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

Citation: *R. T. v. Minister of Employment and Social Development*, 2017 SSTADIS 656

Tribunal File Number: AD-16-287

BETWEEN:

R. T.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

HEARD ON: June 6, 2017

DATE OF DECISION: November 17, 2017

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant is seeking a Canada Pension Plan disability pension.

[3] The Appellant worked part-time in a long-term care facility until April 2012. She had been involved in a motor vehicle accident that occurred on March 3, 2011, when she lost control of her vehicle and struck a tree. She allegedly sustained several injuries from the accident, including generalized pain, right chest pain, headaches, dizziness, nausea, tinnitus, and cognitive impairment. She also allegedly developed anxiety and post-traumatic stress disorder. She underwent surgery in April 2012 to remove breast implants that had been displaced from the accident. However, the Appellant continued to feel symptomatic and by late June 2012, her family physician determined that she was unfit for a return to work.

[4] The Appellant has seen several medical practitioners and undergone various assessments and treatments. Physicians have diagnosed her with fibromyalgia and chronic pain, though one psychologist was of the opinion that in fact she had an exacerbation of her pre-existing somatization disorder, rather than fibromyalgia. X-rays taken in February 2013 revealed that the Appellant had degenerative disc disease throughout her cervical, thoracic and lumbosacral regions.

[5] The Appellant applied for a Canada Pension Plan disability pension in October 2012, 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, 2014. (An appellant's minimum qualifying period is the date by which they are required to have been found disabled.)

[6] The Appellant sought leave to appeal the General Division decision. I granted the Appellant's application for leave to appeal, as I was satisfied that the General Division may have failed to apply *Villani*[1] by overlooking the Appellant's particular circumstances in a "real world" context.

PRELIMINARY MATTER

[7] The Appellant contacted the Tribunal after the hearing of this matter to advise that she had received the Respondent's submissions (AD7) only after the hearing had already concluded. These submissions can be essentially summarized as follows: even if the General Division failed to conduct a *Villani* assessment, the General Division may not be required to consider or apply the real-world test, depending upon the factual circumstances. These submissions were the same as those provided in its earlier submissions (AD4) but included two recent decisions rendered by the Appeal Division (AD-15-1566 and AD-15-1590).

[8] I am not relying on either of these two decisions; indeed, I found AD-15-1590 factually distinguishable. As the submissions were the same as the Respondent's earlier submissions, I find that the Appellant had not been denied an opportunity to know the Respondent's arguments, or denied an opportunity to respond to them. I find that there was no breach of procedural fairness arising from the late delivery of document AD7 to the Appellant.

ISSUES

[9] The only issue before me is as follows:

> Was the General Division required to conduct a *Villani* assessment, given the facts before it?

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

ANALYSIS

[10] At paragraph 31 of its analysis, the General Division indicated that it was guided by the principles set out in *Villani.* Although the General Division described the Appellant's personal characteristics, such as her age, education, transferable skills and work experience (at paragraph 10 of its decision), I determined in my leave to appeal decision that it was not readily apparent whether the General Division had otherwise considered and undertook any analysis of the Appellant's personal characteristics in a "real world context," when it assessed the severity of the Appellant's disability.

a. Appellant's submissions

[11] The Appellant argues that the General Division failed to consider her past work history and education, despite the fact that they were relevant to assessing the severity of her disability. The Appellant has a grade nine education[2] and worked in the retail and food industries. After completing a one-year food service worker program, she worked part-time in a long-term care facility. She argues that these considerations, together with her medical conditions, render her severely disabled.

[12] Other than the Appellant's initial written submissions (at page AD1-8 of the hearing file), she did not provide any further written submissions addressing the *Villani* issue, although she filed evidence and arguments relating to her medical condition and its impact on her. As I indicated in my section 4 ruling, generally no new evidence is permitted on appeal given that the grounds of appeal are limited to those set out under subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), unless the new evidence falls within one of the exceptions to the rule. Such is not the case here. The Appellant explained that she had not intended to file any new evidence. Rather, she was uncertain whether her former representative had provided all of the medical documentation, so she filed it to ensure a complete record. There is no indication that the Appellant is

[2] The Appellant's questionnaire for disability benefits indicates that she has a grade 10 education (GD2-114). A psychologist and vocational evaluator separately noted that the Appellant reported that she quit school after completing grade 9 (GD2-53, 70/81). The General Division accepted that the Appellant has a grade 9 education.

seeking a reassessment, but even if she had been seeking one, as the Federal Court indicated in *Tracey*,[3] subsection 58(1) of the DESDA precludes a reassessment of the evidence.

b. Respondent's submissions

[13] The Respondent argues that the General Division in fact conducted a *Villani* assessment. The Respondent submits that the Appeal Division should consider the General Division decision "as a whole" and infer from paragraph 10 (where it set out the Appellant's personal characteristics) that it necessarily had to have considered them in order to find that she had some work capacity.

[14] The Respondent argues in the alternative that the General Division was not required to conduct a *Villani* assessment because the Appellant in this case had failed to establish that she was disabled, in that, having been found to exhibit some work capacity, she had failed to show that she had undertaken efforts at obtaining and maintaining employment and that these efforts were unsuccessful by reason of her health condition.

[15] In this particular instance, the Respondent notes that the General Division found that, although the Appellant claimed that she had sought alternative work and had been offered modified duties at her former workplace, she was reluctant to pursue them, and had instead pursued employment that was not particularly suitable for her functional limitations and restrictions. The Respondent further notes that the General Division found that the Appellant's explanations for her failure to perform modified duties or to find suitable work were unreasonable and that, as such, she had failed to convince the General Division that she was severely disabled.

[16] The Respondent's position on *Villani* is this: Once an appellant is found to have work capacity, they must adduce evidence of employment efforts and possibilities, and it is only then that the *Villani* analysis is triggered. The Respondent submits that this approach is consistent with *Giannaros*.[4]

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[3] *Tracey v. Canada (Attorney General)*, 2015 FC 1300.
[4] *Giannaros v. Canada (Minister of Social Development*), 2005 FCA 187, at paras. 14 and 15.

[17] The Respondent asserts that Ms. Giannaros had failed to follow recommended treatment without reasonable explanation, from which the Federal Court of Appeal concluded that Ms. Giannaros did not suffer from a severe and prolonged disability and that it was therefore unnecessary to apply the "real world" approach set out in *Villani*. The Respondent concedes that neither the Federal Court nor the Federal Court of Appeal has relied on the Federal Court of Appeal's reasoning in *Giannaros* since, however, argues that *Giannaros* and *Villani* are consistent with each other, in that, generally, a "real world" assessment is required, unless an appellant fails to follow recommended treatment without reasonable explanation.

c. The General Division decision

[18] The *Villani* analysis, i.e. "real world" approach, requires the General Division to determine whether an appellant, in the circumstances of their background and medical condition, is capable regularly of pursuing any substantially gainful occupation. The Federal Court determined that the hypothetical occupations that a decision-maker must consider cannot be divorced from the particular circumstances of an appellant, such as their age, education level, language proficiency and past work and life experience.

[19] It may be that the General Division conducted a *Villani* assessment, but if so, its reasons are deficient in this regard, as it is not apparent whether the General Division conducted any analysis as to how the Appellant's personal characteristics impacted her ability to regularly pursue a substantially gainful occupation. I cannot infer that the General Division necessarily considered the Appellant's personal circumstances, simply because it determined that she exhibited work capacity.

d. The *Giannaros* position—appellants are required to pursue treatment

[20] The Respondent urges me to follow *Giannaros.* There, the Federal Court of Appeal noted that the Pension Appeals Board dismissed the applicant's appeal, making it clear that the applicant had failed to make reasonable efforts to participate in the various programs and treatments recommended to her by some of the physicians whom she had consulted. It seems that the Federal Court of Appeal determined that it was unnecessary to conduct a

Villani analysis because the applicant had failed to reasonably submit to treatment recommendations.

[21] I adopted the *Giannaros* approach in an earlier decision.[5] In *S.S.*, I found that it was unnecessary for the General Division to consider Mr. S.'s personal characteristics, as he was required but failed to pursue and submit to all reasonable treatment recommendations and failed to provide a reasonable explanation why he had not complied with the recommendations when there was evidence that treatment was likely to have some impact on his disability status. It is clear that the "real world" test involves a consideration of whether all reasonable options have been exhausted; after all, it is logical to assume that there must be some likelihood of improvement in one's condition if a health caregiver recommends a particular treatment. In *Lalonde*,[6] 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."

[22] However, I find *Giannaros* and *S.S.* factually distinguishable. In those decisions, the appellants had failed to follow recommended treatment without any reasonable explanation, whereas, in the proceedings before me, the General Division did not make any explicit findings regarding the Appellant's compliance with treatment recommendations.

[23] Here, the Appellant's non-compliance centers on her refusal to perform modified duties or to explore alternative work or retraining opportunities. Compliance with treatment recommendations is necessarily relevant to the issue of the severity of a disability because a claimant may improve in response to treatment, whereas pursuing alternative work or modified duties generally has no bearing on an applicant's medical condition (although in some cases it may impact the condition). Had the General Division made findings regarding the Appellant's compliance with treatment recommendations, I might have determined that *Giannaros* was applicable.

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[5] *S.S. v. Minister of Employment and Social Development,* 2016 SSTADIS 375. N.B. The Appellant S.S. filed an application for judicial review of this decision on June 30, 2017 (A-201-17).
[6] *Lalonde v. Canada (Minister of Human Resources Development),* 2002 FCA 211, at para. 19.

e. Severity test involves aspect of employability

[24] I am mindful that the Federal Court of Appeal has consistently stated that the severity test involves an aspect of employability and that medical evidence of a severe disability is required, as is "evidence of employment efforts and possibilities."[7] However, when I read this against the backdrop of the Federal Court of Appeal's decision in *Inclima*,[8] it becomes apparent that before one is even required to adduce evidence of employment efforts and possibilities, as a first step, there must be some evidence of work capacity.

[25] The Federal Court of Appeal stated, "where […] there is evidence of work capacity, [one] must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition." If there is no evidence of work capacity, the obligation under *Inclima* to provide evidence of employment efforts and possibilities is not triggered.

f. The *Doucette* case—an "in-depth" *Villani* analysis is not required

[26] In *Doucette*,[9] the Federal Court of Appeal suggested that the Pension Appeals Board was not required to consider the applicant's particular characteristics "in-depth." The Court found that there was evidence in the record capable of supporting the Board's view that the true cause of Mr. Doucette's inability to return to work was his failure to make greater efforts between the time of his accident and his minimum qualifying period. At paragraph 16, it wrote that, given that conclusion, "there [was] no need to make an in- depth analysis of the constraints posed to the applicant's capacity to return to the work force by his educational level, language proficiency and past work and life experience."

[27] The Court's use of the word "in-depth" suggested that some analysis was required, even if it was not an "in-depth" one. Yet, it was apparent that the Court determined that the Board was excused from undertaking any analysis at all, given that there was evidence to support the Board's conclusion. The Court noted that the evidence included a medical report

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[7] *Villani*, at para. 50, and *Klabouch v. Canada (Minister of Social Development*), 2008 FCA 33, at para. 16.
[8] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.
[9] *Doucette v. Canada (Minister of Human Resources Development*), 2004 FCA 292.

and a psycho-vocational assessment that identified certain occupations that Mr. Doucette was capable of performing.

[28] The Court then proceeded to conduct its own *Villani* analysis, in the absence of the Board's own analysis. The Court acknowledged that Mr. Doucette suffered from educational and cognitive deficiencies that put him at a disadvantage in terms of seeking employment. The Court found that Mr. Doucette had work capacity and that he could have returned to the labour market had he made a greater effort, even when Mr. Doucette's personal limitations were taken into account, the.

[29] Desjardins J.A., dissenting, found that the Board had failed to provide any analysis of whether the applicant, in the "real world," was capable or incapable regularly of pursuing any substantially gainful occupation. She would have referred the matter back for a rehearing and redetermination.

[30] It is clear that *Doucette* determined that it is sufficient for a decision-maker to rely on medical records and any comprehensive vocational assessments that indicate an appellant has work capacity, and that the decision-maker may thereby be relieved of any obligation to undergo his own in-depth *Villani* analysis.

[31] As such, if there is evidence, such as a comprehensive evaluation that includes a consideration of an appellant's age, language, education, work and life experience, much like the psycho-vocational assessment in the *Doucette* case, a decision-maker may be able to rely on that evaluation, in concluding that an appellant has the capacity regularly of pursuing a substantially gainful occupation. Otherwise, the decision-maker is under a duty to conduct a *Villani* analysis (unless, as I have indicated above, the appellant has unreasonably failed to follow treatment recommendations).

[32] I am bound to follow the Federal Court of Appeal's decision in *Doucette*, notwithstanding my own views in this matter. Had it not been for *Doucette*, I would have required the General Division to determine whether an appellant, in the circumstances of their background and medical condition, is incapable regularly of pursuing any substantially gainful occupation.

[33] After all, when it set out the appropriate legal test for disability under the *Canada Pension Plan*, the Federal Court of Appeal in *Villani* clearly intended that a decision-maker should consider the particular circumstances of an appellant, as part of the "real world" approach, before determining whether they are incapable regularly of pursuing any substantially gainful occupation.

[34] In applying *Doucette*, I find that the General Division did not have to conduct an in-depth *Villani* analysis because it could rely on the comprehensive vocational evaluation and transferable skills analysis report that concluded that, while currently ill- suited for other employment, the Appellant could retrain for other work, even if she had reportedly experienced learning difficulties in school and would likely require accommodation in school to facilitate learning. The vocational evaluator considered the Appellant's particular circumstances, including her age, language, education, work and life experience, as well as her multiple physical and mental disabilities.

[35] The General Division also relied on the opinion of a physiatrist, who discussed the modified work that the employer had offered to the Appellant. The physiatrist wrote, "I do believe [the modified work] is within her means to perform."

[36] Much like in *Doucette*, there is no doubt that the Appellant suffers from educational and other deficiencies, which place her at a disadvantage in terms of seeking employment. However, within those limitations, the evidence was that there was work that she could do, or that she could undergo retraining for other employment that would be more suitable to her limitations.

CONCLUSION

[37] *Villani* requires that there be an air of reality in assessing whether an applicant is incapable regularly of pursuing any substantially gainful occupation. With *Doucette*, it is clear that a decision-maker is not required to vigorously conduct its own *Villani* assessment, provided that he can rely on an expert opinion, such as a medical report and/or a vocational evaluation that considers the "real world" context and concludes that the appellant has some work capacity, or identifies suitable employment for that appellant.

[38] Given that the General Division relied upon a physiatrist's medical report and a vocational assessment and transferable skills analysis report, and the author of the vocational assessment considered the Appellant's "real world" context in concluding that she was capable of retraining and therefore had some residual work capacity, I find that the Appellant has failed to prove that a *Villani* assessment by the General Division was necessary. For this reason, the appeal is dismissed.

Janet Lew
Member, Appeal Division

IN ATTENDANCE (via teleconference)

Appellant	R. T. S. T. (observer) R. B. (observer)
Representative for the Respondent	Anna Mascieri-Boudria (paralegal) and Hasan Junaid (counsel) Sarah Potechin (paralegal—observer)