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

Citation: *J. D. v. Minister of Employment and Social Development,* 2018 SST 47

Tribunal File Number: AD-17-116

BETWEEN:

J. D.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: January 18, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] This appeal examines the extent to which a finder of fact is obliged to elicit information from a claimant.

[3] The Appellant, J. D., who is 56 years old, had polio as a child and has long experienced right arm weakness. More recently, she has been diagnosed with plantar fasciitis, which she claims restricts her mobility. She has a long history of what her legal representative describes as “menial jobs” and was most recently employed as a school crossing guard until February 2015, when “pain” led her to stop working.

[4] In May 2015, Ms. J. D. applied for Canada Pension Plan (CPP) disability benefits. The Respondent, the Minister of Employment and Social Development (Minister), refused her application because it did not find her disability “severe” and “prolonged,” as defined by the legislation, as of her minimum qualifying period (MQP), which it determined would end on December 31, 2017.

[5] Ms. J. D. appealed the Minister’s determination to the General Division of the Social Security Tribunal. The General Division determined that an oral hearing was not needed and decided the appeal based on a review of the existing documentary record. On December 14, 2016, it issued a decision denying the appeal because it found insufficient evidence that Ms. J. D.’s medical condition prevented her from performing substantially gainful employment during the MQP.

[6] On February 8, 2017, Ms. J. D. requested leave to appeal from the Tribunal’s Appeal Division, arguing that the General Division had failed to take into account her age, limited transferable skills, and educational level when it determined that her disability did not prevent her from working.

[7] In my decision dated August 23, 2017, I granted leave because I saw at least an arguable case that the General Division may have failed to properly apply the "real world" test as set out in *Villani v. Canada*,[1] which requires a decision-maker, in assessing disability, to consider the whole person in a real-world context. I also saw an argument that the General Division, having forgone an opportunity to question Ms. J. D. about her past work experience in an oral hearing, unfairly based its decision on an *absence* of information about her vocational history.

[8] I have reviewed the parties' oral and written submissions against the documentary record, and concluded that the General Division's decision cannot stand.

ISSUES

[9] 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 fail to observe a principle of natural justice by denying Ms. J. D. an oral hearing?

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

ANALYSIS

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

[10] 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

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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).

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]

[11] 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.

[12] 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…."

[13] 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.

[3] Subsection 59(1) of the DESDA.
[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 unfairly deny Ms. J. D. an oral hearing?

[14] This case was characterized by a dearth of medical evidence. Ms. J. D. submitted only two medical reports in support of her disability claim, both of them prepared by her family physician. As I noted in my leave to appeal decision, the lack of material may have influenced the General Division's decision to conduct the hearing entirely on the basis of the existing documentary record, but it could just as easily have served as a rationale for calling supplemental oral evidence.

[15] There are two factors that militate against Ms. J. D.'s appeal. First, a disability claimant bears the burden of proof to show that he or she meets the criteria set out in paragraph 42(2)(*a*) of the CPP. It was up to Ms. J. D. to submit evidence demonstrating that her disability was severe and prolonged; it was not the Minister's task—or, for that matter, the General Division's—to show that she could still work.

[16] So there is a presumption that a claimant is not disabled until he or she proves otherwise, but this does not mean that a tribunal member can assume a completely passive role as finder of fact. That brings me to the second obstacle facing Ms. J. D.: the General Division's discretionary power—conferred by section 21 of the *Social Security Tribunal Regulations*—to decide whether to hold a hearing and, if so, in what form, whether by written questions and answers, teleconference, videoconference, or personal appearance.

[17] However, such discretion is not absolute and must be exercised in compliance with the rules of procedural fairness. The Supreme Court of Canada has pronounced on this issue in *Baker v. Canada*,[6] which held that a decision affecting an individual's rights, privileges or interests is sufficient to trigger the application of the duty of fairness. The concept of procedural fairness, however, is variable and it is to be assessed in the specific context of each case. *Baker* then set out a non-exhaustive list of factors to be considered in determining the duty of fairness required in a particular case, including the nature of the decision being made, the importance of the decision to the individual affected, the legitimate expectations of the person challenging the decision, and the choices of procedure made by the agency itself, particularly when the legislation gives the decision-maker the ability to choose his or her own procedure.

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[6] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC).

[18] In this case, I do not doubt that Ms. J. D. would regard her appeal for disability benefits as important and therefore worthy of something approaching a “full” hearing, complete with oral testimony. As for the General Division’s choices of procedure, I note that it offered, in paragraph 2 of its decision, a number of *pro forma* reasons for choosing to proceed without an oral hearing:

> This appeal was decided on the basis of the documents and submissions filed for the following reasons:
>
> (a) The member has decided that a further hearing is not required.
>
> (b) The issues under appeal are not complex.
>
> (c) There are no gaps in the information in the file or need for clarification.
>
> (d) This method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

[19] This passage contradicts what comes later in the decision. Although the General Division found “no gaps in the information” and thus “no need for clarification,” its subsequent analysis indicated that, in fact, it found many gaps in the information and, what is more, relied on them to dismiss Ms. J. D.’s appeal. Among other things, it noted that there was nothing in the file about what medications she was taking or what medical specialists she had seen. Above all, in assessing Ms. J. D.’s employability, it relied on the absence of information about her vocational history:

> [18] […] The appellant was fifty-three years old at the time of her application had a grade 12 education. The tribunal at [*sic*] acknowledges that the appellant has few transferable skills from her job as a school crossing guard *but it is unknown what her previous work experiences have been.* Nonetheless, keeping in mind the appellant’s personal circumstances, along with her medical condition, the tribunal has concluded that her personal circumstances would not negatively impact on her ability to seek, and if necessary, retrain for part-time employment [my emphasis].

[20] In my view, the General Division in effect penalized Ms. J. D. for not offering full particulars about her previous work experience, but I note that: (i) she had an earnings history of more than 30 consecutive years, the last five of which were spent working as a crossing guard; and (ii) there was nothing in the CPP application materials that asked her to disclose her employment history beyond those previous five years. The Minister’s representative suggested that the General Division essentially gave Ms. J. D. the benefit of the doubt on her

pre-2010 work, assuming that none of it was in any way "skilled," but I cannot agree. A plain reading of the General Division's words suggests that it made no findings about the balance of Ms. J. D.'s work experience yet leaped to the conclusion that her skills, or lack thereof, would not hinder her vocational prospects.

[21] In choosing to proceed without the benefit of oral evidence, the General Division based its decision, in part, on a premise ("no gap in the information") that it later acknowledged was false, but I also see a violation of the rules of procedural fairness, in particular, Ms. J. D.'s right to be heard. It is true, as the Minister observes, that the November 2016 letter notifying Ms. J. D. that the appeal would be decided on the record also permitted her to make further submissions, if she so wished. However, this hardly constituted a "hearing," as it is understood by most lay people (and many legal practitioners), and Ms. J. D. can hardly be faulted for expecting more. One cannot help but wonder why, if the General Division saw so many "unknowns," it did not simply convene an oral hearing, or at the very least, ask Ms. J. D. a few key questions in writing. I am not suggesting that a trier of fact must actively conduct its own investigation, but it is not unreasonable to ask why, in this case, the General Division refused to use the tools available to it to call testimony directly from the Appellant. A hearing before the General Division is ordinarily the final opportunity for the evidence in a disability claim to be assessed on its merits. Although Ms. J. D.'s case may have appeared weak on paper, she nevertheless had an argument, as well as some evidence to support it, and I do not think it warranted disposal by a process not very far from summary dismissal.

[22] If the General Division intended to rely on the absence of particular evidence that was not required by the law or demanded by the Minister, then it was only fair to provide Ms. J. D. with a forum in which to supply that evidence—by means of either an oral hearing or written questions and answers. I am ordinarily reluctant to interfere with the General Division's discretionary authority to decide on an appropriate form of hearing, but I see good reason to make an exception in this case.

Issue 3: Did the General Division misapply *Villani*?

[23] My assessment of this question is coloured by my finding that the General Division did not do all it could to elicit information about Ms. J. D.'s work history. The *Villani* "real world" test requires a decision-maker to consider an applicant's background, including factors such as age, education, language proficiency, and work and life experience, when assessing disability. In my decision granting leave, I found that the General Division had summarized the *Villani* principles in its written reasons, but I was less certain about whether it had actually *applied* them in considering Ms. J. D.'s background.

[24] The relevant portion of paragraph 18 of the decision, quoted above, represented a fair attempt to assess Ms. J. D.'s employability, in light of her impairments, as well as the information about her background that was before the General Division. However, this analysis, whatever its merits, was tainted by the fact that it was based on what the General Division acknowledged was fragmentary information about Ms. J. D.'s work experience.

[25] Given the flawed process that the General Division employed to arrive at its decision, I must conclude that, in performing the *Villani* analysis, it ultimately committed an error of mixed law and fact. However, the Minister also argues, in the alternative, that the General Division was permitted to dispense with consideration of the *Villani* factors by application of *Giannaros v. Canada*,[7] which reads in part:

> [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

[7] *Giannaros v. Canada (Minister of Social Development)*, 2005 FCA 187.

> “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.

[26] The Minister argues that *Giannaros* relieves a tribunal of the need to consider the *Villani* factors where it has already decided that an applicant’s disability falls short of severe, but I am reluctant to endorse such an expansive interpretation of this case. First, *Villani* itself suggests that the real-world analysis must be an integral part of the severity assessment:

> [46] What the statutory test for severity does require, however, is an air of reality in assessing whether an applicant is incapable regularly of pursuing any substantially gainful occupation. Naturally, decision-makers already adopt a certain measure of practicality in their severity determinations. As an obvious example, the scope of substantially gainful occupations suitable for a middle- aged applicant with an elementary school education and limited English or French language skills would not normally include work as an engineer or doctor.

[27] Second, to adopt the approach recommended by the Minister would be to excuse disregard for the *Villani* factors by virtue of the General Division simply declaring a disability “non-severe,” and I doubt that was the intention of the Federal Court of Appeal in *Giannaros*. Third, I am guided by a succession of subsequent cases[8] from the same court that have made it clear that some form of *Villani* analysis is an indispensable component of a severity assessment.

CONCLUSION

[28] I find that the General Division based its decision to dismiss Ms. J. D.’s appeal on a false premise and, in doing so, violated her right to be heard. Moreover, in denying itself relevant information about Ms. J. D.’s work history, the General Division failed to properly equip itself for the purpose of applying *Villani* and, in so doing, erred in fact and law.

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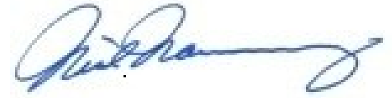
[8] *Klabouch v. Canada (Social Development)*, 2008 FCA 33; *Bungay v. Canada (Attorney General)*, 2011 FCA 47;*D’Errico v. Canada (Attorney General)*, 2014 FCA 95.

[29] 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

HEARD ON:	January 8, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. D., Appellant P. S., for the Appellant Jean-François Cham, for the Respondent