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

Citation: *C. L. v. Minister of Employment and Social Development*, 2017 SSTADIS 767

Tribunal File Number: AD-16-569

BETWEEN:

C. L.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

HEARD ON: July 18, 2017

DATE OF DECISION: December 28, 2017

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, C. L., worked as a forklift driver and operator between 1992 and August 2008, when she stopped working. She claims that, other than for brief periods in 2009, 2010 and 2011 (GD4-6 and 32), she has been unable to work since 2008 because of several medical conditions, including severe arthritis in her lower spine, osteoporosis and degenerative changes in her neck and lower back, sciatica, scoliosis, bulging discs in her back and neck, a bone spur in her neck, bilateral carpal tunnel syndrome and bilateral epicondylitis. She describes having numerous limitations. She claims that she has become severely disabled and that she is no longer able to work.

[3] The Appellant applied for a Canada Pension Plan disability pension in May 2013 but the Respondent, the Minister of Employment and Social Development, denied her claim. The Appellant appealed the Respondent's decision to the General Division, which in turn found her ineligible for a disability pension because it found that her disability had not been severe by the end of her minimum qualifying period on December 31, 2010, or had become severe within a prorated period between January 1 and February 28, 2011. (The end of an appellant's minimum qualifying period is the date by which he or she is required to be found disabled.)

[4] The Appellant appealed the General Division's decision, in part on the basis that it had erred in finding that she had completed both a labour market re-entry program and work placement, and in determining that, as a consequence, she exhibited capacity regularly of pursuing any substantially gainful occupation. I must now decide whether the General Division erred in law or based its decision on any erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it.

ISSUES

[5] The issues before me are as follows:

> **Issue 1:** Did the General Division fail to apply *Villani*[1]?
>
> **Issue 2:** Did the General Division err in its findings regarding the Appellant's participation in a labour market re-entry program and work placement?

[6] If the answer to either of these issues is "yes," what is the appropriate disposition of this matter?

GROUNDS OF APPEAL

[7] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal. It reads:

> **58. (1)** The only grounds of appeal are that
>
> (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 that it made in a perverse or capricious manner or without regard for the material before it.

ANALYSIS

Issue 1: Did the General Division fail to apply *Villani*?

[8] *Villani* requires that the statutory test for severity be applied with some degree of reference to the "real world" and that a decision-maker take into account the particular circumstances of an applicant, such as his or her age, education level, language proficiency

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

and past work and life experience. *Bungay*[2] confirmed that a decision-maker must consider details such as an individual's entire physical condition, age, level of education and employability.

[9] Here, the General Division seemingly did not refer to nor apply *Villani*, nor for that matter, consider the Appellant's particular circumstances in a "real-world" context.

[10] The Appellant submits that her particular circumstances are relevant to any assessment of the severity of her disability. The Appellant notes that she does not have a grade 12 education (which is why she had undergone educational upgrading with the Workplace Safety and Insurance Board (WSIB)). She also notes that she has very limited transferable work skills, given that her employment has been largely limited to working in a factory. The Appellant also claims that her age is a significant consideration.

[11] The Respondent argues that the Appellant is precluded from making any submissions on this issue unless she had already raised them prior to the hearing of this appeal. Nevertheless, the Respondent argues that the General Division had in fact appropriately considered the *Villani* factors, at paragraph 39 of its decision, where it acknowledged that the Appellant's pain, education, and work experience might limit her job opportunities.

[12] Although the General Division did not cite or make any reference to *Villani*, I agree that that fact alone does not establish that the General Division could not have otherwise applied its principles.

[13] In *Villani*, the Federal Court of Appeal set out guiding principles as to how disability under the *Canada Pension Plan* ought to be defined, and how to conduct a disability assessment. It is clear from the Federal Court of Appeal's analysis at paragraphs 38 and 39 that it is insufficient either to point to evidence of an appellant's personal characteristics, or to merely site *Villani*, without *de facto* determining how those personal characteristics impact an appellant's capacity regularly of pursuing any substantially gainful occupation.

---

[2] *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

[14] While the General Division's analysis is brief, I concur with the Respondent that the General Division had in fact considered the Appellant's particular circumstances at paragraph 39, where it wrote, "The Tribunal acknowledges the Appellant's pain, education, and work experience may limit her job opportunities."

[15] The General Division considered the Appellant's personal factors that were relevant to the question of the Appellant's capacity, particularly from a vocational perspective. Given this, I am not satisfied that the General Division failed to conduct a "real world" analysis. As the Federal Court of Appeal[3] cautioned against, I see no reason to interfere with the member's *Villani* assessment.

Issue 2: Did the General Division err in its findings regarding the Appellant's participation in a labour market re-entry program and work placement?

[16] The General Division set out the Appellant's evidence regarding her participation in a WSIB labour market re-entry program (paragraphs 8 and 11). It indicated that the Appellant participated in a labour market re-entry program from 2010 until 2012. The program consisted of education upgrading, job search training and job placement. The General Division indicated that she had a three-month job placement as part of the labour market re-entry program.

[17] At paragraph 16, the General Division also noted that Dr. H. Hasnain, the Appellant's family physician, reported to the WSIB in July 2010 that the Appellant should be excused from attending school because of decreased range of motion in her neck, shoulders, and back. He noted that the Appellant had been suffering from chronic back pain "for some period of time" and that she had restrictions with prolonged sitting and standing, and that she was unable to do any bending or twisting. He was of the opinion that she was unlikely to sustain or do her retraining at school (GD1-16). The General Division noted that, despite the family physician's opinion that the Appellant was unable to sustain or attend retraining at school, the evidence indicated that, from 2010 until 2012, she had attended the

[3] *Villani*, *supra*, at para. 49.

retraining program, including educational upgrading, job search training and a job placement.

[18] At paragraphs 30 and 34, the General Division concluded that because she had been able to participate in a labour market re-entry program and work placement, she necessarily exhibited some residual work capacity, despite her pain. (In coming to this determination, the General Division also considered the fact that the Appellant was receiving only conservative treatment, had limited consultations and treatment by specialists, and minimal pathology appeared on investigative reports.)

Appellant's submissions

[19] The Appellant submits that the General Division erred at paragraph 30, in finding that she had attended the WSIB labour market re-entry program from 2010 to 2012. The Appellant claims that the member's findings are unsubstantiated, as she had testified that the WSIB stopped her from participating in or completing the labour market re-entry academic retraining program because it aggravated her chronic back disability.

[20] The Appellant further claims that she had testified that she was unable to complete a three-month WSIB placement at which she had been expected to perform various clinical duties for a few hours a day, as the duties aggravated her neck, back, elbows, and bilateral carpal tunnel syndrome, and also caused severe headaches. She claims that she had also testified that the company hired another worker in her place to perform her duties.

[21] Essentially, the Appellant claims that the General Division misconstrued her evidence, by suggesting that she fully participated in and was able to complete the labour market re-entry program, when she claims that the evidence showed that she had only limited participation.

Leave to appeal decision

[22] In my leave to appeal decision, I found that if indeed the Appellant had been forced to prematurely stop participating in either the labour market re-entry program or the work

placement program for medical reasons, and if the General Division found or suggested that the Appellant had otherwise fully participated in these two programs over two years, then this could constitute an erroneous finding of fact upon which it based its decision, for the purposes of subsection 58(1) of the DESDA. I indicated in my decision that the Appellant should refer me to the evidence and her testimony before the General Division to support her claim that she was unable to complete the labour market re-entry program or work placement program.

Documentary evidence before the General Division

[23] The Appellant referred me to her family physician's medical opinions as well as to an MRI report taken on September 16, 2011, all of which she claims establish that her cervical impairment had deteriorated and worsened (leading to a nerve root impingement), as well as establish that she was unable to continue and complete the WSIB vocational rehabilitation program.

[24] The Appellant also relies on a disability tax credit form that her family physician completed (GD1-18). In it, the family physician described the Appellant's numerous limitations. The Appellant also notes that, in 2013, she received an increased permanent impairment award to 30 percent, which reflected the fact that her neck and bilateral carpal tunnel syndrome impairment had gotten worse (GD1-25).

[25] The Appellant argued that, on the basis of this medical evidence, which she claims proves that the program permanently aggravated her disabilities, it would be reasonable to accept that she was unable to continue and had indeed stopped attending the labour market re-entry program. In fact, she claims that she participated in the program from October 2008 to June 2011, and she denies that she participated in 2012, although in submissions filed in August 2017, she clarifies that the WSIB referred her to a work placement in 2012 in which she did participate. However, she claims that the job placement aggravated her neck, back, both elbows and carpal tunnel syndrome (AD5).

[26] The Appellant acknowledges that there are no memoranda or any correspondence from the WSIB confirming that she had stopped participating in any components of the

labour market re-entry program. She also acknowledges that she had not contacted the WSIB to obtain written confirmation that she had stopped participating in the program, or that she had not contemplated calling anyone from the WSIB or the employer at the job placement program to give evidence on her behalf as a witness. She claims that she did not contact the WSIB or the employer because it did not occur to her to do so.

[27] The Appellant relies on the medical evidence to support her claim that she was unable to fully participate in the labour market re-entry program. However, this appeal does not call for a reassessment of the medical or other documentary evidence because the nature of an appeal before the Appeal Division is limited under subsection 58(1) of the DESDA. I will instead focus on whether the General Division's findings are consistent with the evidence before it.

Appellant's testimony before the General Division

[28] The Appellant referred me to the timestamps from the hearing before the General Division, as she claims that they show that the General Division erred in its understanding of the evidence regarding her participation in the labour market re-entry program and work placement program.

[29] The Appellant testified that the WSIB placed her into a labour market re-entry program so that she could complete her grade 12 and then go on to college after that. However, she was unable to complete a year of the schooling (and obtain her grade 12 certification) — she guessed that she completed approximately six months or so of the program. Throughout her schooling, she had problems with her arms, neck and lower back from using computers. She testified that using computers was a "huge problem." She could not complete the exam and ended up with a problem involving her elbow and wrists, so "Comp" [i.e. worker's compensation] contacted her and advised her not to return to school (at approximately 17:00 to 17:55 of audio recording).

[30] The Appellant also testified about the job placement. She went for training and job search training and then the WSIB placed her in a job placement at a driver education firm.

She performed this job placement for six weeks,[4] for three to four hours per day. She confirmed that the WSIB expected her to work after completion of this job placement, but the employer did not hire her.

[31] The Appellant testified that she did not seek other employment after the job placement, as she was unable to think of any other job that she might have been able to perform. She testified that, as it was, she was unable to perform the clerical duties that had been assigned to her at the job placement. She testified that she did "close to nothing there" (19:41 to 20:43). Indeed, she testified that she could not do any filing because the books were too heavy and because it involved overhead lifting; she did minimal filing; and, because the employer had little business, she had few telephone calls to answer. She also testified that she was unable to do the computer work, so the employer hired a student. She also took breaks, because she was unable to "sit […] or stand" for prolonged periods.

[32] The Appellant queried how the WSIB had determined that she would be able to work a full eight-hour workday, when she encountered problems and limitations with working merely three hours. She claims that she missed "a day or two" of work at the placement because of her neck, when she tried to do computer work (48:54 to 49:50).

[33] The Appellant agreed that the work placement was for only a specific period of time. After the work placement finished, the employer had the opportunity to hire the Appellant but he indicated that he was unable to employ her because of her disabilities. After the Appellant completed the work placement, the WSIB "cut [her] loose" and it did not offer her any additional retraining, job placement or job search (49:50 to 50:49).

[34] The Appellant testified that she subsequently applied for clerical or general secretarial positions that the WSIB advised her of or felt that she was capable of performing. She applied by posting her resume with online employment agencies, but she never received any interviews. She claims that she would have attempted to work, although she lacked any confidence that she could perform the work. She speculates that the WSIB placed her with

[4] The Appellant testified before the General Division that she had been at this job placement for six weeks, but I note that her application requesting leave to appeal indicates that the WSIB had arranged a three-month placement. Given the passage of time, I do not find that anything turns on this minor discrepancy.

an employer who did not have any business, because it recognized that she would face few physical demands. In other words, she suggests that the WSIB was aware of her limitations and had few expectations that she would be able to fully participate in a work placement (50:50 to 52:06). However, this was speculative and there was no supporting documentation from the WSIB verifying this.

Respondent's submissions

[35] The Respondent, on the other hand, argues that the General Division did not err in finding that the Appellant had participated in the labour market re-entry program between 2010 and 2012, as opposed to having completed the program. The Respondent argues that the General Division came to its finding on the basis of the documentary evidence before it, as well as the Appellant's own testimony. The Respondent argues that the General Division largely described the Appellant's participation as "attendance" at the program, rather than completion, and any reference to "completion" was a reference to time only.

[36] The Respondent notes that the Appellant had not adduced any medical opinions that recommended that she withdraw from the labour market re-entry program, that her participation was impossible or that she was incapable of completing the program. The Respondent argues that, apart from the Appellant's own testimony, there simply was no indication that the Appellant actually ceased participating in or had significantly reduced her participation in the program.

Participation in labour market re-entry program

[37] I do not know whether the General Division intended to draw any distinction between "participating" and "completing" the labour market re-entry program, or whether any such distinction is at all relevant, given that the Appellant had in fact completed at least the job search training and work placement components of the labour market re-entry program. The Appellant claims that she did not complete the educational upgrading or retraining, although there was no supporting documentary evidence of this.

[38] However, the General Division did not focus on the educational upgrading component of the labour market re-entry program, as it focused instead on the job search training and job placement components (paragraph 11). Even so, although the Appellant may not have completed the educational upgrading component of the program, the Appellant proceeded to the next two components and, in this regard, completed the program overall.

[39] The Appellant argues that the General Division essentially misconstrued or overlooked her evidence regarding her limited participation in the labour market re-entry program. She indicates that the General Division suggested that she fully participated in and was able to complete the labour market re-entry program.

[40] Although the General Division did not describe the scope of her participation in the labour market re-entry program in its analysis, when setting out the evidence, it noted that the Appellant experienced back, neck and arm pain while participating in the program. The General Division also noted that the Appellant testified that she was unable to do some of the duties of the job placement, particularly heavy overhead lifting. This description is consistent with the Appellant's testimony. Against this backdrop, I do not see that the General Division misconstrued the evidence when it indicated that the Appellant participated in or attended the labour market re-entry program. Clearly, the General Division was mindful that the Appellant experienced pain and encountered limitations at the job placement.

[41] The Appellant suggests that if the General Division did not fully set out her evidence, including all of the limitations she experienced, then it must have overlooked that evidence. However, there is no obligation for a decision-maker to exhaustively list all of the evidence before it, as there is a general presumption that it has considered all of the evidence. As Stratas J.A. stated in *South Yukon Forest Corporation*,[5] in the end, a decision-maker expresses only the most important factual findings and justifications for them, from what can often be masses of information. The Appellant has not convinced me that the General Division ignored her evidence regarding her limited participation; after all, it noted

[5] *Canada v. South Yukon Forest Corporation and Liard Plywood and Lumber Manufacturing Inc.*, 2012 FCA 165.

that the Appellant was faced with several limitations and that she was unable to perform some of the duties of the job placement.

[42] The Appellant has not convinced me either that there was evidence before the General Division that the job placement ended early because of pain in her arms, neck and back.

[43] Finally, I note that the General Division's conclusion that the Appellant has some residual work capacity was based on several other considerations, apart from whether she had participated in a labour market re-entry program. The fact that the General Division found that she had participated in a labour market re-entry program was a contributing factor—but not determinative on its own—in finding that she had residual work capacity.

CONCLUSION

[44] The Appellant has not convinced me that the General Division either failed to consider *Villani* or that it based its decision on an erroneous finding of fact that she participated in and completed a labour market re-entry program, in either a perverse or capricious manner or without regard for the material before it. For the foregoing reasons, the appeal is dismissed.

Janet Lew
Member, Appeal Division