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

Citation: *B. C. v. Minister of Employment and Social Development*, 2018 SST 510

Tribunal File Number: AD-16-1395

BETWEEN:

B. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Nancy Brooks

DATE OF DECISION: May 9, 2018

DECISION AND REASONS

OVERVIEW

[1] The Appellant, B. C., applied for a *Canada Pension Plan* (CPP) disability pension in March 2014.[1] She stated in her application that she had been involved in motor vehicle accidents (MVAs) in June and December 2011. In the questionnaire she completed as part of her application, she stated that she had stopped working in October 2012.

[2] The Minister of Employment and Social Development refused her application initially[2] and upon reconsideration.[3] B. C. appealed to the Social Security Tribunal's General Division, which dismissed her appeal, concluding that her disability was not severe, as defined in the CPP, on or before the end of her minimum qualifying period (MQP) on December 31, 2011. She appeals the General Division decision.

[3] For the reasons that follow, I have decided the appeal must be dismissed.

SUBMISSIONS

[4] In her notice of appeal,[4] the Appellant submits that the General Division member "made palpable and overriding errors of law", disregarded reliable evidence and made erroneous findings of fact in a perverse or capricious manner or without regard for the materials before her.

[5] With respect to the alleged errors of law, the Appellant contends that the member applied the wrong burden of proof. In this regard, she submits that the member required her to prove her disability was severe beyond a reasonable doubt, rather than on a balance of probabilities.[5] She also contends that the member failed to consider whether her disability was severe in a real-world context in accordance with principles laid down by the Federal Court of Appeal in *Villani v. Canada (Attorney General)*.[6] She also submits that, the General Division member erred in law by relying on the fact that she did not go to a hospital emergency department after her MVA in

---

[1] GD2-22 to GD2-25.
[2] GD2-6 to GD2-9.
[3] GD2-11 to GD2-14.
[4] AD1-3.
[5] AD1A-3.
[6] 2001 FCA 248.

December 2011 to support a finding that her disability was not severe.[7] Finally, she argues that her evidence and the evidence of her sisters relating to the Appellant's condition after the MQP date "gave the Tribunal Member 20/20 hindsight. Failing to take advantage of the 20/20 hindsight was an error of law resulting in a decision that is capricious and cannot be accounted for."

[6] With respect to the alleged errors of fact, the Appellant submits that the evidence—particularly her own and her sisters' evidence—supports a finding of disability. She argues that the General Division member failed to give sufficient weight to evidence that she contends supports a finding of disability. She also submits that the member disregarded evidence which, though created in the post-MQP period, demonstrated that her disability was severe on or before the MQP date.

[7] In response to the allegation that the General Division did not apply *Villani* appropriately, the Minister relies on *Giannaros v. Canada (Minister of Social Development)*[8] to support his argument that the General Division was not required to consider the *Villani* factors because it concluded, at para. 65 of the decision, that the Appellant did not have a severe medical condition at the time of her MQP. The Minister argues that, nonetheless, the Appellant mischaracterizes the test and the General Division appropriately considered and applied *Villani*.

[8] With respect to the alleged errors of fact, the Minister submits that the Appellant has not pointed to any perverse or capricious findings and instead she "cherry picks" the evidence, ignoring significant portions of the evidence that do not support a finding of disability. The Minister also submits that the Appellant invites the Appeal Division to place a great deal of weight on her testimony and to discount a significant amount of medical evidence. The Minister says the General Division stated why it placed less weight on the Appellant's testimony and the Appeal Division has no jurisdiction to reweigh the evidence to arrive at a different determination based on the same facts.

[9] Both parties submitted that this appeal could be dealt with on the basis of the record and written submissions. The appeal proceeded on that basis.

---

[7] The Appellant cites *Klabouch v. Canada (Social Development)*, 2008 FCA 33.
[8] 2005 FCA 187, at para. 15.

ISSUES

Alleged errors of law

Issue 1: Did the General Division apply the wrong burden of proof?

Issue 2: Did the General Division fail to consider the issue of severity in a "real-world" context, as mandated by *Villani*?

Alleged errors of fact

Issue 3: Did the General Division fail to give appropriate weight to the evidence?

Issue 4: Did the General Division disregard evidence that demonstrated the Appellant's disability was severe on or before the MQP date?

ANALYSIS

[10] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) states that 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.

[11] In order to allow the appeal, I must be satisfied that the Appellant has proven it is more likely than not that the General Division committed an error falling within the scope of s. 58(1).

Alleged errors of law

[12] The Federal Court of Appeal recently clarified that when Parliament creates a multilevel administrative framework, the scope of the appeal tribunal's review of the lower tribunal's decision is to be determined by the language in the governing statute.[9]

---

[9] *Canada (Minister of Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, at paras. 46–48.

[13] I agree with the Minister that, based on the unqualified wording of s. 58(1)(*b*) of the DESDA, no deference is owed to the General Division on errors of law. Contrary to the Appellant's submissions, errors of law need not be "palpable or overriding"; rather, it is sufficient that an error of law be made.

Issue 1: Did the General Division apply the wrong burden of proof to the question of whether the Appellant's disability was severe on or before the MQP date?

[14] The Appellant submits that the General Division member incorrectly required her to prove she was disabled under the CPP beyond a reasonable doubt. In order to address the Appellant's arguments with precision, I set out here her counsel's summary arguments on this ground of appeal:

> This appeal is primarily about the burden of proof. The Tribunal Member stated more than once that the burden was the "balance of probabilities" or "more likely than not". She made three errors of law when attempting to apply the burden of proof, however, and these errors constitute the grounds for appeal:
>
> (1) She considered the evidential proof (which is half the burden of proof) and in error she applied to it the burden of "beyond a reasonable doubt";
>
> (2) While she considered the evidential proof, she ignored the written submissions addressing the burden of persuasion (the other half of the burden of proof); and
>
> (3) She failed to look beyond the MQP period to find the assurance she needed to find the proof beyond a reasonable doubt.
>
> The result of these errors is that the finding she made was capricious and unaccountable. The evidence should have clearly indicated to her that disability was more likely than not. And the residual doubt that she may have had about "disability" she refused to resolve by looking past the MQP period to see the outcome, which was most certainly "disability" within the meaning of the *Canada Pension Plan*.[10]

[15] For the reasons that follow, I have concluded this ground of appeal does not succeed.

[16] The statement by Appellant's counsel that the evidentiary burden is "half the burden of proof," and the burden of persuasion is "the other half" is incorrect. The Supreme Court of

[10] AD1A-3.

Canada has held that there is only one burden of proof (also referred to as the burden of persuasion) in a civil case and that is proof on a balance of probabilities.[11] The Federal Court of Appeal has confirmed that a claimant for a CPP disability pension bears the onus to prove his or her disability meets the requirements set out in s. 42(2) of the CPP on the balance of probabilities.[12] This means that the claimant must prove it is more likely than not that his or her disability was severe and prolonged on or before the MQP date and continuously thereafter.

[17] The burden of proof is entirely distinct from an evidentiary (often referred to as an evidential) burden. As noted by the Supreme Court of Canada, an evidential burden is not a burden of proof.[13] The evidential burden determines *whether* an issue should be left with the trier of fact, while the burden of persuasion (i.e. the burden of proof) determines *how* the issue should be decided.[14] For example, in a claim for a disability pension, the claimant must present medical evidence in support of a claim.[15] This is an evidential burden, which was met by the Appellant in this case because she did put forward medical evidence. The task for the General Division was to then analyze the evidence before it, both documentary and oral, to determine whether the Appellant had met her burden of proof by demonstrating on a balance of probabilities—on the basis of the evidence before it—that her disability met the requirements of the CPP.

[18] In her arguments, Appellant's counsel appears to suggest that the burden of persuasion is to be based on the persuasiveness of written submissions and the evidential burden is to be based on the evidence. This misconstrues the process. The General Division member was obligated to consider all the evidence before her to determine whether the burden of persuasion (i.e. the burden of proof) was met. Although submissions may be useful for pointing a court or tribunal to the evidence that a party relies on, submissions do not constitute evidence and the determination of whether a party has met its burden of proof is not based on submissions, but solely on the law and evidence.

---

[11] *F. H. v. McDougall*, 2008 SCC 53.
[12] *Canada (Minister of Human Resources Development) v. Angheloni*, 2003 FCA 140, at para. 10; *Simpson v. Canada (Attorney General)*, 2012 FCA 82.
[13] *R. v. Fontaine*, 2004 SCC 27, at para. 11.
[14] *Ibid.*
[15] *Villani*, at para. 50.

[19] At various points in her reasons, the General Division member stated that the Appellant's burden was to prove on a balance of probabilities, or that it was more likely than not, that her disability was severe and prolonged on or before the MQP date.[16] Having analyzed and weighed the evidence, the member stated she was not satisfied, on a balance of probabilities, that the Appellant was unable regularly to pursue substantially gainful employment by her MQP date. She then found that the Appellant's disability was not severe, on a balance of probabilities.[17] At no time did she apply the standard of beyond a reasonable doubt. Therefore, I do not agree that the General Division erred because it applied an incorrect burden of proof.

[20] I conclude the appeal does not succeed on this ground.

[21] With respect to the argument of Appellant's counsel that the member "failed to look beyond the MQP period to find the assurance she needed to find the proof beyond a reasonable doubt", the Appellant was not required to prove her case on this standard of proof. I consider the arguments that the member failed to consider evidence relating to the period after the MQP date, and that the General Division member's finding "was capricious and unaccountable" below, in paras. 42–47.

Issue 2: Did the General Division fail to consider the issue of severity in a "real-world" context, as mandated by *Villani*?

[22] The General Division's task was to determine whether the Appellant had a severe and prolonged disability on or before December 31, 2011 (the end of her MQP), and continuously thereafter. Under the CPP, a disability is "severe" if "by reason thereof the person […] is incapable regularly of pursuing any substantially gainful occupation".[18] According to the Supreme Court of Canada, in the context of the CPP, "the yardstick is employability"—an individual may suffer severe impairments but will not be entitled to CPP benefits if those impairments, serious though they may be, do not prevent him or her from earning a living.[19]

[23] In *Villani*, the Federal Court of Appeal directed that, in assessing whether a disability is severe, the General Division must adopt a "real-world" approach. The "real-world" approach

[16] General Division decision, paras. 12, 62, 81 and 82.
[17] General Division decision, paras. 81–82.
[18] CPP, s. 42(2)(*a*)(i).
[19] *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, at para. 28.

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;[20] 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.[21]

[24] The Appellant submits that the General Division member misconstrued the meaning of *Villani* and, consequently, did not apply it properly or at all.[22] She says the member "disregards or forgets completely the Appellant's mental disability, which may represent a significant portion of the disability.[23] She disagrees with the member's assessment of the *Villani* factors.

[25] I have concluded there is no merit to this ground of appeal.

[26] The member properly instructed herself that, when deciding whether a person's disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.[24] The member noted that the Appellant has a Grade 12 education and other qualifications, speaks English and, at the time of her MQP, was 50 years old. She also stated there was nothing in the Appellant's past work or life experience to suggest she would have been unable to undertake a job involving light duties on or before her MQP date. There is no basis for me to conclude the member erred in law in her application of the *Villani* factors.

[27] With respect to the allegation that the member did not consider the totality of the Appellant's medical condition because she disregarded or forgot about the Appellant's mental

---

[20] *Villani*, at para. 38.
[21] *Bungay v. Canada (Attorney General)*, 2011 FCA 47, at para. 8.
[22] AD1A-3.
[23] AD1A-16.
[24] General Division decision, para. 79.

disability, this is not borne out by the reasons. The member referred to the Federal Court of Appeal's direction in *Bungay v. Canada (Attorney General)*[25] that it is necessary "to consider an appellant's 'real world' condition, 'taking into account her entire condition,' and not just the main complaint".[26]At para. 41, the member recounted the evidence of Dr. Lubbers, a psychologist, who concluded in a January 2014 report that "there were no clinically significant consequences of the Appellant's injuries, such as significant anxiety or post-traumatic stress disorder." In the analysis portion of her reasons, the member took into account evidence about the Appellant's psychological conditions, stating:

> [71] The Tribunal has also considered the results of the independent medical examinations of January 2014, when a psychologist, a neurologist, and a physiatrist determined that there was no evidence of ongoing impairment. The Tribunal bears in mind that these assessments were performed for the Appellant's insurer. The Tribunal has also taken into account the Appellant's submission that each of these specialists considered her condition in isolation. Nevertheless, three negative reports, taken together, do not add up to a positive report. This is only one factor the Tribunal has considered in making its determination.
>
> [72] The Tribunal acknowledges that Dr. Al-Ozairi, a psychiatrist at the brain Injury clinic [*sic*], diagnosed post-concussive disorder and major depressive disorder, mild to moderate in nature. This diagnosis, however, was given more than three years after her MQP. The Tribunal is unable to read the diagnosis back to the period before December 31, 2011.

[28] It is apparent that, contrary to the Appellant's submissions, the General Division member did consider the psychological aspects of the Appellant's condition. The member also considered the Appellant's physical ailments before concluding, "[e]ven considering together all of the Appellant's documented conditions, it is not apparent that she had a serious medical condition by her MQP."[27]

[29] The General Division member properly instructed herself regarding the analysis she was to conduct under *Villani* and *Bungay* and applied those principles in her analysis of the evidence. Given that she conducted a thorough *Villani* analysis, I need not consider the Minister's

---

[25] 2011 FCA 47, at para. 17.
[26] General Division decision, para. 73.
[27] General Division decision, para. 73.

argument that she was not obligated to do so, pursuant to the Federal Court of Appeal's decision in *Giannaros*.

[30] I conclude that the Appellant has not established that the General Division erred in its application of *Villani*.

Alleged errors of fact

[31] Another of the permissible grounds of appeal to the Appeal Division is that "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".[28] This language indicates that the Appeal Division is to show deference to the General Division's findings of fact: in addition to the disputed finding of fact being material ("based its decision on") and incorrect ("erroneous"), in order for the appeal to succeed, the disputed finding must also have been made in a perverse or capricious manner or without regard for the evidence before the General Division. 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.[29]

Issue 3: Did the General Division fail to give appropriate weight to the evidence?

[32] The essence of the Appellant's argument under this ground of appeal is that the General Division member should have given more weight to the Appellant's evidence, the testimony of her sister D., and a written statement of her sister M.[30] in preference to the medical evidence. The Appellant also contends that her and her sisters' evidence relating to the Appellant's condition after the MQP date "gave the Tribunal Member 20/20 hindsight".[31] She submits that "failing to take advantage of the 20/20 hindsight was an error of law resulting in a decision that is capricious and cannot be accounted for."[32]

[33] In this argument, the Appellant is taking issue with the manner in which the General Division member weighed the evidence. Contrary to the submission that the manner in which the

---

[28] DESDA, s. 58(1)(*c*).
[29] *R. H. v. Minister of Employment and Social Development*, 2017 SSTADIS 58.
[30] GD5-2 to GD5-4.
[31] AD1A-15.
[32] *Ibid*.

member carried out her analysis of the evidence constituted an error of law, weighing the evidence is part of the fact-finding process.

[34] The grounds of appeal under s. 58(1) of the DESDA do not permit the Appeal Division to reweigh evidence. "To put it another way, reweighing the evidence heard by the General Division is not a ground of appeal that can be entertained."[33]

[35] In her reasons, the General Division member provided a rationale for giving more weight to the medical evidence than to the Appellant's evidence. She found the Appellant to be "a vague historian who had great difficulty recalling and providing evidence concerning significant events" that had occurred almost five years previously.[34] The member accepted that this was due both to the lapse of time and to the Appellant's condition at the time of the hearing, and not to any evasiveness on her part. With respect to the evidence of the Appellant's sister D., the member noted that, although D. tried her best to describe her sister's history, her testimony was inconsistent with medical evidence that suggested the Appellant had largely recovered from the June 2011 accident by the time her December 2011 accident occurred. The member stated she did not give much weight to the written statement of the Appellant's sister M., who did not testify, because the statement was not sworn.

[36] Thus, the member provided a reasonable rationale for giving more weight to the medical evidence than to the evidence of the Appellant and her sisters. The Appellant relies on the report of Dr. Al-Ozairi, a psychiatrist, who had diagnosed post-concussive disorder and major depressive disorder in March 2015. The member provided a rational basis for giving no weight to Dr. Al-Ozairi's report. She stated, "[t]his diagnosis, however, was given more than three years after her MQP. The Tribunal is unable to read the diagnosis back to the period before December 31, 2011."[35]

[37] The Appellant also submits that the General Division erred in law by relying on the fact that she did not go to a hospital emergency department after her MVA in December 2011. This is more properly characterized as an alleged error of fact.

---

[33] *Rouleau v. Canada (Attorney General)*, 2017 FC 534, at para. 42.
[34] General Division decision, para. 63.
[35] General Division decision, para. 72.

[38] In her analysis, the General Division member made a finding that the Appellant's medical condition was not severe prior to December 28, 2011, the date of her second MVA. She then considered the period between the second MVA and the MQP date. She stated:

> If the Appellant's injuries from her December 2011 MVA had been serious, she might have been expected to visit the emergency department immediately, and/or gone to see her family physician or a walk-in clinic. There is no indication, however, that the Appellant went to the hospital immediately after her December 2011 MVA, and she did not have an X-ray and CT scan of her cervical spine until January 2012; neither imaging report showed significant findings.[footnote omitted] She did not see her family physician until January 20, 2012, three weeks after the MVA. Dr. Shepherd had given the Appellant a prescription for 20 Tylenol #3 in September 2011, and this was not renewed until eight months later, which would suggest that the Appellant was not in severe pain during this time.[36]

[39] The member then went on to consider the Appellant's evidence and the medical evidence post-MQP. After a detailed review of the evidence, the member concluded that the Appellant's disability was not severe on or before the MQP date. The member was entitled to take this evidence into account in her weighing of the evidence. As noted, it is not my role to reweigh the evidence.

[40] The member reasonably considered the evidence between the second MVA and the MQP date. It cannot be said that doing so led to an error within the scope of s. 58(1)(*c*) of the DESDA.

[41] I have concluded that this ground of appeal does not succeed.

Issue 4: Did the General Division disregard evidence that demonstrated the Appellant's disability was severe on or before the MQP date?

[42] In order to establish that the General Division committed an error falling within the scope of s. 58(1)(*c*) of the DESDA, the Appellant must establish that it based its decision on an erroneous finding of fact and, furthermore, that the finding of fact was perverse or capricious and made without regard for the material before the General Division.

[43] The Appellant submits that the member failed to consider evidence relating to the period after the MQP date. The reasons do not support this submission. The member considered post-

[36] General Division decision, para. 66.

MQP medical evidence both in her summary of the evidence and in her analysis. In her analysis, she looked at medical reports from the post-MQP period at paras. 75 and 76. Therefore, it cannot be said that she did not have regard for the material before her, or that the General Division member's conclusion "was capricious and unaccountable", as submitted by the Appellant.

[44] The Appellant contends that "[t]he Tribunal Member's finding in paras. 65 and 66 that the Appellant's medical condition does not appear to have been severe prior to December 31, 2011 is supported by several references to improvements in range of motion, in pain, but does not reference the later deterioration."[37] However, the Federal Court of Appeal has recognized that deterioration of a claimant's condition after the MQP date or the occurrence of new conditions and symptoms or worsening of conditions present at MQP is not relevant to a determination of severity at MQP.[38]

[45] Under this ground of appeal, the Appellant also submits that the evidence demonstrated that she had a severe disability as of the MQP date. The Appellant is essentially attempting to persuade me to reassess the evidence and come to a different conclusion. An appeal to the Appeal Division does not provide an opportunity to re-litigate or re-prosecute the claim.

[46] There was evidence to support the member's conclusion that the Appellant's disability was not severe on or before December 31, 2011.

[47] I conclude that the Appellant has not demonstrated on a balance of probabilities that the appeal should be allowed on this basis.

CONCLUSION

[48] The appeal is dismissed.

Nancy Brooks
Member, Appeal Division

---

[37] AD1A-31.
[38] *Gilroy v. Canada (Attorney General)*, 2008 FCA 116, at paras. 2–3; *Gilroy v. Canada (Attorney General)*, 2010 FCA 302, at paras. 11–12.

METHOD OF PROCEEDING:	On the record
PARTIES AND REPRESENTATIVES:	B. C., Appellant Joyce Chun, Counsel for the Appellant Minister of Employment and Social Development, Respondent Marcus Dirnberger, Counsel for the Respondent