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

Citation: *C. M. v. Minister of Employment and Social Development,* 2017 SSTADIS 595

Tribunal File Number: AD-16-474

BETWEEN:

C. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

HEARD ON: October 12, 2017

DATE OF DECISION: November 2, 2017

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, C. M., sustained several injuries from a motor vehicle accident that occurred on January 19, 2009. She developed headaches, pain and stiffness in her upper back, as well as an exacerbation of her pre-existing fibromyalgia. Medical practitioners subsequently diagnosed her with chronic major depressive episode, driving-related phobia and chronic pain. The Appellant has undergone extensive investigations and treatment, including physiotherapy, speech language therapy and psychological counseling, but, apart from a brief return to work in June 2009, has not worked since her accident, due to ongoing pain and cognitive impairment.

[3] The Appellant applied for a Canada Pension Plan disability pension in March 2013, but the Respondent denied her claim. The Appellant appealed the Respondent's decision to the General Division, which, in turn, determined that the Appellant was ineligible for a disability pension under the *Canada Pension* Plan, as it found that her disability had not been severe by the end of her minimum qualifying period on December 31, 2012. (An appellant's minimum qualifying period is the date by which she is required to be found disabled.) The Appellant sought leave to appeal the General Division's decision.

[4] I granted the Appellant's application for leave to appeal the General Division's decision, as I was satisfied that the appeal had a reasonable chance of success, in that the General Division may have misapprehended or possibly misconstrued the evidence regarding her cognitive deficits and it may have thereby failed to properly apply the "*Villani*"[1] test. The Appellant advanced several grounds of appeal, but I found that they were inter-related, because each related to the Appellant's alleged cognitive impairment. I must now decide whether the General Division misapprehended or misconstrued the

---

[1] *Villani v. Canada (Attorney General)*, [2002] 1 FCR 130, 2001 FCA 248.

evidence regarding the Appellant's cognitive deficits and, if so, whether it thereby misapplied the "*Villani*" test.

ISSUES

[5] The issues before me are as follows:

> **Issue 1:** Did the General Division misapprehend or misconstrue the evidence regarding the scope of the Appellant's cognitive impairment?
>
> **Issue 2:** Did the General Division fail to properly apply the "*Villani*" test?

ANALYSIS

> **Issue 1:** Did the General Division misapprehend or misconstrue the evidence regarding the scope of the Appellant's cognitive impairment?

[6] The Appellant submits that the General Division misapprehended the medical evidence regarding the extent of her ongoing cognitive impairment. She claims that the General Division mistook an improvement of her symptoms for significant recovery. She claims that, had the General Division appreciated that she continues to suffer significant impairment with concentration, memory and basic comprehension, it would have necessarily accepted that she is severely disabled for the purposes of the *Canada Pension Plan.*

[7] The Respondent denies that the General Division misapprehended the evidence, and argues that the Appellant is essentially seeking a reassessment. The Respondent submits that I should defer to the General Division's findings.

[8] Considering the alleged magnitude of the Appellant's injuries, there were relatively few medical records before the General Division, although the bulk of the records centred on the end of the minimum qualifying period. The hearing before the General Division proceeded in December 2015. Yet, there was a conspicuous absence of any medical records for 2013, 2014 and 2015, save for the rudimentary Canada Pension Plan medical report, which had been prepared in March 2013.

[9] Had the General Division been required to assess whether the Appellant's disability could be considered prolonged for the purposes of the *Canada Pension Plan*, it would have been difficult to draw any definitive conclusions from the medical records alone. The Appellant clearly exhibited ongoing problems, and a psychologist was of the opinion that the prognosis was guarded. Yet, the Appellant was undergoing various therapies with the goal of improving various cognitive communication skills, attention, concentration, memory, oral expression, auditory comprehension and executive functioning. She had yet to attain maximum medical improvement. In other words, there was some expectation that she could see some improvement in some of her symptoms, possibly to the point where she could consider returning to the workforce in some capacity, albeit not at her former employment as a senior global programs manager doing marketing and communications.

[10] The Respondent did not request and the General Division did not draw any adverse inferences from the fact that there were relatively few records before it. The records before the General Division consisted of the following:

2010

October 29	Occupational therapist initial assessment report and assessment of attendant care needs prepared by Amber Yantzi, occupational therapist (GD3-53 to 73 / GD3-74 to 80)

2011

August 29	chronic pain management unit initial assessment prepared by Antoinette Leone, RSW (GD3-46 to 52)

2012

March 22	vocational assessment prepared by Amber Yantzi, OT (GD3-81 to 101)
April 13	report of Dr. J. MacCallum, physiatrist (GD3-102 to 123)

April 20	psychological assessment and treatment plan prepared by Dr. J. Cole, psychologist (GD3-165 to 176)
July 20	speech-language pathology assessment report prepared by Sarah Gillespie, speech language pathologist and Danielle Randall, director of rehabilitation services (GD3-144 to 163)
September 27	psychological treatment progress report and new treatment plan prepared by Dr. Cole (GD3-139 to 143)
October 4	psychological treatment progress report prepared by Dr. Cole (referred to at GD3-136, though this may be the report of Sept. 27)
October 30	speech-language pathology progress report prepared by Sarah Gillespie and Adrienne Trevisonn, clinical practice leader (GD3-127 to 137)

<u>2013</u>

March 5	Canada Pension Plan medical report prepared by Dr. Cole (GD3-38 to 41 / GD3-42 to 45)

[11] The General Division noted Dr. McCallum's diagnosis that the Appellant has headaches, generalized pain, and difficulty with cognition, concentration, memory, articulation and ability to think creatively. The General Division also referred to the psychologist's April 2012 report in which he noted that the Appellant reported significant cognitive problems. In his March 2013 report, he diagnosed her with possible cognitive disorder, among other things. The General Division also noted the speech language pathologist's October 2012 report in which she had reported that increased cognitive demands negatively impacted the Appellant's implementation of strategies.

[12] The General Division noted the Appellant's testimony that she encounters the same cognitive difficulties that she had reported to Dr. McCallum. Pain, stress and poor sleep exacerbated her cognitive difficulties.

[13] The General Division accepted that the Appellant experiences medical issues, but it found that her "symptoms improved considerably with treatment." The General Division found that the Appellant's attention, concentration and working memory improved following a cognitive rehabilitation program. The General Division found that the Appellant had made significant gains in driving. The General Division also suggested that her symptoms were not that severe, given that the Appellant appeared to be managing her symptoms with conservative treatment and that, other than osteopathic treatment, she did not seek out treatment.

[14] Ultimately, the General Division concluded that the Appellant could not be expected to ever work again as a senior global programs manager because of its physical and cognitive demands. This was in part because such a position required various cognitive skills, including critical thinking, planning, organization, memory, attention, communication skills and motivation. The General Division suggested that the Appellant could otherwise perform regular part-time work, modified activities or sedentary occupations, provided they did not require prolonged sitting and there were no extended cognitive demands, such as at her previous employment.

[15] The Appellant asserts that the General Division overlooked the speech language pathology assessments that were conducted in July 2012 and October 2012. The earlier of these two reports indicated that the Appellant had difficulty comprehending sentences of more than seven words in length in a basic one-on-one conversation in a quiet setting. The Appellant claims that the July 2012 assessment also establishes that she has difficulty with verbal reasoning skills, which is notable, given her pre-accident functioning. The Appellant also notes that the assessment shows that she exhibited difficulties relating to attention, concentration, auditory comprehension, oral expression, memory, reading comprehension, written expression and executive functioning. She claims that the General Division mischaracterized the evidence altogether when it overlooked these aspects of the speech pathology assessment.

[16] The Appellant claims that the General Division also mischaracterized Dr. Cole's reports, in suggesting that any improvement in cognitive function restored her to a

functional level, when in fact he concluded that she had not made significant cognitive gains and that she remained below the cognitive level she had been at prior to the motor vehicle accident.

[17] Similarly, although the General Division referred to the psychologist's March 2013 medical report, the Appellant claims that the General Division neglected any mention of the prognosis. Dr. Cole had noted that the Appellant's symptoms—including cognitive fatigue and mental slowness—persisted on a daily basis. He listed relevant functional limitations as "cognitive processing issues and a history of multiple prior concussions." The Appellant argues that Dr. Cole's opinion on the prognosis and relevant functional limitations demonstrates that her cognitive symptoms have not improved considerably.

[18] The Appellant further notes that she gave extensive testimony regarding her cognitive problems, including "comprehension, recall of information, memory difficulties, struggles with concentration, retention, and expression, difficulties with conversations, requiring additional time to process before speaking, and difficulty planning, problem solving, and prioritizing" (2:55 to 4:20 of part 1 of audio recording of hearing before General Division). The Appellant claims that she listed other difficulties, but they are inaudible on the audio recording. She also notes that she testified that any improvement she had seen from the cognitive rehabilitation program was short-lived and that her symptoms had regressed over time (1:00 of part 2 of audio recording). There was no corroborating documentary evidence to substantiate the Appellant's claims that her symptoms regressed over time, but the Appellant insists that the General Division should have accepted her oral testimony in any event. The Appellant claims that the General Division failed to refer to any of her oral testimony.

[19] The Appellant acknowledges that a decision-maker is not required to refer to all the evidence before it, but she argues that these particular passages in the medical reports and her oral testimony are of probative value and that overlooking them misconstrues the true state of her cognitive impairment—at the end of her minimum qualifying period and since then.

[20] In his September 27, 2012 report, Dr. Cole noted that the Appellant had made "significant progress" in her mood and anxiety, sleep and pain management. However, she still encountered headaches on a daily basis, as well as significant pain flare-ups related to an increased level of anxiety. Dr. Cole recommended that the Appellant participate in a five-week Cogmed Working Memory and attention training program. He understood the program "would be very helpful," subject to management of her intense headaches. He wrote:

> Given the proven research evidence that supports this Cogmed program, I am confident that in a short period of time this will help [the Appellant] in a significant way to improve her attention and working memory and then <u>help her to function at a level comparable to her pre-accident state and even help prepare her to possibly return to the workforce</u>. [My emphasis]

[21] Dr. Cole was of the opinion that the Appellant's headache symptoms might persist even after psychological treatment. He indicated that she might require a neurological consultation, and possibly imaging studies of her head and neck, to address the headache symptoms.

[22] In his final report of March 2013, Dr. Cole noted that the Appellant exhibited "performance improvements" over the five-week period, yet, he also wrote that she continued to be mentally slow and experience cognitive fatigue. However, Dr. Cole failed to address whether the Appellant met the expectations that he had in late September 2012 that the Cogmed program would help the Appellant in a significant way "to function at a level comparable to her pre-accident state and even help prepare her to possibly return to the workforce." He did indicate, however, that psychological treatment was ongoing and that speech-language therapy might resume. It is evident that the Appellant continued to see Dr. Cole after September 2012, but the Appellant did not produce any progress reports that he might have prepared and which could have assisted the General Division.

[23] The Appellant argues that the General Division overlooked the July 2012 speech-language pathology report. The July 2012 report represented an initial assessment and

identified recommendations. Therefore, the subsequent October 2012 speech-language progress report provided a more representative picture of the Appellant's medical status, closer to the end of her minimum qualifying period. This is so because by October 2012, the Appellant had undergone speech-language pathology treatment to address the very problems and concerns that the clinicians had identified in their initial assessment. The sessions were designed to provide the Appellant with education, exercises and strategies to strengthen her cognitive communication skills in order to promote improved functioning in daily activities. The Appellant also received some guidance regarding the transfer of skills and strategies learned in therapy to function in everyday settings.

[24] The October 30, 2012 speech-language pathology progress report did not refer to the Cogmed training program. The clinicians documented improvements in various areas, but they noted that pain, fatigue, subsequent emotional state, as well as increased cognitive demands, negatively impacted the Appellant's consistent independent implementation of strategies. Therefore, the clinicians recommended that the Appellant continue to receive speech-language pathology therapy, as well as additional cognitive communication therapy sessions. Future therapy would continue to build awareness of symptoms and their impact on the Appellant's cognitive skills, as well as facilitate independent implementation of strategies. The clinicians were of the opinion that the Appellant would continue to benefit from the sessions. It is unclear whether the Appellant underwent any additional speech-language pathology or cognitive communication therapy sessions and, if so, whether she benefited from them, as she did not produce any updated progress or final reports.

[25] The clinicians' opinions are consistent with the psychologist's September 2012 report. The psychologist concluded that the Appellant had made some significant gains in that she felt less anxious, had improved sleep, felt able to manage her chronic pain and had significantly improved her ability to drive. Her depression was also of decreased intensity and magnitude. Yet, the psychologist noted that the Appellant felt that her mind did not function as it had prior to the accident. And, despite improvements in her sleep, pain and anxiety management, the Appellant found that she had not had significant cognitive gains.

The psychologist recommended a further treatment block of only 10 one-hour therapy sessions, along with participation in the Cogmed working memory training program.

[26] Despite the improvements, it is clear that, by September and October 2012, the Appellant had not improved to the point where her treating caregivers felt confident that she had some capacity regularly of pursuing a substantially gainful occupation. There was no discussion by the therapists or by the psychologist at this stage that the Appellant was ready for a return to the workforce. They recommended ongoing treatment and therapy, including the Cogmed working memory training program, to improve her working memory and improve her ability to pay attention and focus on tasks.

[27] In this regard, the General Division misapprehended the evidence. It suggested that if the Appellant had any ongoing cognitive issues, they were only minor. The General Division referred to the cognitive improvements experienced by September 2012, but it made no mention of the Appellant's ongoing need for therapy and treatment, including the Cogmed working memory training program, or the reported difficulties described in the October 2012 speech-language pathology report. Although the Appellant was no longer at the level where she was unable to comprehend sentences of more than seven words in length, the nature of the recommended treatment, the Appellant's self-reporting and the clinicians' observations suggested that the Appellant continued to exhibit cognitive impairment with memory, attention and processing.

[28] By misapprehending the evidence in this manner and by mistaking significant improvements for cognitive restoration (or something close to it), the General Division was unable to properly determine whether the Appellant had been capable regularly of pursuing a substantially gainful occupation by the end of her minimum qualifying period. For this reason, I would allow the appeal.

[29] Although I am allowing the appeal, I will make some additional remarks. I note that the Appellant's caregivers were of the opinion that her headaches contributed to her cognitive impairment and, despite some discussion that there would be a neurological consultation, ultimately this did not materialize. I do not know whether one can necessarily

infer that the Appellant's headaches resolved and that her cognition further improved, but it would have been a reasonable conclusion to draw in the absence of any updated records that addressed this issue.

[30] There was a lack of medical records before the General Division. There were no speech-language pathology or psychologist's progress and final reports following the Appellant's five-week Cogmed training program and other treatment. Without a more comprehensive medical history, I fail to see how a decision-maker can properly determine whether the Appellant had such cognitive impairment, even after Cogmed training and other treatment that, together with her other medical issues, rendered her severely disabled by the end of her minimum qualifying period. While Dr. Cole prepared a March 2013 report, it contained little in the way of narrative or analysis to provide much guidance. The Appellant also purports that her condition has overall regressed, yet there was no corroborating medical evidence to support her claims.

[31] I am returning this matter to the General Division for a redetermination but, without a more comprehensive medical history, the General Division may well conclude that an adverse inference should be drawn. It would therefore be a useful starting point for the Appellant to access and produce a copy of her personal claims history to determine what treatment she has pursued and when.

Issue 2: Did the General Division fail to properly apply the *Villani* test?

[32] As I am allowing the appeal, I need not address this issue, but I will nevertheless provide some brief remarks.

[33] Although the General Division recited the *Villani* test and then proceeded to consider the Appellant's particular circumstances, such as her age, education, language proficiency and work experience, the Appellant submits that the General Division nevertheless failed to properly apply the *Villani* test.

[34] The Appellant argues that the General Division erred in this regard because it failed to appreciate that her cognitive impairments markedly altered the relevancy of her education and past work experience in any "real world" assessment. The Appellant acknowledges that

she is well-educated—she earned an Arts degree and attended one year of a Master's program in business administration—that she has excellent work experience, and that she also successfully ran her own consulting business from 1992 to 2008. However, she claims that, since her accident, she continues to have problems with attention, concentration, auditory comprehension, oral expression, memory, reading comprehension, written expression and executive functioning. She relies on a speech language pathology assessment that was conducted in July 2012, which found that she had difficulty comprehending sentences of more than seven words in length in a basis one-on-one conversation in a quiet setting.

[35] The General Division determined that the Appellant's symptoms had improved considerably and that there was little cognitive impairment by the end of her minimum qualifying period. On this basis, the General Division found the Appellant's education and work experience relevant. However, given its misapprehension of the evidence regarding the scope of her cognitive improvements, it cannot be said that it properly applied the *Villani* test. The test includes an "air of reality," which, in this case, means that one must be realistic about the applicability of the Appellant's particular circumstances in determining the severity of her disability. The Appellant's education and work experience were far less relevant, given the state of her cognitive impairment in September and October 2012.

CONCLUSION

[36] Given the foregoing reasons, the appeal is allowed and the matter returned to a different General Division member for a redetermination.

Janet Lew
Member, Appeal Division

IN ATTENDANCE (via videoconference)

Appellant	C. M.
Representative for the Appellant	Jillian Deley (counsel)
Representative for the Respondent	Emma Skowron (articling student)
	Dale Randell (counsel)