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

Citation: *E. R. v. Minister of Employment and Social Development*, 2018 SST 370

Tribunal File Number: AD-17-572

BETWEEN:

E. R.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: April 3, 2018

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] E. R. (Claimant) completed high school, and obtained training as a Personal Support Worker in 2004. She worked in this role in a nursing home until May 2014. The Claimant applied for a Canada Pension Plan disability pension and claimed that she was disabled by a number of conditions, including depression, anxiety, panic attacks, asthma, arthritis, and a hip injury. The Minister of Employment and Social Development (Minister) refused the application. The Claimant appealed this decision to this Tribunal. The Tribunal's General Division dismissed the appeal. The appeal is allowed because the General Division decision was based on an erroneous finding of fact regarding her conditions and because the General Division erred in law by not considering the cumulative impact of her conditions on her capacity regularly to pursue any substantially gainful occupation.

PRELIMINARY MATTERS

[3] At the beginning of the hearing, the parties agreed that the General Division decision's statement in paragraph 7 of the decision that the minimum qualifying period (MQP) is December 31, 2014, was a typographical error. The MQP is correctly stated as December 31, 2016, in paragraph 26 of the decision.

ISSUES

[4] Did the General Division err in any of the following ways?

a) By failing to consider all of the Claimant's medical conditions and their cumulative impact on her capacity regularly to pursue any substantially gainful occupation;

b) By finding that the Claimant gained transferrable skills in her accommodated work;

c) By failing to properly apply the legal principle from the *Villani*[1] decision; or

d) By finding that the Claimant had a residual capacity to work.

ANALYSIS

[5] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It sets out only three grounds of appeal that can be considered. They are that that the General Division failed to observe a principle of natural justice or made a jurisdictional error; made an error in law; or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[6] For an appeal to succeed on the basis that the General Division based its decision on an erroneous finding of fact, the Claimant must prove three things: that the finding of fact was erroneous; that it was made perversely, capriciously or without regard for the material that was before the General Division; and that the General Division decision was based on this finding of fact.

Issue 1: Did the General Division fail to consider all of the Claimant's conditions?

[7] The Claimant asserts that she was disabled by a number of medical conditions. The General Division decision lists them as: depression/anxiety, panic attacks, asthma, arthritis, and a hip injury.[2] The decision also states that the Claimant suffers from shortness of breath due to her asthma.[3] It does not refer to any evidence regarding any impact this condition had on her capacity to work or on treatment she received. It reached no conclusion on any impact this condition would have on the Claimant's capacity to work.

[8] Similarly, the decision reports that the Claimant suffers from diarrhea and that her physician told her that it was likely due to a nervous bowel.[4] The decision refers to the Claimant's evidence that this condition restricted her ability to leave her home due to a fear of

[1] *Villani v. Canada (Attorney General)*, 2001 FCA 248
[2] Paragraph 9 of the General Division decision
[3] Paragraph 15 of the General Division decision
[4] Paragraph 14 of the General Division decision

not being near appropriate facilities when necessary.[5] Again, the General Division fails to decide whether this condition had any impact on the Claimant's capacity to work.

[9] The decision also reports that the Claimant was diagnosed with osteoarthritis of the hands , with mild swelling that was worse on the left.[6] The Claimant testified that her hands were swollen and malformed by this disease.[7] The General Division did not consider how this condition affected her capacity to work.

[10] Regarding the Claimant's depression, the decision states that the Claimant saw different doctors. In September 2014, Dr. Szarka reported that the Claimant's mood had improved.[8] A psychiatric assessment in 2016 diagnosed major depressive disorder and recommended an increased dose of medication and continued counselling.[9] The General Division concluded that this condition would not prevent the Claimant from all suitable gainful occupation at the MQP.[10]

[11] I am not persuaded by the Claimant's argument that the General Division determined that the Claimant's depression was not serious because she was receiving counselling from a community organization and not a psychiatrist. Nothing in the decision suggests this.

[12] I am satisfied that the General Division considered the evidence before it regarding the Claimant's numerous conditions. It failed, however, to reach any decision regarding the severity of a number of these conditions. Also, the Federal Court of Appeal teaches that the decision-maker must consider all of a claimant's conditions and their combined impact on a claimant's capacity regularly to pursue any substantially gainful occupation.[11] The General Division decision states:

> [37] A claimant's condition is to be assessed in its totality. All of the possible impairments are to be considered, not just the biggest impairments or the main impairment (*Bungay v. Canada (Attorney General)*, 2011 FCA 47). As can be seen by the analysis, the Tribunal

[5] Paragraph 33 of the General Division decision
[6] Paragraph 23 of the General Division decision
[7] Paragraph 32 of the General Division decision
[8] Paragraph 19 of the General Division decision
[9] Paragraph 20 of the General Division decision
[10] Paragraph 29 of the General Division decision
[11] *Bungay v. Canada (Attorney General)*, 2011 FCA 47

> considered all possible impairments reported by the appellant and her physicians.

This is a correct statement of the law. However, simply stating the law and a conclusion is not sufficient. The decision lacks any analysis of the facts or any consideration of the combined impact of the Claimant's asthma, diarrhea, arthritis, and depression on her capacity regularly to pursue any substantially gainful occupation. This is an error in law.

[13] Further, I am satisfied that the General Division's reasons for its decision are insufficient regarding this issue. The Supreme Court of Canada teaches that reasons for a decision must allow the reader to understand what decision was made and why it was made.[12] Without any analysis of the combined impact of the Claimant's conditions, the reader cannot know why the General Division decided that the Claimant did not have a severe disability.

[14] The appeal must therefore be allowed.

Issue 2: Did the General Division err by finding that the Claimant gained transferrable skills?

[15] The Claimant also argues that the General Division erred when it concluded that she learned transferrable skills when her employer accommodated her and had her do paperwork instead of her regular duties. There is very little evidence on this. The Claimant testified that she did "paperwork". There are no details about what her exact duties were or if the Claimant learned any new skills performing such duties. Consequently, it is unclear why the General Division concluded that this work provided the Claimant with transferrable skills.

[16] In addition, the General Division did not consider whether the Claimant's arthritis in her hands would impact on her capacity to do paperwork in the commercial marketplace, if accommodations were provided by her employer, or if accommodations would be required in another job. As a result, the General Division's finding of fact that the Claimant learned transferrable skills by doing paperwork was erroneous. This finding of fact was made without regard for all of the material that was before the General Division. The decision was based on

[12] *Newfoundland and Labrador Nurses Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62

this finding of fact. Therefore, it was an error under the DESD Act, and the appeal must be allowed on this basis as well.

Issue 3: Did the General Division fail to apply the legal principles from *Villani*[13]?

[17] The Federal Court of Appeal, in *Villani*[14], stated that when deciding whether a claimant is disabled under the *Canada Pension Plan*, the decision-maker must consider the claimant's personal circumstances, including age, education, language skills, and work and life experiences. The General Division did so. It considered that the Claimant was 56 years of age when she applied for the disability pension, that she completed high school and worked in physically demanding positions, including as a personal support worker for eight years, with two years of this period spent performing administrative duties. It concluded that none of the Claimant's personal characteristics would negatively impact her ability to seek or, if necessary, retrain for employment.[15] Clearly, the General Division applied the legal principle from *Villani* to the facts before it. The appeal cannot succeed on this basis.

Issue 4: Did the General Division err by finding that the Claimant had residual capacity to work?

[18] The Federal Court of Appeal also teaches that where there is evidence of work capacity, a claimant must show that effort at obtaining and maintaining employment has been unsuccessful by reason of their health condition.[16] This is clearly stated in the decision.[17] The Claimant asserts that the General Division erred when it applied this principle to the facts before it. The Minister contends that the Appeal Division has no jurisdiction to decide this issue as it is one of mixed fact and law and the Federal Court of Appeal decided that the Tribunal, under the DESD Act, has no jurisdiction to decide issues of mixed fact and law.[18] I have found that the appeal must be allowed on other grounds, so this issue need not be considered.

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[13] *Villani v. Canada (Attorney General)*, 2001 FCA 248
[14] *Ibid*
[15] Paragraph 34 of the General Division decision
[16] *Inclima v. Canada (Attorney General)*, 2003 FCA 117
[17] Paragraph 36 of the General Division decision
[18] *Quadir v. Canada (Attorney General)*, 2018 FCA 21

CONCLUSION

[19] The appeal is allowed. The appeal is referred back to the General Division for reconsideration because the evidence will have to be weighed. This is at the heart of the General Division's mandate.

[20] To avoid any possibility of an apprehension of bias, the matter should be reconsidered by a different General Division member.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	March 26, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	E. R. Appellant Deyanira Benavides, Representative for the Appellant Viola Herbert, Representative for the Respondent