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

Citation: *K. K. v. Minister of Employment and Social Development*, 2018 SST 174

Tribunal File Number: AD-16-947

BETWEEN:

K. K.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jennifer Cleversey-Moffitt

DATE OF DECISION: February 20, 2018

Canada

REASONS AND DECISION

INTRODUCTION

[1] On May 16, 2016, the General Division of the Social Security Tribunal of Canada determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable. The Appellant filed an application for leave to appeal with the Tribunal's Appeal Division, which was received on July 19, 2016. Leave to appeal was granted on August 3, 2017.

[2] This appeal proceeded on the basis of the record for the following reasons:

a) The Member has determined that no further hearing is required.

b) The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

c) The Respondent requested that the appeal proceed in writing based on the record and the Appellant made no submissions with respect to the form of hearing.

GROUNDS UPON WHICH LEAVE TO APPEAL WAS GRANTED

[3] The Appellant's representative submits that the General Division erred in law. The representative argues that the General Division, in neglecting to consider the Appellant's personal characteristics such as her age, level of education, language proficiency, past work experience and life experience, erred by not properly considering the Appellant's capacity of pursuing any substantially gainful employment in a "real world" context as described in *Villani v. Canada*, 2001 FCA 248.

[4] The leave to appeal decision noted that *Villani* was not cited. However, some of the factors identified in the "real world" test found in *Villani* were noted in the decision and one does not need to cite *Villani*, but an analysis considering the *Villani* factors is required. It was determined at the leave stage that there was the potential that the *Villani* analysis was insufficient and I was satisfied that the appeal had a reasonable chance of success. Although other grounds were raised, it was unnecessary for me to address each of the Appellant's

arguments in the context of the leave to appeal application, as it was sufficient to grant leave to appeal on the basis of one ground.

ISSUE

[5] The Appeal Division must determine whether the General Division erred in law. Did the General Division fail to properly apply *Villani* when it determined that the Appellant was not disabled within the meaning of the CPP on or prior to her minimum qualifying period (MQP) date of December 31, 2014?

SUBMISSIONS

[6] The Appellant submits that the General Division did not properly assess the Appellant's capacity to perform, be productive and achieve profitability in any type of employment. The Appellant further argues that the capacity to pursue any substantially gainful employment was not assessed in a "real world" context as required by *Villani*. Additionally, the Appellant argues that there was no consideration for "permanent restrictions" when considering her work attempts.

[7] The Respondent submits that the General Division member, despite not citing *Villani* specifically, did turn his mind to the *Villani* factors when assessing the Appellant's file. The Respondent notes that paragraphs 8 to 12 and 15, 30, 33, 39, 47 and 48 discuss the Appellant's age, education and work history. In its submissions, the Respondent asserts that the General Division did weigh the evidence and because it was determined that the Appellant did not suffer from a severe and prolonged disability, it was not required to assess the Appellant's capacity in a "real world" context (*T.B. v. MESD*, 2017 SSTADIS 233, para. 17, *Giannaros v. Canada (Minister of Social Development)*, 2005 FCA 187, para. 14-15).

[8] Additionally, the Respondent submits that the Appellant did have capacity to work because she returned to work after her surgery in January 2013, worked up until October 2014, and had not looked for any other type of work since she stopped working in October 2014. The Respondent argues this did not constitute a failed attempt at work.

APPEAL DIVISION'S ROLE

[9] Subsection 59(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the powers of the Appeal Division. 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 in accordance with any directions that the Appeal Division considers appropriate, or confirm, rescind or vary the General Division decision in whole or in part.

[10] The Federal Court of Appeal in *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93 held that administrative tribunals should not use standards of review that were designed for appellate courts. Instead one must look to the words used in the legislation.

[11] According to subsection 58(1) of DESDA the only grounds of appeal are the following:

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.

[12] Therefore, for the purposes of determining whether there is an error of law or a breach of natural justice, *Huruglica* would suggest that the words show that Parliament intended no deference to be owed to the General Division. However, in contrast, as to questions of fact, the test contains specific language to guide the Appeal Division—"made in a perverse or capricious manner or without regard for the material before it." This would suggest that the Appeal Division is to intervene only when the error is quite severe or at odds with the record.

ANALYSIS

[13] At paragraph 38 of *Villani*, the Federal Court of Appeal states:

> This analysis of subparagraph 42(2)(a)(i) strongly suggests a legislative intention to apply the severity requirement in a "real world" context. Requiring that an applicant be incapable regularly of pursuing any substantially gainful occupation is quite different from requiring that an applicant be incapable at all times of pursuing any conceivable occupation. Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.

[14] The General Division decision does not cite *Villani* specifically but does comment on the relevant factors in the evidence portion of the decision. From paragraphs 8 to 12, the General Division member notes the Appellant's age, her education level and cites much of her past work history including her attendance at a retraining program. Paragraph 15 of the General Division decision also identifies the Appellant's attendance at an upgrading program.

[15] The Respondent noted that the *Villani* factors were discussed in paragraphs 30, 33, 39, 47 and 48 as well. Upon review of these paragraphs, it is evident that they reiterate the evidence found in paragraphs 8 to 12 of the General Division decision, but they contribute no additional analysis as to how the Appellant's age, education level, language proficiency and past work and life experience have impacted her ability to pursue with consistent frequency any truly remunerative occupation.

[16] Much of the General Division's analysis provides a summary of the medical evidence and, without first making a finding on the Appellant's capacity to work, moves on to consider her failure to attempt to work (see: paragraphs 38 through 52). The Appellant's personal circumstances as per *Villani* are relevant to determining whether she retained work capacity. This analysis was lacking. Although the General Division did review her work attempts (*Inclima v. Canada (Attorney General)*, FCA 2003 117), this was done without first completing a full *Villani* analysis.

[17] The Respondent cited *T.B. v. MESD*, 2017 SSTADIS 233, at para. 17, and *Giannaros v. Canada (Minister of Social Development)*, 2005 FCA 187, paras. 14 and15 in support of the argument that a *Villani* analysis need not be done. These cases can be distinguished from the one before me, based on the facts. In *T.B. v. MESD*, 2017 SSTADIS 233, my learned colleague found that the General Division had failed to conduct a *Villani* analysis, but it was moot because the Appellant still would not have been found disabled for the purposes of the CPP, "given that it determined that there had been no change in his medical condition between the time he had last worked and the end of the minimum qualifying period" (paragraph 17). It appears that the Appellant in *T.B.* only developed back pain after the expiry of the MQP, rendering the *Villani* analysis unnecessary. In the case before me, the Appellant's last period of work ended on October 2014, with her MQP ending on December 31, 2014. Although the General Division comments on the lack of medical evidence during that period, the Appellant's own evidence was that changes were occurring in her health prior to the expiry of her MQP.

[18] With respect to the decision in *Giannaros*, the Federal Court of Appeal noted that the *Villani* analysis was not required because the Appellant had failed to make reasonable efforts to participate in various programs and treatment recommended to her by some of the physicians consulted. In the case before me, the General Division did not make findings regarding the Appellant's compliance with treatment recommendations. The General Division noted that her treatment was conservative, but did not find that she had declined participation in various recommended treatments. Had the General Division made findings regarding the Appellant's compliance with treatment recommendations, I might have determined that *Giannaros* was applicable. But in the absence of this finding, *Giannaros* can be distinguished from the case before me.

[19] The Respondent argues that even though *Villani* was not expressly cited, many of the paragraphs in the General Division decision adequately set out the Appellant's personal circumstances and that these factors were considered in the analysis of the "real world" test. I disagree. The personal characteristics were listed but there was a lack of analysis of how these factors affected this particular Appellant's circumstances. This does not mean that the Appellant would necessarily be found disabled for the purposes of the CPP, but rather that, without a proper analysis, it is difficult to determine whether the General Division properly discharged its

duty. I am not persuaded that the General Division conducted an analysis of the Appellant's personal circumstances before it made its determination.

[20] In *Garrett v. Canada (Minister of Human Resources Development)*, 2005 FCA 84, the Federal Court of Appeal stated that "a failure to cite or to conduct an analysis in accordance with the principles set out in *Villani*, supra is an error of law." The Court added:

> [3] In the present case, the majority failed to cite the *Villani* decision or conduct their analysis in accordance with its principles. This is an error of law. In particular, the majority failed to mention evidence that the Appellant's mobility problems were aggravated by fatigue and that she would have to alternate sitting and standing; factors which could effectively make her performance of a sedentary office or related job problematic. This is the 'real world' context of the analysis required by *Villani*.

[21] Merely citing personal characteristics is not enough. The General Division did not carry out the proper analysis of the *Villani* factors in relation to the Appellant's ability to pursue with consistent frequency any truly remunerative occupation. In accordance with *Garrett*, this constitutes an error of law.

CONCLUSION

[22] The appeal is allowed.

[23] The matter is referred back to the General Division for reconsideration in accordance with section 59 of the DESDA.

Jennifer Cleversey-Moffitt
Member, Appeal Division