...] This means that when deciding whether a person's disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. The only factor that is relevant in this situation is that the Appellant was 57 years old at the time of his application. However, it should be noted that he was 5 years younger when he stopped work in November 2009.

[28] It is not enough to merely cite case law; the trier of fact must also apply it fairly to an applicant's particular circumstances. Here, it is unclear whether the General Division believed that the Appellant's age was an impediment to his continued participation in the labour market. In any event, I note that the General Division did not explain why it found the Appellant's age to be the "only" relevant *Villani* factor, when a casual perusal of the record indicates that Mr. J. C. emigrated from India as an adult, a fact that goes unmentioned in the decision. I think it is within the realm of possibility that the Appellant's proficiency in English, his work history and the perceived value of his educational credentials would have bearing on his ability to secure and maintain substantially gainful employment.

Additional Considerations

[29] Although the Appellant raised no other issues, I would like to make further observations about the General Division's decision.

Sufficiency of Reasons

[30] The General Division's reasons, including the title page, are just over seven pages, most of them concerned with summaries of the documentary evidence, the law and the parties' written submissions. There is a page on the issue of severity, but more than half of this section is occupied with perfunctory recitations of case law. With only a few sentences remaining for analysis *per se*, I think there is more than an arguable case, particularly given the apparent omissions and inconsistencies described below, that the General Division failed to observe a principle of natural justice by giving insufficient reasons for its dismissal of the Appellant's appeal.

Dr. Safieh's Findings

[31] In paragraph 25 of its decision, the General Division wrote:

The Appellant presents that his mental health is an issue. Again, there is no objective medical evidence to substantiate this claim. There are no reports of a referral to a mental health care specialist. Nor does Dr. Safieh refer to the Appellant's mental health in his letters of 2015 and 2016.

[32] Here, the reference appears to be to Dr. Safieh's letter of January 4, 2016, but I note that, contrary to General Division's finding, the Appellant's family physician did, in fact, refer to mental health issues:

All of Mr. J. C.'s medical conditions are considered to be severe. They have all compounded each other and the main cardiac and back issues have led to the other severe medical conditions. These conditions are back pain, chest pain, hypertension, headaches, anxiety/depression and memory issues (also associated with depression)... As stated, Mr. J. C. is incapable of working in any capacity since he is not able to do any physical or *mental* activities in any capacity [emphasis added].

[33] This suggests that the General Division based its decision on an erroneous finding of fact, contrary to paragraph 58(1)(c) of the DESDA.

Heart Condition

[34] The Appellant's August 2014 application materials indicate that his heart problems, as much as his back condition, were a significant component of his disability claim. Despite this, the General Division made no mention of any of the symptoms (such as weakness and chest pain) related to the Appellant's MI in its analysis proper. While a trier of fact is presumed to have considered all the material before it, I am convinced that the General Division did not take into account the totality of the relevant evidence.

Evidence of Severity

[35] In paragraph 23, the General Division wrote: "Medical evidence has failed to disclose any severe medical conditions that would have prevented him [the Appellant] from work at the time of his MQP of December 31, 2011."

[36] I acknowledge that it is the General Division's role to assess the available evidence for the purpose of determining whether an applicant's disability is "severe." However, a trier of fact cannot flatly state a conclusion without outlining the chain of logic that led to it. This is especially important where, as in this case, evidence existed that, on its face, was at odds with said conclusion. I refer to the January 25, 2011 MRI of the lumbar spine, which noted "moderately severe spinal canal stenosis" at L4-5. In my view, having denied there was any

evidence of “severity,” the General Division owed the Appellant a duty of fairness to address this item of ostensibly contradictory evidence.

CONCLUSION

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

[38] 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.



Member, Appeal Division