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

Citation: *B. C. v. Minister of Employment and Social Development*, 2018 SST 11

Tribunal File Number: AD-17-68

BETWEEN:

B. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

HEARD ON: December 21, 2017

DATE OF DECISION: January 4, 2018

Canada

DECISION AND REASONS

PERSONS IN ATTENDANCE

Appellant	B. C.
Representative for the Appellant	Paul Oddi
Representative for the Respondent	Stéphanie Yung Hing

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, B. C., who is now 60 years old, attended school up to

Grade 11 and was most recently employed as a bus driver for disabled persons, a job she held for more than 13 years. In August 2013, she fractured her right shoulder and has not worked since. In May 2015, the Respondent, the Minister of Employment and Social Development (Minister), refused her application for disability benefits under the *Canada Pension Plan* (CPP) because her disability was not "severe and prolonged" as of her minimum qualifying period (MQP), which was to end on December 31, 2015.

[3] Ms. B. C. appealed the Minister's determination to the General Division of the Social Security Tribunal of Canada (Tribunal). In a decision dated November 30, 2016, it found insufficient evidence that Ms. B. C.'s medical condition prevented her from performing substantially gainful employment during the relevant period. It also found that she had residual capacity to pursue lighter sedentary work within her restrictions.

[4] In January 2017, Ms. B. C. requested leave to appeal from the Tribunal's Appeal Division. In my decision dated August 18, 2017, I granted leave because I saw at least an arguable case that the General Division may have (i) erroneously ascribed capacity to learn new

skills to Ms. B. C.'s recreational reading and (ii) failed to apply *Villani v. Canada*[1] in assessing the severity of her disability.

[5] Now, having considered the parties' submissions and reviewed the underlying record, I have come to the conclusion that the General Division's decision cannot stand.

ISSUES

[6] The issues before me are as follows:

Issue 1: How much deference should the Appeal Division extend to General Division decisions?

Issue 2: Did the General Division base its decision on an erroneous finding of fact by ascribing capacity to learn new skills to Ms. B. C.'s propensity for recreational reading?

Issue 3: Did the General Division err in law by failing to properly apply the *Villani* "real world" test in assessing the severity of Ms. B. C.'s disability?

ANALYSIS

Issue 1: How much deference should the Appeal Division show the General Division?

[7] The only grounds of appeal to the Appeal Division are that the General Division erred in law, failed to observe a principle of natural justice, or 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.[2] The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration, or vary the General Division's decision in whole or in part.[3]

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[1] *Villani v. Canada (Attorney General)*, 2001 FCA 248.
[2] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA).
[3] Subsection 59(1) of the DESDA.

[8] Until recently, it was accepted that appeals to the Appeal Division were governed by the standards of review set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick.*[4] Where errors of law or failures to observe principles of natural justice were alleged, the applicable standard was held to be correctness, reflecting a lower threshold of deference deemed to be owed to a first-level administrative tribunal. Where erroneous findings of fact were alleged, the standard was held to be reasonableness, reflecting a reluctance to interfere with findings of the body tasked with hearing factual evidence.

[9] The Federal Court of Appeal decision *Canada v. Huruglica*[5] rejected this approach, holding that administrative tribunals should not use standards of review that were designed to be applied by appellate courts. Instead, administrative tribunals must look first to their home statutes for guidance in determining their role. This premise led the Court to determine that the appropriate test flows entirely from an administrative tribunal's governing legislation: "The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent […]."

[10] The implication here is that the standards of reasonableness or correctness will not apply unless those words, or their variants, are specifically contained in the tribunal's home statute. Applying this approach to the DESDA, one notes that paragraphs 58(1)(*a*) and (*b*) do not qualify errors of law or breaches of natural justice, which suggests that the Appeal Division should afford no deference to the General Division's interpretations. The word "unreasonable" is not found in paragraph 58(1)(*c*), which deals with erroneous findings of fact. Instead, the test contains the qualifiers "perverse or capricious" and "without regard for the material before it." As suggested by *Huruglica*, those words must be given their own interpretation, but the language suggests that the Appeal Division should intervene when the General Division bases its decision on an error that is clearly egregious or at odds with the record.

[4] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9.
[5] *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93.

Issue 2: Did the General Division erroneously attribute capacity to recreational reading?

[11] Having considered the parties' submissions, I am convinced that the General Division went too far in attributing to Ms. B. C. a capacity to learn new skills based on her propensity to read for pleasure.

[12] In paragraph 39 of its decision, the General Division considered Ms. B. C.'s employment prospects in the context of not just her physical impairments, but also her personal profile, including her recreational pursuits:

> The Appellant was 58 years of age at the time of the MQP. Although 58 is a mature age the Appellant testified that she spends much of her day reading. This is indicative of an ability to learn new things and skills in order to obtain employment.

[13] Ms. B. C. argues that, while she reads, she does not watch TV or own a computer, and she passes the time doing exercises recommended by her doctors. There is no evidence that her hobby translates into a capacity to work.

[14] While the General Division, as trier of fact, has broad discretion to make findings, it must do so within the parameters defined by paragraph 58(1)(*c*) of the DESDA. The General Division suggests that recreational reading is associated with capacity to learn skills, but I do not think this proposition is obvious, and I am satisfied that it was made "without regard for the material." I note that there was nothing in the decision about *what* Ms. B. C. reads in her spare time.

[15] Having reviewed the audio recording of the hearing, I can confirm that Ms. B. C. briefly mentioned her recreational reading pastime twice, although each occasion prompted little in the way of follow-up questioning from the General Division:

> At the 18:00 mark:
>
> Mr. Oddi: How do you pass the time? Ms. B. C.: I read a lot of books.
>
> Mr. Oddi: Have you tried to go back to work?
>
> At 32:00:
>
> General Division: What else do you do during the day?

Ms. B. C.:	I do a little bit of walking, and then sometimes I'll ride my bike. I do a lot of reading. I do a lot of [inaudible].
General Division:	So you do a lot of reading. Is it fair to say, like… you understand English without a problem? You can read and write?
Ms. B. C.:	Yes, that's true. I can do that.
General Division:	So if you did try to upgrade your education, you don't have any barriers with respect to language?
Ms. B. C.:	No.

[16] These exchanges indicate that the General Division was interested in Ms. B. C.'s reading only insofar that it established her facility in English. However, in my view, if the General Division wanted to draw broader conclusions from Ms. B. C.'s reading habits—that is, her capacity to learn new skills—then, out of fairness, it should have further inquired about what kinds of printed materials she consumes, while it had an opportunity. There is a vast difference between, say, technical manuals and great works of literature at one extreme, and gossip magazines and comic books at the other, and the General Division was too hasty to draw an unsupported inference from Ms. B. C.'s statements. Moreover, this inference could not, as the Minister suggested, be isolated; it was an integral part of the General Division's *Villani* analysis.

Issue 3: Did the General Division improperly apply the *Villani* "real world" test?

[17] Ms. B. C.'s reading habits were a component of a larger discussion, in which the General Division assessed her employment prospects in light of not just her impairments, but also her background and personal profile. In doing so, it was guided by the leading case of *Villani v. Canada*, where the Federal Court of Appeal held that disability is to be assessed in a "real world" context, taking into account a claimant's employability given his or her age, work experience, level of education, and language proficiency.

[18] Ms. B. C. argued that, having been found unfit to drive a bus following her shoulder injury, there was no occupation that, realistically, was open to her. She emphasized that she had never graduated from high school and was 58 by the end of her MQP. She disputed the General

Division's finding that she had "transferable skills," even though her work history had been limited to manual labour. In reply, the Minister pointed to Ms. B. C.'s literacy, work history, and previous attainment of a specialty bus operator's licence, which, it submitted, demonstrated abilities and skills that did not preclude future employment. It said that the General Division was entitled to deference in finding that Ms. B. C. was likely capable of training or lighter work.

[19] On balance, I agree with Ms. B. C. I have already found that the General Division's assessment of Ms. B. C. as a whole person was compromised by the leap in logic it took in inferring capacity to retrain from the mere fact that she reads for pleasure. However, that was not the only problem with the General Division's *Villani* analysis.

[20] Although the General Division correctly summarized *Villani* in paragraph 38 of its decision, I think it is fair to ask whether the General Division properly applied it in considering Ms. B. C.'s work history. Returning to paragraph 39, the General Division wrote:

> She testified that she does not have language barriers and is able to read, write and speak English without difficulties. She has an employment history and had the ability to obtain a specialty license to operate a bus. This work history gives her some transferable skills. There is insufficient medical evidence and evidence of employment efforts to finds [*sic*] on a balance of probabilities she suffers from a severe disability as defined in the CPP in a real world context. Although the Appellant is 58 years of age she has the health and mental ability to pursue any substantially gainful occupation within the restrictions of her shoulder/arm injury. The Tribunal does not agree with the submission of the Appellant's solicitor that the Appellant is of such an advanced age that she is not capable of entering the workforce.

[21] I note that the General Division found that Ms. B. C. has "transferable skills," although there was no evidence that she has ever done anything other than various types of manual labour during her working life. Her skills, such as they are, are for a narrow subset of jobs for which her shoulder injury would appear to be a significant impediment. Indeed, both the General Division and the Minister conceded that Ms. B. C.'s impairments now barred her from the one job for which she has ever received any form of certification. In oral argument, the Minister's representative suggested that a lengthy work history, as Ms. B. C. possesses, in itself conveys transferable skills, but I cannot agree. It is true that even low-wage, low-skill jobs teach

valuable life lessons in punctuality, tenacity, and interpersonal communication, but these are not "transferable skills" as are commonly understood in the vocational context.

[22] As the concept of "employability" is intrinsic to any consideration of the *Villani* factors, I am satisfied that the General Division failed to take a realistic look at Ms. B. C.'s prospects for finding lower impact work.

CONCLUSION

[23] I find that the General Division erred in law and fact by grounding its *Villani* analysis on unsupported findings that (i) recreational reading is necessarily linked to capacity to retrain and (ii) a lengthy history of low-wage jobs by itself gives rise to "transferable skills."

[24] Section 59 of the DESDA sets out the remedies that the Appeal Division can give on appeal. To avoid any apprehension of bias, it is appropriate, in this case, that the matter be referred back to the General Division for a *de novo* hearing before a different member.

Member, Appeal Division