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

Citation: *V. V. v. Minister of Employment and Social Development*, 2018 SST 902

Tribunal File Number: AD-17-533

BETWEEN:

V. V.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: September 17, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] V. V. (Claimant) applied for a Canada Pension Plan disability pension in March 1997 and claimed that he was disabled by back and neck pain that resulted from a car accident. The Minister of Employment and Social Development (Minister) refused the application. The Claimant appealed this decision. In August 1999, the Claimant was admitted to hospital to prepare for dialysis for kidney disease. On October 12, 1999, the Minister reconsidered its decision and granted the Claimant a disability pension.

[3] The Claimant received a kidney transplant in May 2005 and returned to part-time work in January 2006. The Minister reassessed his disability status and decided in July 2006 that he continued to be disabled, in spite of his part-time work.

[4] In 2015, the Minister again reassessed the Claimant's disability status and decided that the Claimant ceased to be disabled in April 2007. It cancelled the disability pension and asked the Claimant to repay the overpayment that had accrued from 2007 to 2015. The Claimant appealed the decision that cancelled his disability pension to this Tribunal. The Tribunal's General Division dismissed the appeal. The Claimant's appeal from that decision is dismissed. The General Division did not make any errors in law by failing to specifically consider the *Villani*[1] or *Boudreau*[2] decisions or to consider whether the Claimant's employer was a benevolent employer.[3]

ISSUES

[5] Did the General Division make an error in law by failing to analyze the factors set out in the *Villani* decision when making its decision?

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[1] *Villani v. Canada (Attorney General)*, 2001 FCA 248
[2] *Boudreau v. Minister of Human Resources Development*, 2000 CP 11626
[3] See *Atkinson v. Canada (Attorney General)*, 2014 FCA 187

[6] Did the General Division fail to observe a principle of natural justice or make an error in law by failing to consider whether the Claimant's employer was a benevolent employer?

[7] Did the General Division make an error in law by failing to consider the *Boudreau* decision?

ANALYSIS

[8] The *Canada Pension Plan* (CPP) states that a claimant is disabled only if they have a disability that is both severe and prolonged. A disability is severe if it renders the claimant incapable regularly of pursuing any substantially gainful employment. It is prolonged if it is likely to be long continued and of indefinite duration or likely to result in death.[4]

[9] The CPP also provides that a disability pension ceases to be payable when a claimant ceases to be disabled.[5] The Minister decided that the Claimant ceased to be disabled on April 30, 2007, because the Claimant began to work in 2006 and continued to work at least until 2015, when the Minister completed the reassessment.[6] I must decide whether the General Division made an error in law or failed to observe a principle of natural justice when it dismissed the Claimant's appeal from this decision.[7]

Issue 1: Did the General Division make an error in law by failing to analyze the factors set out in the *Villani* decision when making its decision?

[10] In *Villani*, the Federal Court of Appeal stated that when a decision-maker is deciding whether an applicant is disabled under the CPP, each word in the definition of "severe" must be given meaning and 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."[8] The Federal Court of Appeal has also stated that it is an error of law not to consider these factors when deciding whether a

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[4] CPP s. 42(2)(*a*)
[5] *Ibid.* s. 70(1)(*a*)
[6] GD2-7
[7] Section 58(1) of the DESD Act states that the only grounds of appeal are 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.
[8] *Villani supra* at note 1, para. 38

claimant is disabled.[9] However, in this case, there is no dispute that the Claimant was disabled when the disability pension application was granted in 1999. So, the question is whether a *Villani* analysis is specifically required when a claimant is working and may have ceased to be disabled.

[11] In the *Atkinson*[10] case, the Federal Court of Appeal considered a situation where a claimant's disability pension was cancelled because she returned to the paid workforce. In that decision, although the Court refers to *Villani* and its explanation of the definition of "severe," it did not find fault with the Tribunal's Appeal Division for failing to conduct a detailed *Villani* analysis to decide whether the claimant ceased to be disabled.

[12] Similarly, in this case, the Claimant returned to part-time work in 2006. He continued to work despite limitations from all of his health conditions, his limited English language skills, his lack of formal education in Canada, and his age (the Claimant was 52 years of age in April 2007). The Claimant's personal characteristics are set out in the decision. In addition, the General Division found, based on the evidence, that the Claimant's work was a substantially gainful occupation.[11] The General Division did not have to consider any "hypothetical occupations"[12] because the Claimant was regularly working at a substantially gainful occupation within his limitations.[13] Therefore, a detailed *Villani* analysis was not required.

[13] Thus, the General Division made no error when it failed to conduct a detailed analysis of the Claimant's personal characteristics and their impact on his capacity to work.

Issue 2: Did the General Division fail to observe a principle of natural justice or make an error in law by failing to consider whether the Claimant's employer was a benevolent employer?

[14] The Federal Court of Appeal also teaches that a claimant may be disabled, despite being employed, if they work for a "benevolent employer." This term is not defined in the CPP. However, the Court has recognized that not all employers who provide accommodations to their employees are benevolent employers. To be a benevolent employer, the accommodations that employer offers must go beyond what is required in the competitive marketplace, and the work

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[9] *Garrett v. Canada (Minister of Human Resources Development)*, 2005 FCA 84
[10] *Atkinson supra* at note 3
[11] General Division decision para. 89
[12] *Villani supra* at note 1
[13] See also *J. P. v. Minister of Employment and Social Development*, 2017 SSTADIS 620

performance or output of that employee must be considerably less than what is required of others.[14] In this case, the General Division analyzed the evidence regarding the accommodations that the Claimant received at work. It found that the Claimant worked regular hours, his earnings were not nominal, and there was no evidence that he could not do the essential tasks of his lighter duties.[15] Therefore, it concluded that the employer was not a benevolent employer. The General Division's decision on this issue is logical, transparent, and based on the evidence that was before it. The General Division made no error in law in this regard.

[15] The principles of natural justice are concerned with ensuring that all parties to an appeal have the opportunity to present their case, to know and answer the case against them, and to have the decision made by an impartial decision-maker based on the law and the facts. Nothing in the written record or the parties' submissions suggests that the General Division failed to observe these principles. The appeal cannot succeed on the basis of a breach of natural justice.

Issue 3: Did the General Division make an error in law by failing to consider the *Boudreau* decision?

[16] In *Boudreau*, the Pension Appeals Board instructs that when the Minister ceases to pay a disability pension, it must demonstrate that the conditions upon which the disability payments were made had undergone such improvement that the claimant no longer qualified for the pension. The Claimant argues, based on this, that the Minister had to establish that his health conditions had improved such that he was no longer disabled under the CPP. However, this is not required. The Minister is required simply to establish an improvement in the Claimant's condition—which could be his medical condition, his capacity to work, or other circumstances.[16] The General Division did not err in this regard. It considered that when the disability pension was granted, the Claimant had back and neck pain and a serious kidney condition for which dialysis was prescribed. When the Minister reassessed his pension eligibility, the Claimant had successfully received a kidney transplant and was working on a regular basis in a substantially gainful occupation.[17] This was a significant improvement in his condition.

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[14] *Atkinson supra* at note 3
[15] *Ibid*. para. 87
[16] *D. H. v. Minister of Employment and Social Development*, 2015 SSTGDIS 65
[17] General Division decision para. 89

[17] In addition, the Federal Court of Appeal teaches that it is not the diagnosis of a medical condition that determines whether a claimant is disabled, but rather the impact that the medical condition has on the claimant's capacity regularly to pursue any substantially gainful occupation.[18] Therefore, a change in a claimant's medical condition would also not be determinative of a change in their disability status. The General Division correctly based its decision on the Claimant's return to part-time work.

[18] The Claimant also later increased his work hours and had regular increases in income. However, the General Division correctly stated that this was not relevant because it had to decide whether the Claimant was capable regularly of pursuing any substantially gainful occupation in April 2007.[19]

[19] The appeal cannot succeed on this basis.

CONCLUSION

[20] I am sympathetic to the Claimant's circumstances. I applaud him for persevering and working in spite of significant medical conditions and limitations. However, I cannot allow this appeal on the basis of the Claimant's circumstances.The General Division did not make any errors in law or fail to observe a principle of natural justice. It did not base its decision on any erroneous finding of fact. There is no indication that it overlooked or misconstrued any important evidence. Therefore, the appeal is dismissed.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	September 12, 2018
METHOD OF PROCEEDING:	Videoconference

[18] *Klabouch v. Canada (Social Development)*, 2008 FCA 33
[19] *Ibid*. para. 89

APPEARANCES:	V. V., Appellant Jordan Nussbaum, Counsel for the Appellant Jean-François Cham, Counsel for the Respondent