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

Citation: *S. F. v. Minister of Employment and Social Development*, 2017 SSTADIS 494

Tribunal File Number: AD-16-301

BETWEEN:

S. F.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: September 27, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] This case is about whether the General Division applied the 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 of November 9, 2015, which determined that he did not establish that he had a severe and prolonged disability for the purposes of the *Canada Pension Plan* by the end of his minimum qualifying period on December 31, 2013. 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 failing to consider the Appellant's personal characteristics in a "real world" context.

[3] Both parties are represented by counsel or a paralegal. The Appellant did not file any further written submissions or respond to the Respondent's written submissions of February 17, 2017, and, as neither party requested a hearing, I have determined that an oral hearing is unnecessary and that this matter can appropriately be decided on the basis of the documentary record, pursuant to paragraph 43(*a*) of the *Social Security Tribunal Regulations*.

ISSUE

[4] I acknowledge that the Appellant raised several issues in his application requesting leave to appeal, but I found that, apart from one issue, they did not raise an arguable case. The Appellant argued that the General Division had based its decision on several erroneous findings of fact that it made without regard to the material before it. I was not satisfied that those arguments raised an arguable case, as I found that there was an evidentiary foundation upon which the General Division could base its decision. The Appellant has not since made any other submissions that would compel me to revisit these issues.

[5] Accordingly, 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.* In particular, did the General Division apply *Villani*? This also requires me to examine whether there are any circumstances in which a *Villani* assessment is unnecessary.

TEST FOR SEVERITY

[6] *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 age, education level, language proficiency, and 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.

[7] As I indicated in my leave to appeal decision, although the General Division set out some of the Appellant's personal characteristics at paragraph 8 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.

[8] In citing *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 18, the Respondent 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. Further, the Respondent submits that a tribunal "need not refer […] to each and every piece of evidence before it, [as it] is presumed to have considered all of the evidence": *Simpson v. Canada (Attorney General)*, 2012 FCA 82 at para. 10.

[9] The Respondent also cited *Yantzi v. Canada (Attorney General)*, 2014 FCA 193, where the Federal Court of Appeal held:

> [4] It is true that the Tribunal's reasons do not contain a detailed assessment of all of the evidence that could support Mr. Yantzi's case. However, this is not necessary: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII), [2011] 3 S.C.R. 708. There may be cases where the reasons show a failure to grapple with the evidence of such degree that no one can understand how the decision was arrived at or be sure that the decision-maker carried out its mandate: see, *e.g.*, *D'Errico v. Canada (Attorney General)*, 2014 FCA 95 (CanLII). However, this is not one of those cases.

[10] The Respondent argues that the General Division met the *Villani* requirements: One, it cited the Appellant's characteristics at paragraphs 8 and 9 of its decision and two, and more significantly, it was apparent that none of the characteristics such as age, English-language skills, education level and work experience would provide any further impediment to the Appellant's ability to find any substantially gainful employment. He was 49 years old at the end of his minimum qualifying period. He has a grade 13 education. He worked for various companies as a private investigator and as a self-employed investigator between 1982 and 2010. In the latter position, he managed a private investigation business; this included office management and securing work from insurance companies. He supervised staff, including private investigators. It is also evident that the Appellant is functionally fluent in the English language. The Respondent argues that the General Division turned its mind to the *Villani* factors in light of the Appellant's personal circumstances and that it summarized all the medical and employment evidence in paragraphs 8 to 29 and analyzed this evidence in paragraphs 32 to 48.

[11] Here, the General Division did not refer to *Villani.* That alone does not constitute an error, but when a decision-maker does not cite *Villani*, it suggests that he or she may have failed to undertake a *Villani* analysis. The *Villani* test is discharged when a decision- maker *de facto* considers an appellant's personal circumstances in a "real world" context. This is achieved when he or she determines how those factors impact an appellant's capacity regularly of pursuing any substantially gainful occupation. It is insufficient to either point to evidence of an appellant's personal characteristics or to merely cite *Villani*, without further

determining whether and how those personal characteristics impact or influence an appellant's capacity regularly of pursuing any substantially gainful occupation.

[12] Notwithstanding the Respondent's submissions, I do not readily see that the General Division conducted a *Villani* assessment, as there is no consideration of the Appellant's "real world" context. The General Division undertook a comprehensive analysis of the medical evidence in this case, but it is not apparent that it considered how his personal characteristics might have affected the employability component of the severity test articulated by the Federal Court of Appeal.

[13] The Respondent suggests that, even so, the Appellant's personal characteristics would not impede his ability "regularly of pursuing any substantially gainful occupation." That may be so, but generally it is not for me to assess and reweigh the evidence, as such is the domain of the trier of fact.

[14] The Respondent argues that, in the alternative, the General Division did not have to apply *Villani* because the Appellant had failed to follow treatment recommendations without a reasonable explanation. The Respondent contends that there is jurisprudence from the Federal Court of Appeal that indicates that, under the appropriate circumstances, a "real world" analysis may be unnecessary. For instance, in *Giannaros v. Canada (Minister of Social Development)*, 2005 FCA 187, the Federal Court of Appeal did not require the Pension Appeals Board to conduct a "real world" assessment of the facts of that case, given that the "Board was not persuaded that the applicant suffered from a severe and prolonged disability." The Federal Court of Appeal noted that the Pension Appeals Board had made it clear that it was not satisfied that the applicant had made reasonable efforts to participate in the various programs and treatments recommended to her by some of the physicians whom she had consulted. In particular, the Board had noted that the applicant had failed to wear both her lumbar and neck braces, and that she had failed to lose weight and to exercise in a reasonable manner. 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] As 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.

[15] In *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211 at para 19, the Federal Court of Appeal held that “[t]he ‘real world’ context also means that the [Pension Appeals 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.”

[16] The General Division made the following findings, in regard to the Appellant’s efforts to follow medical advice to alleviate his medical conditions:

> [36] The Appellant has not complied with any of the recommendations made by the neurosurgeon in his report of October 28, 2010, including smoking cessation, reducing weight, physiotherapy, massage therapy, chiropractic therapy, and acupuncture. He has not complied with the recommendations contained in a chronic pain management assessment in April 2012, which again recommended aqua therapy and other physical therapies, smoking cessation, epidural injections, and attendance at a pain clinic. The Appellant did not attend the Wellness Program or further counseling recommended by the psychiatrist seen in February 2013. He

> did not start the anti-depressant prescribed by the psychiatrist until eighteen months after the psychiatrist was seen. He has not followed-up with the psychiatrist as recommended. The Appellant's sole treatment for pain and depression since he stopped working in September 2010 to the present has been pain medication, a sleep medication, six counselling sessions in 2012, and an anti-depressant first started in August 2014.
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> […]
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> [48] The Appellant failed to comply with numerous treatment recommendations made by specialists and assessors. He indicated he did not do so, as he did not believe the recommended treatment would be a benefit, and that such belief may have been caused by depression. The Tribunal did not consider the Appellant's reason for not pursuing recommended treatment reasonable, and concluded the failure to pursue such treatment and participate in recommended programs an unreasonable refusal to accept treatment. The Tribunal is unable to determine what impact the refusal to pursue such treatment recommendations might have had on the Appellant's disability status, with the result the Tribunal is unable to conclude the Appellant was suffering from a disability that was long continued and of indefinite duration; and accordingly prolonged.

[17] The General Division clearly was aware that it had to consider whether the Appellant's non-compliance with treatment recommendations was reasonable and what impact that refusal had on his disability status. The General Division indicated that it was unable to determine what impact, if any, the Appellant's non-compliance with treatment recommendations might have on his disability status, but it is unclear how it came to this conclusion, given that there was little analysis of this issue. While the Appellant expressed reservations over pursuing treatment (aqua therapy had not been successful, his own experience when a family physician abandoned him and his wife's long history on antidepressants), even the Appellant recognized that getting some additional help was necessary (counselling notes from July, August and September 2012 at pages GD6-62, 63 and 67). Early on, the consulting physician at Hotel-Dieu Grace Hospital "strongly encouraged" the Appellant to stop smoking. The physician explained to the Appellant that there was a strong relationship between smoking and back problems. The physician partially attributed the Appellant's smoking to the degeneration and encouraged him to stop smoking to slow down the degeneration (GD2-16). However, even if the Appellant had stopped

smoking, this would not have reversed the degenerative process, so that would have had little impact on the Appellant's disability status.

[18] On the other hand, the Appellant's family physician expressed the opinion that the Appellant could see some improvement in his pain if he were to undergo surgery. However, the Appellant did not seek a neurosurgeon consultation (referred to at GD6-85) to determine whether surgery was a viable option for him, in terms of alleviating some of his symptomology, and to determine what the risks might be. Given the Appellant's complaints, it would have been reasonable for him to at least consult a neurosurgeon and then decide whether to pursue more interventionist treatment, such as surgery.

[19] It would have been reasonable to conclude also that, given that there were different health caregivers who recommended counselling, there was some expectation that the Appellant would benefit from counselling. When seen at the Community Crisis Centre, the mobile team encouraged him to participate in the Wellness Program. The Appellant was subsequently assessed by a psychiatrist, who made a series of recommendations, as noted by the General Division at paragraph 36 of its decision. The psychiatrist was of the opinion that the Appellant would benefit from counselling, given that he did not otherwise have a lot of social support in his life. The psychiatrist was also of the opinion that the Appellant would benefit from antidepressants.

[20] Clearly there was some evidence before the General Division that the medical practitioners expected some benefit if the Appellant were to pursue treatment recommendations.

[21] The General Division properly applied *Lalonde* in that it considered whether the Appellant's refusal to pursue recommended treatment options was unreasonable and what impact that refusal would have on his disability status. Much like the case in *Giannaros*, given that the Appellant had unreasonably failed to pursue recommended treatment options and given that practitioners expected some benefit from the treatment, it was unnecessary for the General Division to have conducted a real-world assessment. In other words, a *Villani* assessment was unnecessary in the circumstances of this case where the Appellant unreasonably failed or refused to follow treatment recommendations, and where there was

some evidence that his medical practitioners expected that the Appellant could benefit from some of those recommendations.

CONCLUSION

[22] Given the above considerations, the appeal is dismissed.

Janet Lew
Member, Appeal Division