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

Citation: *E. G. v. Minister of Employment and Social Development*, 2018 SST 121

Tribunal File Number: AD-16-1041

BETWEEN:

E. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: February 5, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, E. G., worked as a registered nurse until September 2011, when she stopped working because of mental health issues that caused psychosis and significant cognitive impairment. She was diagnosed with schizophrenia. She is seeking a Canada Pension Plan disability pension. The General Division of the Social Security Tribunal found that she was not entitled to a disability pension. I must determine whether, in the circumstances of this case, the General Division erred in law in coming to its findings.

HISTORY OF PROCEEDINGS

[3] The Appellant applied for a Canada Pension Plan disability pension in August 2012. The Respondent, the Minister of Employment and Social Development, refused her application. The Appellant appealed the Respondent's decision to the General Division, which determined that the Appellant did not have a severe disability by the end of her minimum qualifying period on December 31, 2013. (The end of the minimum qualifying period is the latest date by which a claimant is required to be found disabled.)

[4] The Appellant appealed the General Division's decision without citing any grounds of appeal under subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), though she indicated that she was still awaiting medical clearance for a return to work and that she remained on long-term disability.

[5] In my leave to appeal decision, I determined that the General Division had failed to recognize that there was a possible prorated date of February 2014 and that it had thereby failed to assess whether the Appellant had become disabled sometime between January 1, 2014 and February 28, 2014. However, I found that the evidence before the General

Division could not support a finding that the Appellant had become disabled within this prorated period.

[6] I also determined that the General Division had misconstrued some of the evidence, given its reliance on the Appellant's own statements without adequate consideration of the documentary evidence before it. I granted leave to appeal on the basis that the General Division may have erred in law by failing to consider the Appellant's particular circumstances when assessing her capacity, pursuant to the test set out by the Federal Court of Appeal in *Villani.*[1]

PRELIMINARY MATTER

[7] The Appellant attempted to file updated mental health records, for the period between August 1, 2016 and August 25, 2017, in support of her claim to a disability pension (AD4). The General Division did not have copies of any of these records. The Respondent opposed the admissibility of these medical records.

[8] New evidence generally is not permitted on an appeal and is limited to the three grounds listed in section 58 of the DESDA.[2] In *Cvetkovski*,[3] Russell J. determined that "new evidence is not admissible except in limited situations […]."

[9] In *Glover*,[4] the Federal Court adopted and endorsed the reasons in *O'Keefe*, concluding that the Appeal Division had not erred in refusing to consider new evidence in that case, in the context of the application for leave to appeal. The Court also noted that the DESDA makes provisions under section 66 for the General Division to rescind or amend a decision where new evidence is presented by way of application. However, that section requires that an application to rescind or amend be made within one year after the day on which the decision in question had been communicated.

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[1] *Villani v. Canada (Attorney General)*, 2001 FCA 248.
[2] *Canada (Attorney General) v. O'Keefe*, 2016 FC 503, at paragraph 28.
[3] *Cvetkovski v. Canada (Attorney General)*, 2017 FC 193, at paragraph 31.
[4] *Glover v. Canada (Attorney General)*, 2017 FC 363.

[10] Based on the facts before me, I am unconvinced that there are any compelling reasons why I should admit these additional medical records, as there is no indication that they fall into any of the exceptions to the general rule. As the Federal Court has determined, generally, an appeal to the Appeal Division does not allow for any new evidence.

ISSUE

[11] The issue before me is as follows:

> Did the General Division fail to consider the Appellant's particular circumstances, pursuant to *Villani*?

ANALYSIS

Did the General Division fail to consider the Appellant's particular circumstances?

[12] *Villani* indicates that the statutory test for severity be applied with some degree of reference to the "real world"and that a decision-maker must take into account the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience. *Bungay*[5] confirmed that a decision-maker must consider these details, when it wrote:

> [11] [. . .] Further, aside from brief mention of the applicant's work history, there is no mention of her age, education level, language proficiency and past life experience at all or in any detail as required by *Villani*, *supra*.
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> [. . .]
>
> [14] The dissenting member charged herself properly as to the law as set out in *Villani* (at paragraph 14):
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> > The *Villani* (2001 FCA 248 (CanLII), [2002] 1 F.C. 130) test and the case law requires the Tribunal and this Board to examine an

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

> individual's entire physical condition, age, level of education, employability and so on.

[13] The Federal Court of Appeal in *Bungay* allowed the application for judicial review and quashed the decision of the Pension Appeals Board, ordering that a new panel of the Pension Appeals Board "reconsider [the] matter applying the *Villani* test."

[14] In my leave to appeal decision, I indicated that the Appellant should be prepared to demonstrate how her personal characteristics were relevant when assessing the severity of her disability. Despite this, the Appellant did not have any submissions in response to this issue.

[15] The Respondent argues that the General Division identified the *Villani* factors at paragraphs 9 to 13 and that it appropriately considered them. The Respondent notes that the Appellant was 41 years old when she applied for a disability pension, is proficient in English, has a Canadian university education, has job-specific work experience and training, and lives in an urban area.

[16] The Respondent submits that "neither [the Appellant's] medical condition, nor her age, education level, language proficiency and past work and life experience prevented her from working." The Respondent contends that the "real world" example that the Federal Court of Appeal provided in *Villani* is the scope of substantially gainful occupations that one might be capable of regularly pursuing, while living with significant medical conditions.

[17] The Respondent asserts that the "real world" assessment as applied to the Appellant's case is the "suitability for other work that is more routine, structured and supervised and does not involve direct patient care for a person with a Bachelor of Science in Nursing, graduate in Midwifery and a graduate Nurse with English as a second language [*sic*]." The Respondent argues that the consulting psychiatrist, Dr. Scarth, concluded that the Appellant could work and that her psychologist, Dr. Zaide, determined that she could

consider transitioning into a different type and level of work with more "routine, structure, supervision and not involved with direct patient care."[6]

[18] The Respondent argues that the psychiatrist and the psychologist both considered the Appellant's *Villani* characteristics. In the psychologist's case, the Respondent claims that the *Villani* assessment can be found in the testing, such as the intelligence scale scores. While the testing itself does not refer to any of the Appellant's particular circumstances, I note that the psychologist had fully canvassed the Appellant's background, noting her age, education, language proficiency and past work and life experience.

[19] The Respondent contends that, despite the Federal Court of Appeal's decisions in *Villani*, *Bungay* and *Garrett*[7] that require a decision-maker to conduct an analysis in accordance with the *Villani* principles, the Court has also determined that it is not essential when the evidence demonstrates that a claimant has the capacity to work or is in fact working. In *Kiriakidis*,[8] for instance, Mr. Kiriakidis was actually working. This case is factually distinguishable from the proceedings at hand, given that the Appellant has not been working.

[20] The Respondent further asserts that in *Doucette*,[9] the Federal Court of Appeal found that there was no need to make an in-depth *Villani* analysis, because there was evidence capable of supporting the Pension Appeals Board view that the true cause of Mr. Doucette's inability to return to work was "his failure to make greater efforts." The Federal Court of Appeal was prepared to accept that Mr. Doucette suffered from educational and cognitive difficulties that put him at a disadvantage in terms of seeking employment, but within those limitations, the Court found that there was evidence that there was work that he could do. A vocational assessment concluded that Mr. Doucette had the capacity for certain occupations, such as a gas station attendant, dispatcher or telemarketer.

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[6] See GT1-64.
[7] *Garrett v. Canada (Minister of Human Resources Development)*, 2005 FCA 84, at paragraph 3.
[8] *Kiriakidis v. Canada (Attorney General)*, 2011 FCA 316.
[9] *Doucette v. Canada (Minister of Human Resources Development)*, 2004 FCA 292.

[21] Desjardins, J.A., dissenting, wrote that the legal analysis of the "real world" is a demanding one to which the Board was duty-bound to address its mind. She determined that if the Board had failed to make this analysis, it had failed to properly apply the law to the facts before it, and in so doing, erred in law.

[22] In *Doucette*, the Court's use of the word "in-depth" suggested that some analysis was required, even if it was not an "in-depth" one, albeit in that case the Pension Appeals Board had not undertaken one. Instead, the Court conducted its own analysis. It determined that it is sufficient for a decision-maker to rely on medical records and any comprehensive vocational assessments that indicate a claimant has work capacity, and that that basis could thereby relieve a decision-maker from his obligation to conduct an in-depth *Villani* analysis.

[23] In short, in the absence of a comprehensive vocational assessment or the like, a decision-maker generally is under a duty to conduct a *Villani* analysis. However, there may be circumstances that relieve a decision-maker of this duty. Once such occasion is when a claimant has unreasonably failed to follow treatment recommendations. In *Lalonde*,[10] the Federal Court of Appeal held that the real-world context also means that one must consider whether a claimant's refusal to undergo treatment is unreasonable and what impact that refusal might have on his or her disability status should the refusal be considered unreasonable.

[24] The Respondent vigorously argues that *Inclima*[11] also applies and because the Appellant failed to establish that any efforts to obtain and maintain employment failed because of her health condition, she cannot be found disabled. However, this presupposes that the Appellant has work capacity. Before a decision-maker can apply *Inclima*, a claimant must be found to have work capacity, taking into account their particular circumstances. In other words, a decision-maker must conduct a *Villani* analysis before they can determine

[10] *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211, at paragraph 19.
[11] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

whether a claimant has any work capacity and whether that claimant has shown that any efforts to obtain and maintain employment have failed because of their health condition.

[25] Turning to the General Division's decision, there is no analysis —either in the evidence or analysis sections — on how the Appellant's particular circumstances impacted her capacity regularly of pursuing any substantially gainful occupation in a "real world" context at the time of her minimum qualifying period. In this regard, the General Division seemingly erred by failing to conduct a "real world" analysis.

[26] Given that Dr. Zaide reviewed the Appellant's background, age, education, language proficiency and work and life experience, it is arguable that the neuropsychological report could serve as a substitute for the General Division's own *Villani* analysis, much like the vocational assessment had in *Doucette*. Had the General Division explicitly accepted the Zaide report in substitution for its own *Villani* analysis, I would have been prepared to find that its duty to conduct a "real world" assessment had been discharged.

Did the Appellant exhaust all treatment recommendations?

[27] As I indicated above, there may be occasions whereby a *Villani* assessment is not required, such as when a claimant has unreasonably failed to follow treatment recommendations.

[28] The General Division relied on the psychiatrist's June 20, 2012 medical opinion.[12] Dr. Scarth suggested that the Appellant should undergo neuropsychological testing, although he did not anticipate that it would show sufficient cognitive deficits to impact her ability to function adequately and safely in her profession.

[29] However, when the Appellant underwent the neuropsychological evaluation, it showed that she had mild to moderate deficits in cognitive functioning, "significantly below levels expected for nurses in her occupational niche,"[13] For Dr. Zaide, the results raised

[12] See psychiatrist's medical report dated June 20, 2012, at GT1-47 to 53.
[13] See neuropsychological evaluation dated October 15, 2012, at GT1-57 to 65.

concerns about the Appellant's readiness to return to her previous duties, even in a graduated manner. He found that she demonstrated a number of strengths that "*may* make it possible to attempt a return to work in a different occupational niche" (my emphasis).[14] In other words, there was no guarantee that the Appellant would be able to return to work, even in a different occupational niche.

[30] Dr. Zaide recommended cognitive remediation. He also suggested that she be reviewed by a psychiatrist to determine whether medication to improve cognitive functioning might be useful.

[31] There were no updated or current medical reports or records after 2012 before the General Division, to indicate whether the Appellant had ever been reassessed by a psychiatrist (with a view to determining whether she should be placed on any medication to possibly improve her cognitive functioning), or to show that she had undergone any cognitive remediation.

[32] The psychologist had made several other recommendations for the Appellant, including being maintained on a first-line antipsychotic, psychoeducation and supportive interventions through a therapist, as well as cognitive behavioural therapy.

[33] It is unclear whether the General Division canvassed whether the Appellant pursued or followed any of these treatment recommendations, and if not, whether there was a reasonable explanation for any non-compliance or refusal, or what impact that might have had on her disability status.

[34] The Appellant's schizophrenia has been in remission for the past several years. At the time of the hearing before the General Division, the Appellant testified that she was "totally recovered" and that she did not have any symptoms. The Appellant was optimistic that her family physician would provide her with medical clearance for a return to work in September 2015.

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[14] See GT1-65.

[35] Based largely on the Appellant's testimony and the psychiatrist's opinion, the General Division found that the Appellant could return to her former employment. The member also accepted the Appellant's statement that she no longer had any limitations associated with schizophrenia. It is likely because of these considerations that the General Division determined it was unnecessary to one, assess whether the Appellant could be found severely disabled by the end of her minimum qualifying period, and two, assess whether she had exhausted treatment recommendations. As the General Division accepted that the Appellant was "totally recovered," it did not require the Appellant to pursue any of the treatment recommendations that Dr. Zaide had made.

[36] Yet, this overlooked the results from neuropsychological testing, which showed that the Appellant's judgment was significantly impaired and that she had very little insight into her illness. Testing also showed that she had mild to moderate deficits in cognitive functioning and that the severity of her cognitive impairments impacted her ability to carry out the duties of her former profession, despite her stability and remission. Likely if the Appellant had failed to pursue appropriate treatment, it was because of her limited insight and "significantly impaired" judgment.

[37] The results of the neuropsychological testing should have led the General Division to exercise some caution in necessarily accepting the Appellant's perception of the state of her disability and capacity, but, at the same time, Dr. Zaide did provide two options for the Appellant. One of these included considering a transition and return to a different type and level of work that was more routine, structured, supervised and did not involve direct patient care.

[38] Despite the shortcomings in the evidence before the General Division, and the General Division's failure to conduct a *Villani* analysis, ultimately it was entitled to rely on Dr. Zaide's recommendation that the Appellant could consider a transition and return to alternative work that was more suitable for her limitations and impairments.[15] This is so,

[15] *Doucette, supra*.

because Dr. Zaide had considered the Appellant's particular circumstances, in suggesting that she could consider a transition and return to alternative work as one of her options.

[39] While the outcome of such a transition was somewhat speculative, nevertheless this recommendation had been made and, as such, the Appellant was obligated to, at the very least, attempt the transition.[16] Although the Appellant remains optimistic that she can return to her former employment, and continues to await medical clearance in this regard, that option seems to have been foreclosed, given her results in the neuropsychological testing. Nevertheless, other options have yet to be exhausted.

[40] Finally, I note that in the submissions before me the Appellant indicates that she is extensively involved in various volunteer endeavours.[17] While volunteering itself may not establish capacity, in this case, it suggests that the Appellant's cognitive impairments are mild to moderate (as described by Dr. Zaide) and that she is capable of undergoing the transition that Dr. Zaide had recommended. The extent and nature of the Appellant's current volunteer work undermines her appeal and suggests that her disability currently is not severe.

[41] The Appellant claims that her disability is severe because she is unable to return to her former employment, but that alone is insufficient under the *Canada Pension Plan.* Under paragraph 42(2)(*a*) of the *Canada Pension Plan*, a disability is severe only if the claimant is incapable regularly of pursuing any substantially gainful occupation, and not just their former occupation.

[42] The Appellant claims that her disability is also prolonged because she has remained off work for several years and because she continues to receive long-term disability benefits from her insurer. However, the measure of whether a disability is prolonged is whether it is likely to be long continued and of indefinite duration or is likely to result in death. The General Division did not specifically address the issue of whether the Appellant's disability was prolonged, having found that her disability was not severe. Furthermore, although the

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[16] *Inclima*, *supra.*
[17] See AD1-2 and AD1B-2.

Appellant has been off work for several years, her disability must be both severe and prolonged if she is to qualify for a disability pension under the *Canada Pension Plan*.

CONCLUSION

[43] Although the General Division failed to conduct a *Villani* analysis, it was unnecessary in the factual circumstances of this case where there was a comprehensive neuropsychological test in which the psychologist had considered the Appellant's particular circumstances, and where he indicated that she could consider transitioning into other occupational areas in which he determined she was capable. Additionally, there simply was no medical evidence for 2013 or even early 2014 to enable the General Division to properly assess whether the Appellant could be found severely disabled by the end of her minimum qualifying period. I note also that the Appellant is currently involved in various volunteer initiatives and that she exhibits sufficient cognitive ability such that she should be able to pursue the transition into a "different type and level of work" that Dr. Zaide had recommended. For these reasons, the appeal is dismissed.

Janet Lew
Member, Appeal Division

HEARD ON:	January 17 and 30, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	E. G., Appellant (January 30, 2018 only) Viola Herbert (paralegal), Representative for the Respondent Dale Randell (counsel), Representative for the Respondent