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

Citation: *Minister of Employment and Social Development v. P. R.*, 2018 SST 980

Tribunal File Number: AD-17-542

BETWEEN:

Minister of Employment and Social Development

Appellant

and

P. R.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Decision by: Shu-Tai Cheng

Date of Decision: October 5, 2018

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, the Minister of Employment and Social Development, appeals a decision of the General Division of the Social Security Tribunal of Canada granting a disability pension under the *Canada Pension Plan* (CPP) to the Respondent, P. R..

[3] The Respondent maintains that diabetes and injuries from a car accident prevent him from working. The General Division found that the Respondent has had a severe and prolonged disability since he stopped work in March 2014.

[4] The Appellant submits that the General Division erred in law in making its decision and that it also based its decision on serious errors in its findings of fact. The Appellant also argues that the General Division failed to observe a principle of natural justice by failing to provide adequate reasons for its decision.

[5] I find that the General Division did not commit any reviewable errors.

ISSUES

[6] Did the General Division breach a principle of natural justice by failing to provide adequate reasons for its decision?

[7] Did the General Division err in law (a) by failing to complete the *Villani*[1] real-world assessment, (b) by failing to apply the correct test for disability, or (c) by failing to apply Federal Court of Appeal jurisprudence?

[8] Did the General Division base its decision on errors in its findings of fact that it made without regard for the material before it?

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

[9] If the General Division did err, should the Appeal Division refer the matter back to the General Division for reconsideration, or can the Appeal Division render the decision that the General Division should have rendered?

ANALYSIS

[10] 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.[2] Because the General Division may have erred in law in making its decision, the Appeal Division granted leave to appeal.

[11] The Appeal Division does not owe any deference to the General Division on questions of natural justice, jurisdiction, or law.[3] In addition, the Appeal Division may find an error in law whether or not it appears on the face of the record.[4]

[12] The appeal before the General Division turned on the question of whether the Respondent had a severe and prolonged disability on or before the General Division hearing, which is a question of mixed fact and law.

[13] Where an error of mixed fact and law committed by the General Division discloses an extricable legal issue, the Appeal Division may intervene under s. 58(1) of the DESD Act.[5]

[14] The appeal before the Appeal Division rests on distinct questions of natural justice, errors of law, and serious errors in the findings of fact, each of which discloses an extricable legal issue.

Issue 1: Did the General Division breach a principle of natural justice by failing to provide adequate reasons for its decision?

[15] The General Division did not fail to provide adequate reasons for its decision.

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[2] *Department of Employment and Social Development Act* (DESD Act), s. 58(1).
[3] *Canada (Attorney General) v. Paradis*; *Canada (Attorney General) v. Jean*, 2015 FCA 242, para. 19.
[4] DESD Act, at s. 58(1)(*b*).
[5] *Garvey v. Canada (Attorney General)*, 2018 FCA 118.

[16] In the context of administrative tribunals, it is settled law that the decision-maker must provide sufficient reasons when rendering a decision.[6] Furthermore, "in the absence of any indication in the reasons that it engaged in a meaningful analysis of the evidence, a decision cannot stand."[7]

[17] The Appellant submits that the General Division's decision was insufficient because it did not provide any analysis as to how the Respondent's conditions were severe within the meaning of the CPP.

[18] The analysis was perhaps not as detailed as the Appellant would have liked, but the General Division did provide some analysis. It referred to documentary evidence on the Respondent's injuries from a severe car accident, diabetes, shoulder and arm problems, spine and postural dysfunction, the treatment that he had received, and his chronic pain. It also referred to the Respondent's testimony and evidence on his ability to work. Based on this evidence, the General Division found that the Respondent had a severe disability before the relevant date.

[19] The General Division's reasons need not be perfect; they must be read within the context of the evidence and the submissions.[8]

[20] In this case, the General Division did engage in some meaningful analysis of the evidence, and it did provide sufficient reasons for its decision.

Issue 2: Did the General Division err in law?

Failure to Complete the *Villani* Real-world Assessment

[21] I find that the General Division completed the *Villani* real-world assessment.

[22] The General Division was required to conduct an assessment of the "severe" criterion in a real-world context.[9] This means keeping in mind such factors as age, level of education, language proficiency, and past work and life experience when determining whether a person is incapable regularly of pursuing any substantially gainful occupation. This assessment seeks to

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[6] *Canada (Attorney General) v. Landry*, 2008 FC 810, para. 34.
[7] *Canada (Minister of Human Resources Development) v. Quesnelle*, 2003 FCA 92, para. 9.
[8] *Andrews v. Canada (Attorney General)*, 2018 FC 606.
[9] *Villani*, *supra* at note 1.

determine a claimant's workforce attachment in light of their medical condition and the limitations resulting from this condition. If the General Division failed to reasonably determine the Respondent's workforce attachment, then the *Villani* real-world assessment was not complete.[10]

[23] The General Division's analysis of the "severe" criterion consists of seven paragraphs.[11] Three of these paragraphs repeat portions of the evidence from earlier paragraphs of the decision.[12] One paragraph refers to the *Villani* case.[13] Three paragraphs state the General Division's conclusions.[14]

[24] The Appellant submits that the General Division's explanation of its conclusions appears to be that "it is evident" that the Respondent "does suffer a severe disability" and that, as a result, the General Division failed to complete the *Villani* assessment.

[25] I disagree. The General Division considered the Respondent's age,[15] level of education,[16] and past work and life experience.[17] It did not mention his language proficiency, but the Respondent's language proficiency has not been argued to be a limiting factor.[18] The General Division referred to specific medical evidence in the record and the Respondent's testimony to explain its conclusions on his medical condition and the limitations resulting from this condition.[19]

[26] The analysis was perhaps not as detailed as the Appellant would have liked, but the General Division did conduct an assessment of the "severe" criterion in a real-world context and did not fail to reasonably determine the Respondent's workforce attachment.

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[10] *Murphy v. Canada (Attorney General)*, 2016 FC 1208.
[11] General Division decision, paras. 31 to 37.
[12] Ibid., paras. 33 to 35.
[13] Ibid., para. 31.
[14] Ibid., paras. 32, 36, and 37.
[15] Ibid., para. 8.
[16] Ibid., paras. 8 and 37.
[17] Ibid., paras. 9, 15, 33, and 37.
[18] I note that before this Tribunal, this matter has taken place in English and French, at the Respondent's request.
[19] General Division decision, paras. 32 to 36.

[27] I also note that the Appellant withdrew certain arguments that it initially presented in its Notice of Appeal pertaining to the General Division's consideration of how the *Villani* factors impact the Respondent's capacity to work.[20]

[28] Nevertheless, the Appellant criticizes the General Division's *Villani* analysis. As a result, I felt it was necessary to make a determination on the General Division's *Villani* assessment. In my view, such a determination is acceptable under s. 58(1) of the DESD Act.[21]

Failure to Apply the Correct Test for Disability

[29] I find that the General Division did not fail to apply the correct test for disability.

[30] The Appellant submits that in finding that the Respondent was disabled, the General Division did not determine whether the Respondent was regularly incapable of substantially gainful employment. Instead, the General Division considered only "whether the [Respondent] was capable of some alternative type of work that might have accommodated his pain."

[31] The General Division referred to the legislative test for a "severe" disability as follows: a person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation.[22] It was aware of the legal test.

[32] It did not, however, repeat this wording in the analysis section of its decision. Instead, the General Division concluded that there was no work the Respondent could do, given his education, work and life experience, medical condition, and limitations.[23] It phrased this conclusion as "the Tribunal was hard pressed to imagine what else the Respondent could do," which is clearly a finding that the Respondent could not do any work.

[33] The General Division found that the Respondent was incapable of employment. This conclusion was broader than the wording in the CPP ("incapable regularly of pursuing any substantially gainful occupation"), but it certainly encompasses the legal test.

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[20] AD4, Notice of Appeal, paras. 29, 33, 34, and 35.
[21] *Garvey*, *supra* at note 5.
[22] General Division decision, para. 6.
[23] Ibid., para. 37.

[34] Failure to repeat the exact wording of the legislation in concluding that a claimant has a severe disability is not an error in law. It is the substance of the conclusion, rather than its form, that is important.

[35] The General Division found that the Respondent was incapable of employment, which encompasses the finding that he was incapable regularly of pursuing any substantially gainful occupation. It did not err in law by choosing to use plain language to explain its conclusion.

Failure to apply Federal Court of Appeal Jurisprudence

[36] I find that the General Division did not fail to apply the *Inclima* or *Klabouch* cases.[24]

[37] The Appellant submits that the General Division did not consider whether the Respondent made attempts to work in any substantially gainful employment within his limitations. It argues that Federal Court of Appeal jurisprudence requires that a claimant show that he or she has attempted to work in any substantially gainful occupation and that these attempts were unsuccessful due to a health condition.

[38] If the Respondent had some work capacity prior to the end of his minimum qualifying period (MQP), then he must show that efforts to obtain and maintain employment were unsuccessful by reason of a health condition.[25]

[39] In this case, the General Division concluded that the Respondent did not have any work capacity. Therefore, he was not required to show that his efforts to obtain and maintain employment were unsuccessful by reason of his health.

[40] The Appellant cites the *Klabouch* case for the principle that the measure of whether a disability is "severe" is not whether the claimant suffers from severe impairments, but whether his or her disability prevents him or her from earning a living.[26]

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[24] *Inclima v. Canada (Attorney General)*, 2003 FCA 117; *Klabouch v. Canada* (*Minister of Social Development*), 2008 FCA 33.
[25] *Inclima, supra* at note 24.
[26] *Klabouch, supra* at note 24.

[41] The General Division did not refer to the *Klabouch* case, but this did not, in and of itself, result in an error of law.

[42] The Appellant argues that the General Division focused on whether the Respondent suffers from severe impairments but failed to analyze whether his disability prevented him from earning a living.

[43] As explained above, I find that the General Division did measure whether the Respondent's disability prevented him from earning a living and it found that the Respondent could not work because of his disability.

Issue 3: Did the General Division base its decision on errors in its findings of fact that it made without regard for the material before it?

[44] I find that the General Division did not make an erroneous finding of fact without regard for the material before it.

[45] The Appellant submits that the Respondent failed to provide any objective evidence to support a finding that his disability was severe.

[46] The General Division summarized the medical evidence.[27] It is also presumed to have reviewed the entire documentary record.

[47] The Federal Court of Appeal has confirmed that an applicant for CPP disability benefits "must provide some objective medical evidence" of his or her disability.[28]

[48] The Appellant accepts that there was medical evidence of the Respondent's disability but argues that the medical evidence did not state that he is prevented from carrying out any substantially gainful employment.

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[27] General Division decision, paras. 9 to 13.
[28] *Warren v. Canada (Attorney General)*, 2008 FCA 377; *Pantic v. Canada (Attorney General)*, 2011 FC 591, para. 21.

[49] The Appellant takes the jurisprudence to mean that there must be medical evidence that clearly states that the Respondent's limitations prevent him from carrying out any substantially gainful employment. In my view, this interpretation takes the jurisprudence too far.

[50] In the *Pantic* case, upon which the Appellant relies, there was medical evidence that the claimant had an ability to work at a light level, his condition had improved, a physician questioned the correlation between his pain and his actual joint problems, and a physical examination did not suggest any organic problem. It is in this context that the Federal Court of Appeal stated that "[i]t is not an error of law to require objective evidence of the disability."

[51] I agree that Federal Court of Appeal jurisprudence confirms the need for some objective medical evidence of a claimant's disability. Whether that disability is "severe," as defined in the CPP, is a finding that the trier of fact (the General Division) needs to make based on all of the evidence, both documentary and oral.

[52] Here, the General Division had objective medical evidence and the Respondent's oral evidence upon which to make a finding that the Respondent's disability was "severe" by the end of his MQP.

[53] Although the Appellant relies on the *Garvey* case for the principle that "where a tribunal makes a factual finding that squarely contradicts or is unsupported by the evidence, its determination may be said to be made in a perverse or capricious manner or without regard to the evidence,"[29] the finding here was not contradicted or unsupported by the evidence.

[54] I note that the General Division's finding is that the Respondent's disability was "severe" and "prolonged" in March 2014, long before the end of his MQP (of December 31, 2017).

[55] I need not address the Appellant's submissions that there is a lack of evidence between September 2015 and the time of the General Division hearing (in March 2017) to support that the Respondent lives with a condition that renders him incapable regularly of performing any substantially gainful employment, because the General Division found the date of disability to be in March 2014.

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[29] *Garvey*, *supra* at note 5.

[56] The General Division did not base its decision on findings of fact that it made without regard to the material before it.

CONCLUSION

[57] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division

HEARD ON:	June 12, 2018 and July 24, 2018
METHOD OF PROCEEDING:	Teleconference and additional written submissions
APPEARANCES:	Stéphanie Pilon, Representative for the Appellant Pierre-Étienne Daignault, Representative for the Respondent