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

Citation: *G. H. v. Minister or Employment and Social Development*, 2018 SST 425

Tribunal File Number: AD-17-165

BETWEEN:

G. H.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: April 18, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, G. H., worked in construction until September 2011, when he was involved in an accident and injured his lower back. He has had lower back pain since then, as well as decreased mobility. He also has poor sleep and fatigue. He applied for a Canada Pension Plan disability pension in June 2015.

[3] The Respondent, the Minister of Employment and Social Development, denied the Appellant's application for a disability pension. The Appellant appealed the Respondent's decision to the General Division, but it also determined that he was ineligible for a Canada Pension Plan disability pension, since it found that his disability had not been "severe" by the end of his minimum qualifying period on December 31, 2014. (The minimum qualifying period is the date by which a claimant is required to be disabled, to qualify for a Canada Pension Plan disability pension.)

[4] The Appellant sought leave to appeal the General Division's decision, on the basis of several arguments. I granted leave to appeal on the basis that the General Division may have failed to assess the Appellant's disability in a "real world" context and to determine whether any efforts at obtaining and maintaining employment had been unsuccessful because of his health condition. In this appeal before me, I must decide whether the General Division erred in law.

ISSUES

[5] In the application requesting leave to appeal, the Appellant had raised several arguments. I found that, apart from two of them, the appeal did not have a reasonable chance of success. The Appellant has not produced any further submissions that would lead me to find any basis upon which the appeal could be allowed on the other arguments for which I did not grant leave to appeal.

[6] Therefore, the issues before me are as follows:

1. Did the General Division fail to assess the Appellant's disability in a "real world" context?

2. Did the General Division fail to determine whether any efforts at obtaining and maintaining employment had been unsuccessful because of the Appellant's health condition?

ANALYSIS

[7] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to 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.

[8] The Appellant submits that the General Division erred under para. 58(1)(*b*) of the DESDA.

Issue 1: Did the General Division fail to assess the Appellant's disability in a "real world" context?

[9] In *Villani),*[1] the Federal Court of Appeal stipulated that a decision-maker is required to conduct a "real world" analysis, i.e. they are to consider a claimant's particular circumstances, such as age, education level, language proficiency, and past work and life experience, when assessing whether a claimant is incapable regularly of pursuing any substantially gainful occupation. The Federal Court of Appeal also held that the assessment of a claimant's circumstances is a question of judgment with which one should be reluctant to interfere. Hence,

[1] *Villani v. Canada (Attorney General),* 2001 FCA 248.

if the General Division conducted the *Villani* test, and the Appellant simply disagrees with the manner of the assessment, I should refrain from interfering with that assessment.

[10] In *Villani,* the Federal Court of Appeal set out some guiding principles. At paras. 38 and 39, the Federal Court of Appeal stated:

> [38] 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**.
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> [39] I agree with the conclusion in *Barlow*, *supra* and the reasons therefor. The analysis undertaken by the Board in that case was brief and sound. It demonstrates that, on the plain meaning of the words in subparagraph 42(2)(a)(i), Parliament must have intended that the legal test for severity be applied with some degree of reference to the "real world". It is difficult to understand what purpose the legislation would serve if it provided that disability benefits should be paid only to those applicants who were incapable of pursuing any conceivable form of occupation no matter how irregular, ungainful or insubstantial. Such an approach would defeat the obvious objectives of the *Plan* and result in an analysis that is not supportable on the plain language of the statute.
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> (My emphasis)

[11] From this, it is clear that it is insufficient to point to evidence of a claimant's personal characteristics, or to merely cite *Villani*, without actually determining how those personal characteristics impact a claimant's capacity regularly of pursuing any substantially gainful occupation.

[12] The Appellant relies on several Appeal Division decisions to support his argument that a decision-maker is required to consider his personal circumstances.[2] One of these authorities involves an application requesting leave to appeal and it is therefore of no relevance in this appeal. In the other two decisions, the Appeal Division allowed the appeal where the General Division had altogether failed to assess the claimants' disability in a "real world" context.

[13] Here, the General Division's decision contains few references, if any, to the Appellant's personal circumstances. The General Division did not consider how any of the Appellant's characteristics might have impacted his capacity regularly of pursuing any substantially gainful occupation. On its face, this oversight constitutes an error of law. However, there are exceptions to the general rule that a decision-maker is required to conduct a *Villani* assessment.

[14] The Respondent argues that, because the General Division had concluded that the Appellant did not have a severe and prolonged disability, it was not required to conduct a *Villani* assessment. The Respondent argues that this is consistent with the Federal Court of Appeal's reasoning in *Giannaros v. Canada (Minister of Social Development)*.[3]

[15] In *Giannaros*, the Federal Court of Appeal did not require the Pension Appeals Board to conduct a "real world" assessment because the "Board was not persuaded that the applicant suffered from a severe and prolonged disability." The Federal Court of Appeal noted that the Pension Appeals Board had made it clear that it was not satisfied that the applicant had made reasonable efforts to participate in the various programs and treatments recommended to her by some of the physicians she had consulted. In particular, the Board had noted that the applicant had failed to wear both lumbar and neck braces, and that she had failed to lose weight and to exercise in a reasonable manner.

[16] There was no issue before the General Division regarding the Appellant's compliance with treatment recommendations, although it noted at para. 14 of its decision that the Respondent had indicated that there was no indication of any active treatment by the Appellant. For this reason, I find that *Giannaros* is factually distinguishable.

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[2] *G. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 400; *B.D. v. Minister of Employment and Social Development*, 2017 SSTADIS 44; and *Minister of Employment and Social Development*, 2017 SSTADIS 111.
[3] *Giannaros v. Canada (Minister of Social Development)*, 2005 FCA 187 at paras. 14 and 15.

[17] In the proceedings before me, the Respondent notes that the Appellant's family physician had prepared an opinion stating that the Appellant had residual work capacity.[4] The Respondent argues that it was implicit that the family physician was familiar with the Appellant's characteristics and limitations and that he necessarily considered them when determining that the Appellant had residual work capacity.

[18] The family physician wrote:

> Overall, it is my impression that G. H. suffers from a lumbar strain related to his work-related injury of September 12, 2011. G. H. and I have discussed his current condition and his work-related limitations. It is my opinion that G. H. return to modified duties [*sic*]. It is my opinion that G. H. needs light duties at work, specifically no prolonged sitting or standing. It is my opinion that he could stand for a period of time no greater than half an hour to an hour. It is also felt that prolonged sitting should be reduced to less than an hour. With respect to lifting, G. H. cannot engage in any lifting from floor to waist. G. H. could do some light lifting less than 10 pounds from waist to shoulder height and not on a repetitive basis. G. H. should also restrict his activities with respect to any repetitive activities involving his dorsolumbar spine.

[19] The Respondent notes that, in addition to the family physician's February 2012 medical report, there was other evidence before the General Division that the Appellant had some residual work capacity. The General Division alluded to this evidence at para. 15a of its decision.[5] In a multidisciplinary healthcare assessment report dated December 29, 2011, an orthopaedic surgeon and a chiropractor were of the opinion that the Appellant could return to work, provided that he observed various restrictions, including avoiding repetitive bending; lifting over 15 pounds; pushing/pulling heavy objects; and avoiding continuous sitting, standing, or walking for more than 15 minutes. They expected that, once the Appellant completed his treatment program, he could expect a full recovery and could resume his full duties.

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[4] Dr. Kevin Green's medical report dated February 13, 2012 at pages GD5-267 to 268 and GD5-326 to 327 of the hearing file.
[5] Multidisciplinary Healthcare Assessment Report dated December 29, 2011, at pages GD5-259 to 262.

[20] The Respondent notes that in 2013, the Appellant participated in a psycho-vocational assessment,[6] which identified multiple suitable occupational options and that, in 2014, he completed 10 weeks of customer service training followed by 12 weeks of an employment placement.[7] The Respondent also notes that before that, the Appellant had declined multiple modified light duty opportunities with his employer.

[21] There is no suggestion that the Appellant's medical condition deteriorated between 2011 and December 31, 2014. It is clear that the General Division determined that the Appellant's condition had not deteriorated after 2011. It therefore relied extensively on the December 29, 2011 assessment, the family physician's medical report, and the work transition plan and re-training program documentation, in determining that he did not have a severe disability by the end of his minimum qualifying period.

[22] The Respondent asserts that the General Division did not have to conduct a "real world" assessment because there was evidence upon which it found that the Appellant did not have a severe and prolonged disability, much like the Federal Court of Appeal had found in *Giannaros*.

[23] The Respondent contends that *Doucette v. Canada (Minister of Human Resources Development)*[8] is also applicable. In *Doucette*, the Federal Court of Appeal suggested that the Pension Appeals Board was not required to consider the claimant's particular characteristics in depth. The Court found that there was evidence in the record capable of supporting the Board's view that the true cause of Mr. Doucette's inability to return to work was his failure to make greater efforts between the time of his accident and his minimum qualifying period. At para. 16, it wrote that, given that conclusion, "there [was] no need to make an in-depth analysis of the constraints posed to the applicant's capacity to return to the work force by his educational level, language proficiency and past work and life experience."

[24] The Court's use of the word "in-depth" suggested that some analysis was required, even if it was not an "in-depth" analysis. Yet it was apparent that the Court determined that the Board was excused from undertaking any analysis at all, given that there was evidence to support the

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[6] Psycho-Vocational Assessment Report dated September 26, 2013, at pages GD5-42 to 54.
[7] Work Transition Plan Closure Summary dated September 22, 2014, at pages GD5-186 to 187.
[8] *Doucette v. Canada (Minister of Human Resources Development)*, 2004 FCA 292.

Board's conclusion. The Court noted that the evidence included a medical report and a psycho-vocational assessment that identified certain occupations that Mr. Doucette was capable of performing.

[25] The Court then proceeded to conduct its own *Villani* analysis, in the absence of such an analysis by the Board. The Court acknowledged that Mr. Doucette had educational and cognitive deficiencies that put him at a disadvantage in terms of seeking employment. The Court found that Mr. Doucette had work capacity and that he could have returned to the labour market had he made a greater effort, even when Mr. Doucette's personal limitations were taken into account.

[26] *Doucette* establishes that a decision-maker may rely on medical records and any comprehensive vocational assessments that indicate a claimant has work capacity. Under *Doucette*, a decision-maker may thereby be relieved of any obligation to conduct their own in-depth *Villani* analysis.

[27] Therefore, if there is evidence such as a comprehensive evaluation that includes a consideration of a claimant's age, language proficiency, education, and work and life experience, much like the psycho-vocational assessment in *Doucette*, a decision-maker may be able to rely on that evaluation to conclude that a claimant has the capacity regularly of pursuing a substantially gainful occupation. Otherwise, the decision-maker has a duty to conduct a *Villani* analysis (unless, for instance, the claimant has unreasonably failed to follow treatment recommendations).[9]

[28] In this case, the General Division relied on the family physician's February 2012 medical report and the December 2011 multidisciplinary healthcare assessment report to find that the Appellant exhibited some residual capacity. The Respondent argues that the multidisciplinary healthcare assessment report took into account the Appellant's age, education, and work history.

[29] Although the family physician was aware that the Appellant was a construction labourer engaged in heavy physical work, it is not apparent whether he turned his mind to the "real world" context when he determined that the Appellant exhibited some residual work capacity. For

[9] *Sharma v. Canada (Attorney General)*, 2018 FCA 48.

instance, I do not readily see that the family physician ever considered the Appellant's educational attainments or his work history, beyond being a construction labourer.

[30] On the other hand, the orthopaedic surgeon and the chiropractor considered the Appellant's particular characteristics, including his educational and work background when they found that he could return to work, albeit with restrictions. I find that the General Division's reliance on this particular assessment was sufficient for the purposes of meeting the requirements set out in *Doucette*, and ultimately in *Villani*, that it assess the severity of the Appellant's disability in a "real world" context.

[31] As the Respondent notes, there was also a September 2013 psycho-vocational assessment report before the General Division, upon which it could have relied to conclude that the Appellant was not severely disabled. The assessors considered the Appellant's particular characteristics, including his age, language proficiency, education, and work and life experience, as well as his medical issues. The assessors noted that the Appellant has a Grade 10 education and limited computer skills, and that he has been working as a construction labourer since 1986. Based on test results, they determined that he would require extensive upgrading of reading comprehension and math skills. They identified potential obstacles and suggested strategies. Finally, they identified potential suitable occupational options. This assessment was comparatively more comprehensive than the one conducted by the orthopaedic surgeon and the chiropractor.

[32] In *R. T. v. Minister of Employment and Social Development*,[10] I determined that it was unnecessary for the General Division to conduct a *Villani* assessment in that case because it had relied upon a comprehensive vocational evaluation and transferable skills analysis report that concluded that, while R. T. was ill-suited for other employment at that time, she could retrain for other work, even though she had reportedly experienced learning difficulties in school and would likely require accommodation in school to facilitate learning. The vocational assessor had considered R. T.'s particular circumstances, including her age, language proficiency, education, and work and life experience, as well as her multiple physical and mental disabilities.

[10] *R. T. v. Minister of Employment and Social Development*, 2017 SSTADIS 656.

[33] The General Division could have also relied on the September 2013 psycho-vocational assessment report to find that the Appellant was not severely disabled by the end of his minimum qualifying period. The psychologist and psychometrist who prepared the vocational assessment identified several potential suitable occupations for the Appellant in a "real world" context.

[34] Given the opinions expressed in both assessments, the Appellant does not meet the severity test under the *Canada Pension Plan*.

[35] However, this does not conclude the investigation, because having found that the Appellant exhibited residual capacity, the General Division was required to conduct the *Inclima* test[11] to determine whether "any efforts at obtaining and maintaining employment ha[d] been unsuccessful by reason of that health condition."

Issue 2: Did the General Division fail to determine whether any efforts at obtaining and maintaining employment were unsuccessful because of the Appellant's health condition?

[36] The Appellant submits that the General Division erred because it failed to consider whether any efforts at obtaining and maintaining employment were unsuccessful because of his health condition. He suggests that he attempted but failed to maintain employment because of his health condition.

[37] The Appellant notes that he underwent computer training and that he received assistance in résumé writing as well as advice on pursuing work in customer service. He states that his job search failed because any prospective employers would not provide any accommodations for him, being under no obligation to do so. Further, he argues that, in any event, any employment in customer service is bound to fail because the nature of the employment is beyond his physical capability and is therefore untenable. He acknowledges that there is employment within his physical restrictions, but claims that such employment is unsuitable for his skill level and training.

[38] In *Inclima*, the Federal Court of Appeal held as follows:

> Consequently, an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she)

[11] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

> has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.

[39] It seems that the onus falls on an applicant to establish that such efforts have been unsuccessful because of their health condition. It would appear that, having focused on the medical evidence that supported his disability claim, the Appellant failed to address the issue that was raised by his family physician, the multidisciplinary healthcare assessment report, and the psycho-vocational assessment report — namely, that he exhibited some residual capacity. In other words, the Appellant failed to show that although there was evidence of work capacity, efforts at obtaining and maintaining employment were unsuccessful because of his health condition.

[40] First, the Respondent submits that because the General Division had determined that the Appellant did not have a severe disability, it was not required to apply the *Inclima* test.

[41] Second, the Respondent argues that, notwithstanding the fact that the General Division was not required to apply the *Inclima* test, there was no medical or other evidence that could have established that any efforts by the Appellant at obtaining and maintaining employment had indeed failed because of his health condition. In this regard, the Respondent argues that the Appellant had declined multiple offers for suitable modified duties without any loss in income.[12] The Appellant declined his employer's offers for modified duties, ostensibly because the Appellant was awaiting further assessment by his physician.

[42] The Appellant underwent retraining in 2014, and although the hearing file before the General Division documented efforts by the Appellant to seek employment in alternative fields, there were no supporting medical opinions to corroborate his claims that those opportunities were unsuitable.[13]

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[12] Initial Contact & Action Plan WPP dated September 21, 2011 (page GD5-307); undated letter from Michels Canada (page GD5-157); Workplace Safety and Insurance Board letter dated October 13, 2011 (pages GD5-153 to 154); and RTWS Intervention Memo/Plan dated October 28, 2011 (pages GD5-256 to 257).
[13] Employment Placement Closure Report dated August 19, 2014, at pages GD5-188 to 191.

[43] The Appellant continued to see his family physician. In addition to the February 13, 2012 report, his family physician prepared the CPP medical report in June 2015, as well as a brief medical note dated January 13, 2016.[14] In his CPP medical report, the family physician indicated that the Appellant had ongoing lower back pain and decreased mobility. (It is unclear whether the decreased mobility arose after the end of the minimum qualifying period.) There is no dispute between the parties that the Appellant has a permanent impairment in connection with his lower back, or that he has various limitations; however, the physician did not address the issue of the Appellant's work capacity for light duties or other employment.

[44] In his January 2016 medical note, the family physician stated that the Appellant was "currently unable to perform the duties necessary for his employment as the result of his medical condition." However, the physician failed to clarify whether these duties included any modified duties. The physician also failed to address whether the Appellant was, in his opinion, able to pursue any of the alternative occupations that had been identified in the psycho-vocational assessment report.

[45] In June 2016, the Appellant also saw Dr. T. John, a physiatrist.[15] Dr. John had also seen the Appellant in May 2012.[16] Dr. John did not address the issue of whether the Appellant exhibited any residual capacity or whether any attempts at obtaining and maintaining any employment had failed because of the Appellant's health condition.

[46] The Appellant saw other health caregivers after 2011, including a neurologist in February 2013,[17] and he has also had various diagnostic examinations, but none of these medical records after 2011 address the issue of the Appellant's work capacity or whether any efforts by the Appellant to obtain and maintain employment have failed because of the Appellant's health condition.

[47] The Federal Court of Appeal has determined that, where there is work capacity, in order for a claimant to be found severely disabled, any job searches have to have failed because of a

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[14] Medical note prepared by Dr. K. Green, addressed to "Whom it may concern," dated January 13, 2016, at page GD1-5.
[15] Consultation report dated June 6, 2016, prepared by Dr. T. John, physiatrist, at page GD6-2 to 3.
[16] Consultation report dated May 24, 2012, prepared by Dr. T. John, at pages GD5-240 to 241 and GD5-321 to 322.
[17] Consultation report dated February 4, 2013, prepared by Dr. Somchai Jiaravuthisan, at pages GD2-50 to 51.

claimant's health condition. In this case, it is insufficient that the Appellant's job searches failed, since it was not also established that those efforts failed because of his health condition. The Appellant clearly has chronic back issues that affect his functionality, but since his health caregivers have opined that he is capable of light or modified duties or that he can perform alternative occupations, the Appellant was required to show that he had undertaken efforts at obtaining and maintaining employment, and to show that they had failed because of his health condition. The General Division did not apply *Inclima*; however, even if it had done so, the evidence fell short of establishing that the Appellant met his requirements under *Inclima*.

CONCLUSION

[48] In summary, an orthopaedic surgeon and a chiropractor, as well as a psychologist and a psychometrist, determined that the Appellant was capable of performing light or modified duties, or working at alternative occupations, taking into account his particular circumstances. For this reason, the Appellant was required to establish that any efforts at obtaining and maintaining employment had failed by reason of his health condition.

[49] After finding that the Appellant had work capacity, the General Division failed to apply the *Inclima* test. Despite this, the evidence before the General Division still fell short of establishing that any efforts at obtaining and maintaining employment had failed by reason of the Appellant's health condition. The evidence before the General Division was simply insufficient. For this reason, the appeal is dismissed.

Janet Lew
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
APPEARANCES:	G. H., Appellant Chris Topple (paralegal), Representative for the Appellant Minister of Employment and Social Development, Respondent Nathalie Pruneau (paralegal), Representative for the Respondent