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

Citation: *S. L. v. Minister of Employment and Social Development,* 2018 SST 191

Tribunal File Number: AD-16-1165

BETWEEN:

S. L.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Nancy Brooks

DATE OF DECISION: February 28, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed and the matter is referred back to the General Division for reconsideration by another member.

OVERVIEW

[2] The Appellant S. L. has undergone three surgeries on her left knee. She has been diagnosed with chronic pain, diabetes, fibromyalgia, osteoarthritis and irritable bowel syndrome (IBS). She applied for a disability pension under the *Canada Pension Plan* (CPP). The Minister denied her application initially and upon reconsideration. She appealed that decision to the General Division of the Social Security Tribunal of Canada.

[3] The General Division concluded that the Appellant did not have a "severe" disability as defined by the CPP. The Appellant brought an application for leave to appeal to the Appeal Division. On October 26, 2017, I granted the application.[1]

[4] I have concluded that the appeal must be allowed because the Appellant has established that the General Division committed errors that fall within the grounds under s. 58(1) of the *Department of Employment and Social Development Act* (DESDA).

PRELIMINARY MATTER

[5] The Appellant filed two documents on this appeal that were not before the General Division when it made its decision: a disability tax certificate completed by the Appellant's family physician, Dr. Shaw, on March 17, 2017,[2] and a notice of determination by the Canada Revenue Agency dated April 27, 2017, in respect of the application for a disability tax credit (DTC).[3]

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[1] *S. L. v. Minister of Employment and Social Development,* 2017 SSTADIS 557.
[2] AD1-C.
[3] AD1-D.

[6] As a rule, the Appeal Division does not consider new evidence[4] and, therefore, I have not considered these two documents on this appeal. In any event, as eligibility for a DTC under the income tax regime is not based on the same criteria as eligibility for a CPP disability pension, these two documents are not relevant to the question of whether the Appellant meets the criteria for a disability pension or to the issues on this appeal.

ISSUES

[7] The following issues arise on this appeal:

Issue 1: Did the General Division commit an error of law because it failed to apply the real-world approach when considering whether the Appellant's disability was severe?

Issue 2: Did the General Division fail to take into account evidence that tended to show the Appellant's disability was severe?

ANALYSIS

Issue 1: Did the General Division commit an error of law because it failed to apply the real- world approach to the question of severity?

[8] Counsel for the Appellant argues that the General Division erred in law because it failed to properly apply the principles set out by the Federal Court of Appeal in *Villani v. Canada (Attorney General)*.[5] He submits that the General Division did not take into account her age and the totality of the Appellant's medical condition in its assessment of whether the Appellant's disability was severe. I agree.

[9] Under s. 58(1)(*b*) of the DESDA, the Appeal Division may allow an appeal if an appellant demonstrates that the General Division "erred in law in making its decision, whether or not the error appears on the face of the record". Given the unqualified wording of s. 58(1)(*b*), the Appeal Division owes no deference to the General Division on errors of law.[6]

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[4] *Parchment v. Canada (Attorney General)*, 2017 FC 354, at para. 23.
[5] *Villani v. Canada (Attorney General)*, 2001 FCA 248.
[6] See *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, where the Federal Court of Appeal held that in a multi-level administrative framework, such as the Tribunal, the scope of the appeal tribunal's review of the lower tribunal's decision is to be determined by the language of the governing statute, here the DESDA.

[10] The General Division's task was to determine whether the Appellant had a severe and prolonged disability on or before December 31, 2015 (the end of her minimum qualifying period, or MQP). Under the CPP, a disability is "severe" if "by reason thereof the person […] is incapable regularly of pursuing any substantially gainful occupation".[7] If the General Division failed to conduct its analysis of severity in accordance with the *Villani* principles, this would constitute an error of law under s. 58(1)(*b*) of the DESDA.[8]

[11] *Villani* stands for the proposition that in assessing whether a disability is severe, the General Division must adopt a "real world" approach. This "real world" approach requires it to determine whether a claimant, in the circumstances of his or her background and medical condition, is employable, i.e. capable regularly of pursuing any substantially gainful occupation. Employability is not to be assessed in the abstract, but rather in light of "all of the circumstances." A claimant's circumstances fall into two categories:

a) *The claimant's background*: Matters such as "age, education level, language proficiency and past work and life experience" are relevant here;[9] and

b) *The claimant's medical condition*: This is a broad inquiry, requiring that the claimant's condition be assessed in its totality. All of the possible impairments of the claimant that affect employability—both physical and psychological—are to be considered, not just the biggest impairments or the main impairment.[10]

[12] In the present case, the Appellant was 62 years old on the MQP date of December 31, 2015. Her medical documentation established that she had had three knee surgeries and was diagnosed with chronic pain, diabetes, fibromyalgia, osteoarthritis and IBS. She also had a breast lumpectomy in September 2015, although it was negative for malignancy[11] and there is no evidence in the record of the effect of the lumpectomy on the Appellant's employability as at the MQP date. Appellant's counsel submits the Appellant was also suffering from an acute dental infection which was chronic;[12] however, the only evidence I have located on this point is a letter from Dr. Hui dated February 24, 2016, stating she "currently has an acute dental

[7] CPP, s. 42(2)(*a*)(i).
[8] *Garrett v. Canada (Minister of Human Resources Development)*, 2005 FCA 84.
[9] *Villani* at para. 38.
[10] *Bungay v. Canada (Attorney General)*, 2011 FCA 47, at para. 8.
[11] GD5-54.
[12] AD1-1.

infection that has been causing significant pain”.[13] Although her counsel submits that this was a chronic ailment, this is not how I read Dr. Hui’s letter; therefore, it is not clear whether the Appellant was contending with a dental infection on the MQP date of December 31, 2015, and, if so, the effect of this on her employability.

[13] In her analysis of whether the Appellant’s disability was severe at the MQP date, the General Division member cited *Villani* and referred to the Appellant’s total left knee replacement and her continued struggles with pain and limited mobility relating to that surgery. However, although the General Division member correctly noted that “[a]ll of the possible impairments are to be considered, not just the biggest impairments or the main impairment”[14], she did not apply this principle in her analysis. Indeed, she made no mention of any of the Appellant’s other medical conditions in her analysis of the issue of severity. The member also did not discuss the effect of the Appellant’s age on her employability. Therefore, I disagree with the Minister’s submission that the member appropriately considered the Appellant’s personal circumstances in her analysis.

[14] I conclude that the General Division erred in law by failing to apply the *Villani* principles, because it did not consider the Appellant’s personal circumstances, including the totality of her medical condition and her age, in the assessment of severity.

Issue 2: Did the General Division fail to take into account relevant evidence that tended to show the Appellant’s disability was severe?

[15] Paragraph 58(1)(*a*) of the DESDA provides as a ground of appeal that “the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction”. The unqualified language in s. 58(1)(*a*) indicates that the Appeal Division owes no deference where there is a breach of the principles of natural justice or a jurisdictional error.

[16] Subsection 54(2) of the DESDA imposes an obligation on the General Division to give reasons for its decision. The courts have held that when reasons are required by law, a decision-maker must give adequate reasons that must be “sufficiently clear, precise and intelligible” to

[13] GD5-87.
[14] Reasons, para. 31.

enable the parties to know why the tribunal decided as it did.[15] As part of this duty, decision-makers are to explain the basis for material findings of fact, and reasons must reflect a meaningful analysis of the evidence and, where there is conflicting evidence, the decision-maker must explain how that evidence was reconciled. If deficiencies in the reasons do not permit meaningful appellate review of the correctness of the decision, this constitutes an error of law.[16]

[17] Furthermore, it is a principle of natural justice that decision-makers will consider all relevant evidence before reaching a decision. The failure to consider all relevant evidence adversely affects the claimant's right to a fair hearing and will constitute a breach of natural justice.

[18] In its reasons, the General Division appears to recite a selective summary of the evidence and then state a conclusion. It did not analyze, reject, or otherwise explain why it preferred some evidence over other evidence, which it was required to do.[17]

[19] There was conflicting medical evidence on one of the key issues—whether the Appellant retained the residual capacity to work—however, the General Division member failed to acknowledge the conflicting medical evidence in her reasons. At para. 20 of the reasons, the member stated, "Dr. Shaw noted in November 2015 that while the Appellant could not return to any sort of physical work, he could not in good conscience say that she was incapable of sedentary work."[18] However, he did not refer to the conflicting evidence of another of the Appellant's physicians, Dr. Hui. At para. 21 of the reasons, the member (who referred to Dr. Hui as a naturopath, when in fact he is a physician) referred to Dr. Hui's February 2016 report, which "noted that the Appellant is undergoing regular treatments in hopes of improving her symptoms".[19] The member neglected to note that Dr. Hui stated in his report that it was his opinion that the Appellant was unable to work, and she made no reference to the Appellant's medical conditions (fibromyalgia, osteoarthritis, residual knee and leg swelling, difficulty

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[15] Brown and Evans, *Judicial Review of Administrative Action in Canada*, (Carswell: loose-leaf) at 12:5310.
[16] *R. v. Sheppard*, 2002 SCC 26, at para. 28; *Canada (Minister of Human Resources Development) v. Quesnelle*, 2003 FCA 92.
[17] *Quesnelle*.
[18] GD5-47.
[19] Reasons, paras 21 and 26.

ambulating, impairment in the use of arms and forearms) listed by Dr. Hui as the medical basis for his opinion.[20] There was no attempt by the General Division member to reconcile this conflicting medical evidence. There was also evidence from Laura Moon,[21] nurse practitioner, and Pauline Brown, registered nurse,[22] who opined that the Appellant was unable to work. This evidence was also not mentioned.

[20] Appellant's counsel points to a report completed in May 2014 by Dr. Shaw for OMERS,[23] in which he answered "yes" to the question "does the member [i.e. the Appellant] meet the disability pension definition?" which required that "the member must have a physical or mental impairment that wholly prevents them from doing any work for compensation or profit for which they are, or may reasonably become, qualified to do by education, training or experience. This impairment is also reasonably expected to last for the remainder of their lifetime".[24] The General Division member did not refer to this report in her reasons or state why she preferred Dr. Shaw's November 2015 statement regarding her capacity for sedentary work over it.

[21] Reasons need not refer to every piece of evidence;[25] however, material evidence should be considered on matters central to the rights at stake.[26] In the CPP disability regime, this includes evidence relating to the question of whether the claimant has a residual capacity to work. The member's failure to consider the conflicting evidence and the absence of any indication that she engaged in a meaningful analysis on this central point constituted an error of law. Furthermore, the principles of natural justice encompass the right to have all relevant evidence considered by the decision-maker. The General Division member did not consider relevant evidence on this central issue. This was a breach of the principles of natural justice.

[22] This is not to say that it was not open to the General Division member to find, on the evidence, that the Appellant did not have a severe disability within the meaning of the CPP: a

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[20] GD5-87.
[21] GD5-67, GD5-76.
[22] GD5-69.
[23] OMERS is the Ontario Municipal Employees Retirement System.
[24] GD5-57.
[25] *Newfoundland and Labrador Nurses' Union v. Nfld. and Labrador (Treasury Board)*, 2011 SCC 62, at para. 16; *Simpson v. Canada (Attorney General)*, 2012 FCA 82.
[26] *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC), at paras 14–17; *Dossa v. Canada (Pension Appeals Board)*, at para. 4.

careful analysis of the evidence might well have led the General Division member to the conclusion she reached. It may be, as counsel for the Minister argued, that the evidence of Dr. Shaw and Dr. McKenzie should be preferred over that of Dr. Hui because the former two physicians were responsible for her long-term treatment, whereas Dr. Hui was not her following practitioner. However, the member did not even mention the part of Dr. Hui's report that stated the Appellant was unable to work. The member had an obligation to consider all relevant evidence, reconcile inconsistencies, and engage in a meaningful analysis on matters central to her determination that the Appellant's disability was not severe. This she did not do.

CONCLUSION

[23] The General Division's breaches are not determinative of the Appellant's claim for disability benefits. As her entitlement to benefits continues to be contested by the Minister, it is appropriate to refer this matter back to the General Division for reconsideration by another member.

[24] The appeal is allowed. Pursuant to s. 59 of the DESDA, the matter is referred back to the General Division for reconsideration by another member.

Nancy Brooks
Member, Appeal Division

HEARD ON:	February 2, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. L., Appellant Peter Denton, Counsel for the Appellant Philipe Sarrazin, Counsel for the Respondent