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

Citation: *M. M. v. Minister of Employment and Social Development,* 2018 SST 207

Tribunal File Number: AD-16-1168

BETWEEN:

M. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: March 2, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, M. M., was born in 1966 and left school after Grade 6. She has a long and varied employment history as a bartender, fish plant worker, and landscaper. In September 2010, she was working as a traffic controller for a construction company when she injured her back in a workplace accident.

[3] In January 2012, Ms. M. M. applied for a disability pension under the *Canada Pension Plan*. The Respondent, the Minister of Employment and Social Development (Minister), refused the application because it found that her disability was not "severe" and "prolonged," as defined by the legislation, as of her minimum qualifying period (MQP), which ended on December 31, 2012. While the Minister acknowledged that Ms. M. M. was no longer capable of working in any occupation involving heavy labour, it concluded that she was still capable of some type of work.

[4] Mr. March, Ms. M. M.'s legal counsel, appealed the Minister's determination to the General Division of the Social Security Tribunal. The General Division held a hearing by teleconference and, in a decision dated August 1, 2016, dismissed Ms. M. M.'s appeal because, among other reasons, her work history suggested an ability to adapt to and retrain for alternative employment.

[5] In September 2016, Mr. March requested leave to appeal from the Tribunal's Appeal Division, alleging that the General Division had committed multiple factual and legal errors.

[6] In a decision dated August 17, 2017, the Appeal Division granted unrestricted leave to appeal because it saw an arguable case that the General Division had breached Ms. M. M.'s right to natural justice by holding the hearing by teleconference—one that was possibly compromised by technical difficulties.

[7] I have reviewed the parties' oral and written submissions on all grounds and concluded that none have sufficient merit to warrant overturning the General Division's decision.

ISSUES

[8] Under the *Department of Employment and Social Development Act* (DESDA), 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.[1]

[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 deny Ms. M. M. a reasonable opportunity to present her case by holding a hearing by teleconference?

Issue 3: Did the General Division place insufficient weight on selected reports from Banyan Work Health Solutions and the Life Mark Institute?

Issue 4: Did the General Division permit itself to be influenced by irrelevant Workers' Compensation Board (WCB) decisions, which were governed by legislative criteria that differed from the CPP?

Issue 5: Did the General Division fail to consider Ms. M. M.'s employability in a "real-world" context, as required by *Villani v. Canada*?

ANALYSIS

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

[10] 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*.[2] Where errors of law or failures to observe principles of natural justice were alleged, the

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[1] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA).
[2] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9.

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.

[11] The Federal Court of Appeal decision *Canada v. Huruglica*[3] 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…."

[12] 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.

Issue 2: Was Ms. M. M. denied the right to present her case?

[13] Mr. March claims that his client was denied a fair hearing because, at one point, he was effectively locked out of the July 18, 2016, teleconference. He claims that for some time—he is not sure how long—he could not hear everything that was being said, and his interjections were inaudible to the other participants. Eventually, he says, the problem resolved.

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[3] *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93.

[14] I have listened to the entirety of the teleconference recording and heard no obvious auditory disturbances (e.g. static, choppiness) to support Mr. March's account. Of course, as counsel, he would have been silent much of the time in any event, and I acknowledge that the absence of his voice on the recording does not prove anything one way or the other.

[15] However, the recording also indicates that at no time did Mr. March ever bring the interruption to the General Division's attention or otherwise mention any technical difficulties. At the hearing before me, Mr. March conceded as much and could not explain why he had let the matter pass. One must assume that, had Mr. March believed that his client's right to procedural fairness had been significantly compromised, he would have said something about it during the hearing.

[16] I agree with the Minister that Mr. March's failure to raise a timely objection about the integrity of the teleconference constitutes an implied waiver of the right to argue that the form of hearing denied his client her right to be heard. According to the most relevant case law,[4] Ms. M. M. is now barred from asserting such an argument. Any apprehension of a breach of natural justice must be raised as early as is practicable. I find it notable that Mr. March complied with the General Division's direction to produce post-hearing documents but did not use that opportunity to register a claim that the teleconference, which at that time had been recently completed, was unfair to his client.

[17] Mr. March also submitted that the teleconference format *per se* effectively prevented his client from pleading her case. In his view, fairness demanded that the trier of fact be able to see the witnesses to allow for a better assessment of credibility.

[18] Again, this argument is brought too late. In April 2016, Mr. March was asked whether there was any type of hearing in which his client could not participate. Although he completed and returned the Hearing Information Form (HIF), he left this question blank. When the Tribunal sent out a notice informing potential participants that the forthcoming hearing would be conducted by teleconference, he raised no objection.

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[4] *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191; *Benitez et al v. Minister of Citizenship and Immigration*, 2006 FC 461.

[19] Section 21 of the *Social Security Tribunal Regulations* states that the General Division may hold a hearing by one of several methods. Use of the word "may" in the absence of qualifiers or conditions in the text suggests that the General Division has discretion to make this decision. This is not to suggest that the General Division's discretion to make such a decision can be completely divorced from reason. However, the Federal Court of Appeal has confirmed that setting aside a discretionary order requires an appellant to prove that the decision-maker committed a "palpable and overriding error,"[5] and I see nothing like that here.

[20] As it happens, the General Division exercised its discretion to select what it believed was the most appropriate form of hearing under the circumstances. In its decision, it explained that it was proceeding by teleconference because, among other reasons, Ms. M. M. would be the only party in attendance, there were gaps in the information on file, and videoconferencing was not available within a reasonable distance of her residence. Mr. March contested this last reason, citing several locations near Ms. M. M.'s home in Newfoundland where he knew videoconferencing facilities to be available. However, none of those locations were federal government property, rendering them ineligible to host videoconference hearings.

[21] In *Baker v. Canada*,[6] the Supreme Court of Canada held that the concept of procedural fairness is variable and is to be assessed in the specific context of each case. *Baker* listed a number of factors that may be considered in determining what the duty of fairness requires in a particular case, including 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 its own procedure.

[22] I accept that the issues in this matter are important to Ms. M. M., but I also place great weight on the nature of the statutory scheme that governs the General Division. The Tribunal was designed to provide for the most expeditious and cost-effective resolution of disputes before it. To accomplish this, Parliament enacted legislation that gives the General Division the discretion to determine how hearings are to be conducted, whether in person, by

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[5] *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100; *Horseman v. Horse Lake First Nation*, 2015 FCA 122; *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139.

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

videoconference, by teleconference, or in writing. The discretion to decide how each case will be heard should not be unduly fettered. While the General Division had wide discretion to rule on this matter, its decision to hear the appeal by teleconference was not made on a whim, but for reasons that it explained in its decision.

Issue 3: Did the General Division disregard the Life Mark and Banyan reports?

[23] Following Ms. M. M.'s September 2010 workplace accident, her employer's long-term disability insurer enrolled her in a return to work rehabilitation program under the auspices of Banyan Work Health Solutions. In March 2011, Banyan commissioned the Life Mark Health Institute to conduct an interdisciplinary assessment of Ms. M. M.'s injuries and work prospects and, in the following months, at least two reports were generated from this process.[7] Banyan itself issued a series of reports chronicling Ms. M. M.'s progress through the rehabilitation program,[8] as well as a report documenting the results of her job search training.[9] Noting Banyan's ultimate failure to reintegrate Ms. M. M. into the workforce, Mr. March argues that the General Division disregarded three reports detailing his client's lack of employability.

[24] Having reviewed the record, I cannot agree. In this case, the General Division took pains to say that, although it had reviewed all the medical evidence on file, it would be referring only to those items it considered "most pertinent." It then nevertheless conducted what appears to be a wide-ranging survey of the evidentiary record. Among much else, it referred to the April 11, 2011, Life Mark report (at paragraph 35) and summarized—in my view, fairly—the May 27, 2011, progress report (at paragraph 36). The second report later played a significant role in the General Division's analysis, which noted that Ms. M. M. had been found capable of performing light physical work.

[25] Although the General Division did not make specific reference to the Banyan job search training report or any of the progress reports, that does not mean it ignored them. In any event, I note that the latter are largely concerned with case management, documenting milestones in Ms. M. M.'s rehabilitation. Moreover, they incorporate substantive findings drawn from the Life

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[7] Life Mark interdisciplinary services assessment dated April 11, 2012 (GD3-18) and interdisciplinary services progress report dated May 27, 2011 (GD2-151).
[8] Banyan progress reports dated March 30, 2011 (GD3-2), June 3, 2011 (GD3-42), and July 7, 2011 (GD3-47).
[9] Banyan job search training program report dated July 22, 2011 (GD3-54).

Mark interdisciplinary assessments, as well as other evaluations commissioned by Banyan, such as Dr. Naidu's September 2011 physiatry examination, which was discussed in the decision.

[26] It is axiomatic that an administrative tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence.[10] While Ms. M. M. may not agree with the General Division's conclusions, it was within its rights to sift through the evidence and assess its quality, choosing what to disregard while assigning weight to the remainder.

Issue 4: Was the General Division influenced by WCB decisions?

[27] Mr. March objects to the General Division's "insertion" into the hearing of Alberta WCB decisions, arguing that they were irrelevant to the adjudication of a claim under the CPP.

[28] I agree with Ms. M. M. that the outcomes of claims under workers' compensation or private insurance plans should have no bearing on CPP disability assessment. That said, I see no indication that the General Division was, in fact, influenced by the post-hearing documents in question.

[29] The audio recording of the hearing reveals an extended discussion about Ms. M. M.'s Alberta WCB claims, starting at the 1:14:50 mark. It was Mr. March who volunteered that his client lost her appeals because of a lack of timeliness on the part of her previous representative, and not because the substance of her claims was lacking. He added, "That's a matter of record, which I can provide to you, if you wish." A question then arose as to where Ms. M. M.'s injury occurred—at home or at work. The presiding General Division member, who had been earlier led to understand that Ms. M. M. had *not* appealed the WCB's termination of her benefits, expressed concern that he was not in possession of the full record. Mr. March rightly cautioned the General Division that the WCB documents would be of limited relevance ("We're talking about two absolutely totally different programs here"), and the member agreed, but insisted, "I have to understand the history and what happened."

[10] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

[30] In its decision, the General Division documented this episode as follows:

> **Additional Documents**
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> [27] After the oral evidence was completed the Tribunal administratively adjourned the hearing on the following terms:
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> 1. The Appellant is to file copies of the Alberta WCB documents and Sun Life letters with the Tribunal by July 25, 2016.
> 2. These documents are to be shared with the Respondent and the Respondent shall have until August 25, 2016 to file additional submissions in response to these documents, if so advised.
> 3. Once the documents and the additional submissions, if any, are received the Tribunal will determine if a further hearing is required.
> 4. If no further hearing is required, the Tribunal will deliver its reasons for decision.
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> [28] On July 25, 2016 the Appellant filed the following additional documents:
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> 1. A letter from Sun Life Financial dated July 8, 2011 to the Appellant advising that she did not meet the definition of total disability from any commensurate occupation and therefore she would not be eligible for benefits beyond January 22, 2012. [GD8-2]
> 2. A decision by the Worker's Compensation Board of Alberta Dispute Resolution Review Body dated January 13, 2011 which determined on the basis of the medical evidence and employer information that the Appellant's claim of a workplace related accident could not be attributed to her employment. [GD8-4]
> 3. A decision of the Appeals Commission of the Worker's Compensation Board of Alberta dated August 14, 2013 denying the Appellant's request for reconsideration because it did not comply with the conditions of reconsideration as established by the Appeal Rules of the WCB. [GD8-11]
> 4. A decision of the Appeals Commission of the Worker's Compensation Board of Alberta dated February 15, 2015 upholding the decision denying the request for reconsideration. [GD8-17]

[31] The General Division made no further reference in its decision to either the WCB appeals or Sun Life Financial's refusal. I see no indication that these documents played any role in its analysis, and I am reassured by the General Division member's avowal in the audio recording that he understood their use was subject to strict limits in a CPP disability proceeding. It is clear that the General Division member became aware of two potential, albeit minor, inconsistencies in Ms. M. M.'s evidence—about where she injured her back and whether the WCB appeals proceeded—and he determined that the only way to resolve them was to examine the WCB reports firsthand.

[32] I am satisfied that the General Division did not rely on these documents in arriving at its decision. In requesting them, the General Division appeared to be pursuing a concern about the general reliability of Ms. M. M.'s evidence. I agree with Mr. March that it would have been better had the General Division explained in its decision what use, if any, it made of the WCB appeals and Sun Life refusal, but its failure to do so, in my view, did not amount to an error under subsection 58(1) of the DESDA.

Issue 5: Did the General Division consider Ms. M. M.'s real-world employability?

[33] Mr. March submits that the General Division failed to properly apply *Villani* and its predecessor, *Leduc v. Canada*,[11] which require a decision-maker, in assessing disability, to consider the claimant as a whole person, including background factors such as age, education, language proficiency, and work and life experience. In essence, Mr. March argues that the General Division did not direct its mind toward Ms. M. M.'s real-world employability.

[34] I see little merit in this submission, which amounts to a request to reassess the evidence as it pertains to Ms. M. M.'s personal characteristics. I note the words of the Federal Court of Appeal in *Villani*:

> […] as long as the decision-maker applies the correct legal test for severity—that is, applies the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) he or she will be in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantially gainful

[11] *Leduc v. Canada (Minister of National Health and Welfare)*, (June 29, 1988), CP 1376 CEB & PG 8546.

> occupation. The assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere.

[35] In paragraph 48 of its decision, the General Division correctly summarized *Villani* and, in paragraph 59, undertook a meaningful assessment of the impact of Ms. M. M.'s impairments in the context of her age, education, and work experience:

> The Tribunal also noted that the Appellant was only 46 years old on the MQP (she was 44 when she last worked), that she has appears to have [*sic*] achieved a reasonable level of education, and that she has a varied work history in fish plants, as a bartender and in landscaping and construction which suggests the ability to adapt to and retrain for alternative employment.

[36] It was open to the General Division, as trier of fact, to make an inference about Ms. M. M.'s adaptability from the many types of jobs she has held over her career. Mr. March suggested that Ms. M. M.'s "young age" should not have figured in the General Division's analysis, But *Villani* explicitly lists age as a factor to be considered in assessing a claimant's employment prospects—and this can apply to the detriment of an appeal as much as its benefit. Furthermore, it is a market reality that a person in her forties will be perceived to possess greater flexibility and endurance than an otherwise comparable individual who is 10 or 15 years older; in that sense, the former will indeed be more "employable" than the latter.

[37] I see no reason to overturn the General Division's assessment, where it has noted the correct legal test, taken Ms. M. M.'s background into account, and arrived at a defensible conclusion. While she may not agree with the outcome, it emerges from what strikes me as a good-faith attempt to assess her employability using the *Villani* principles.

CONCLUSION

[38] For the reasons discussed above, Ms. M. M. has not demonstrated to me that, on balance, the General Division committed an error that falls within the grounds enumerated in subsection 58(1) of the DESDA.

[39] This appeal is therefore dismissed.

Member, Appeal Division

HEARD ON:	February 2, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. M., Appellant Fraser March, Representative for the Appellant Viola Herbert, Representative for the Respondent Dale Randell, Observer