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

Citation: *J. P. v. Minister of Employment and Social Development*, 2017 SSTADIS 480

Tribunal File Number: AD-16-445

BETWEEN:

J. P.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: September 15, 2017

REASONS AND DECISION

OVERVIEW

[1] This case is about whether the General Division properly applied the legal test for "severity" when assessing the Appellant's disability and her eligibility for a Canada Pension Plan disability pension. The Appellant appeals the General Division's decision rendered on October 31, 2015, which determined that she had not established that she had a severe and prolonged disability for the purposes of the *Canada Pension Plan* by the end of her minimum qualifying period on December 31, 2010. The General Division determined that the Appellant was therefore not entitled to a disability pension.

[2] I granted leave to appeal on the basis that the General Division may have erred in law, by failing to apply *Villani v. Canada (Attorney General)*, 2001 FCA 248 and by not considering the Appellant's personal characteristics in a "real world" context. The Appellant did not otherwise present any issues that I considered could have raised an arguable case.

[3] The Appellant did not file any further written submissions or respond to the Respondent's submissions of April 18, 2017, and, as neither party requested a hearing, I have determined that this matter may proceed on the record, pursuant to paragraph 43(*a*) of the *Social Security Tribunal Regulations*.

ISSUE

[4] The sole issue before me is whether the General Division properly applied the legal test for "severity" under subparagraph 42(2)(*a)*(i) of the *Canada Pension Plan.*

TEST FOR SEVERITY

[5] *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 her age, education level, language proficiency, past work 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.

[6] As I indicated in my leave to appeal decision, although the General Division set out some of the Appellant's personal characteristics at paragraph 9 in its evidence section, it is not apparent that the General Division undertook any analysis of the Appellant's personal characteristics in a "real world" context, which it was required to do when it assessed the severity of her disability.

[7] While the Respondent agrees that the test for disability must be applied in a "real world" context, the Respondent argues that there is case law from the Federal Court of Appeal that establishes that there are circumstances whereby it may be unnecessary to conduct such an analysis.

[8] In *Giannaros v. Canada (Minister of Social Development)*, 2005 FCA 187, the Federal Court of Appeal stated:

> [14] I now turn to the applicant's last submission, which is based on our Court's decision in *Villani, supra.* Specifically, the applicant argues that the Board erred in omitting to consider her personal characteristics, such as age, education, language skills, capacity to retrain, etc. In my view, in the circumstances of this case, this last submission cannot possibly succeed. In *Villani, supra*, at para. 50, our Court stated unequivocally that a claimant must always be in a position to demonstrate that he or she suffers from a severe and prolonged disability which prevents him or her from working:
>
> [50] 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. Cross-examination will, of course, be available to test the veracity and credibility of the evidence of claimants and others.

> [15] A the board was not persuaded that the applicant suffered from a severe and prolonged disability, as of December 31, 1995, there was, in my view, no necessity for it to apply the "real world" approach.

[9] And, in *Erickson v. Minister of Human Resources and Skills Development*, 2009 FCA 58 at paragraphs 8 and 10, in a case that the Respondent argues more closely resembles the Appellant's appeal, the Federal Court of Appeal found that the decision dismissing Ms. Erickson's appeal was not unreasonable. The Respondent argues that, in that case, the outcome was based largely on evidence that Ms. Erickson could return to her previous employment. At paragraph 10, the Federal Court of Appeal wrote that the Pension Appeals Board "was well aware of its overall task; determining whether the applicant had a severe and prolonged disability, which prevented her from performing any gainful employment, given the options realistically available to her."

[10] The Respondent maintains that the Appellant failed to show that her medical condition was severe and prolonged, and that it was therefore unnecessary for the General Division to engage in an analysis of the *Villani* factors.

[11] Citing *Newfoundland and Labrador Nurses v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 18, the Respondent further submits that the Supreme Court of Canada has established that reasons do not have to be comprehensive and that the General Division therefore did not have to conduct an exhaustive analysis of the severity test.

[12] The Respondent asserts that the General Division determined that the Appellant did not have a severe disability on the basis of the objective medical evidence before it. For instance, the General Division noted that, at paragraphs 9, 10 and 15, the Appellant had been treated conservatively and that medical opinions from 2009 stated that there were no medical reasons preventing the Appellant from returning to work as a nursing aide. The General Division noted that, on June 7, 2009, Dr. Betzner was of the opinion that there were no contraindications—from strictly a musculoskeletal perspective— precluding the Appellant from returning to her former employment as a health care aide.

In October 2010, Dr. England, an orthopaedic surgeon retained by the Workers Compensation Board of Alberta, shared this opinion (GT1-69 to 72).

[13] The General Division did not conduct an extensive analysis of the medical evidence. It focused on some of the diagnostic examinations and the medical opinions of Drs. Betzner and England.

[14] Drs. Betzner and England relied on the results of a September 2009 MRI (GT1- 91 to 92/137-138). Yet, due to the Appellant's ongoing symptoms, Dr. Jaarsveldt requested a repeat MRI. In his consultation report of November 2, 2010 (GT1-76 to 77), he indicated that if the Appellant did not improve with an injection and subsequent physiotherapy, she should be referred to an arthroscopic orthopaedic surgeon.

[15] The repeat MRI of the Appellant's right shoulder was done on November 10, 2010, and showed tendinopathy of the suprahumeral rotator cuff with a partial tear at the insertion site to the greater tuberosity, as well as a small bursal surface tear. Degenerative changes of the acromioclavicular (AC) joint with mild to moderate capsular hypertrophy were also seen (GT1-78/135-136).

[16] Dr. Skeith saw the Appellant again in December 22, 2010. The Appellant complained of severe ongoing pain. Dr. Skeith indicated that the Appellant would be receiving an injection in her right shoulder and, depending upon the results, might require surgery. He was of the opinion that she was "still not medically capable currently of any regular employment either usual work or modified" and that she would need to be re- evaluated by a surgeon (GT1-132).

[17] The Appellant was referred to another orthopaedic surgeon. On March 23, 2011, Dr. Jan Lategan diagnosed the Appellant with a partial rotator cuff tear with osteoarthritis of the AC joint in the right shoulder. Dr. Lategan was of the opinion that the Appellant had not had effective conservative management. He referred her to physiotherapy. At the same time, he also arranged for a consultation regarding possible arthroscopic surgery (GT1-131).

[18] The Appellant had an orthopaedic consultation in December 2011. Dr. Rigal ultimately concluded that the Appellant was not a surgical candidate as she did not have a serious rotator cuff tear. Dr. Rigal was of the opinion that the Appellant required "extensive support in the management of her apparent considerable stress level" (GT6-8 to 9).

[19] The Appellant had another orthopaedic consultation in December 2013. Dr. Lalani advised the Appellant that she would not benefit from surgical intervention but that she required a referral to a pain clinic to help resolve her pain issues. He was of the opinion that she also required a proper shoulder physiotherapy program to restore the strength and function to the muscles of the shoulder girdle (GT2-15/16).

[20] The Appellant attended a pain clinic in February 2014 for an assessment. The pain consultant diagnosed her at that point with a chronic pain disorder. Dr. Hauptman made several recommendations, including lifestyle modifications and cognitive behavioural therapy, along with optimizing her medication use. Otherwise, relying on medication use alone would be less effective in reducing the Appellant's pain (GT2-17 to 20).

[21] In April 2014, the Alberta Appeals Commission for Alberta Workers Compensation determined that the Appellant was entitled to a home maintenance allowance, though this of course is not determinative of the severity of the Appellant's disability.

[22] While it is true that a decision-maker need not cite all of the evidence before it, it does not appear that the General Division considered the totality of the evidence. For instance, it did not address the Appellant's apparent chronic pain disorder, despite alluding to it at paragraph 11 of its decision.

[23] It may be that the Appellant's chronic pain disorder arose after the end of the minimum qualifying period had passed but, nevertheless, it was something that the General Division should have addressed, particularly because there was at least one medical opinion, from Dr. Skeith, that found that the Appellant was "still not medically capable currently of any regular employment either usual work or modified." Dr. Skeith did not indicate whether his opinion arose in connection with the Appellant's musculoskeletal complaints, or because of any psychological component. Given the absence of any significant musculoskeletal findings by

Drs. Betzner and England, a chronic pain disorder could have explained why the Appellant felt unable to regularly pursue any substantially gainful occupation. In other words, if the Appellant had a severe chronic pain disorder before the end of her minimum qualifying period, this could have affected her capacity regularly of pursuing any substantially gainful occupation. For this reason, the General Division should have also examined the possibility of a chronic pain disorder and, if it existed at the material time, determined whether, cumulatively with the Appellant's physical pain complaints, it could have accounted for or contributed to a severe disability.

[24] Significantly, Dr. Skeith's report appears to be the closest to the end of the minimum qualifying period. In this regard, the General Division should have addressed the two apparent discrepant medical opinions between Dr. Skeith, on one hand, and Drs. Betzner and England, on the other.

[25] I would have been prepared to accede to the Respondent's submissions, but for the fact that the evidence upon which the General Division relied in coming to its conclusion may not accurately or fully reflect the evidentiary record.

[26] In *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211 at paragraph 19, 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."

[27] I am mindful that the Appellant has received several treatment recommendations. It is unclear whether she has pursued or complied with these treatment recommendations and, if not, whether her non-compliance is reasonable, or what impact her non-compliance might have on her disability status. These might have been relevant considerations, in assessing the severity of the Appellant's disability.

[28] Given the deficiencies that I have identified above, the appeal is allowed.

CONCLUSION

[29] The appeal is allowed and the matter is to be returned to a different member of the General Division for a redetermination.

Janet Lew
Member, Appeal Division