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

Citation: *V. P. v. Minister of Employment and Social Development*, 2018 SST 1147

Tribunal File Number: AD-18-296

BETWEEN:

V. P.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: November 14, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, V. P., was born in Sri Lanka, where he attended school up to the equivalent of Grade 12. He is now 37 years old. He moved to Canada in 2007 and worked in a series of low-skilled jobs, most recently as a dough mixer in an industrial bakery. In August 2013, he injured his back and right shoulder in a motor vehicle accident (MVA). After a period of recovery, he felt unable to return to the bakery and instead took a part-time job as a limousine driver. After three months, he quit because he had difficulty loading and unloading heavy baggage for customers. He has neither worked nor looked for work since December 2014.

[3] In February 2016, the Appellant applied for a Canada Pension Plan (CPP) disability pension. The Respondent, the Minister of Employment and Social Development (Minister), refused the application after determining that his disability was not "severe and prolonged" as of the minimum qualifying period (MQP), which ended on December 31, 2014.

[4] The Appellant appealed the Minister's refusal to the General Division of the Social Security Tribunal. The General Division held a hearing by teleconference and, in a decision dated January 31, 2018, dismissed the appeal, finding that the Appellant had failed to demonstrate that he was "incapable regularly of pursuing any substantially gainful occupation" as of the MQP. The General Division found that, despite his limited education, English language skills, and work experience, he still had residual work capacity. It also found that he had made insufficient effort to seek alternate work within his limitations.

[5] On May 7, 2018, the Appellant's legal counsel requested leave to appeal from the Tribunal's Appeal Division, alleging various errors on the part of the General Division. In a decision dated June 20, 2018, I granted leave to appeal because I saw a reasonable chance of success for two of the Appellant's arguments.

[6] Having now reviewed the parties' oral and written submissions, I have concluded that none of the Appellant's reasons for appealing have sufficient merit to warrant overturning the General Division's decision.

PRELIMINARY MATTER

[7] On August 7, 2018, following my leave to appeal decision, the Appellant's counsel submitted a 396-page package of documents, including a factum, case law, and various medical reports. Some of the reports had already been presented to, and considered by, the General Division; others had not. The factum also contained what appeared to be fresh evidence regarding the Appellant's efforts to return to work. The Appellant's counsel asked the Appeal Division to admit the new material into the record and to hear additional oral evidence from the Appellant.

[8] For reasons that I explained at the outset of the hearing, I could not grant the Appellant's counsel's requests. According to the Federal Court's decision in *Belo-Alves v Canada*,[1] the Appeal Division does not ordinarily admit new evidence, given the constraints of the *Department of Employment and Social Development Act* (DESDA), which does not give the Appeal Division authority to rehear claims on their merits.

ISSUES

[9] According to section 58(1) of the DESDA, there are only three grounds of appeal to the Appeal Division: the General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material.

[10] I must decide the following questions:

Issue 1: Did the General Division base its decision on an erroneous finding that the Appellant had a "good" education?

[1] *Belo-Alves v Canada (Attorney General)*, 2014 FC 1100.

Issue 2: Did the General Division err by dismissing expert reports for irrelevant reasons—that they were prepared after the MQP or referred to documents that were not before the Tribunal?

ANALYSIS

Issue 1: Did the General Division base its decision on an erroneous finding that the Appellant had a "good" education?

[11] In paragraph 42 of its decision, the General Division assessed the impact of the Appellant's background on his employment prospects:

> In this case, in determining that the Appellant's disability is not severe, I considered that he was very young (33 years old) as of the MQP with a good education (grade 12). I also considered that he is limited in his ability to speak and understand English and has worked in a variety of physically-demanding jobs. He has never done a sedentary type of work.

The Appellant objects to any suggestion that his education, which he obtained in another country in a foreign language, can be reasonably described as "good." He argues that he is not realistically employable in Canada, given his profile in combination with his medical condition.

[12] Now that I have fully considered the parties' submissions, I am convinced that the General Division based its decision on an erroneous finding that it made in a capricious manner. The oral and documentary evidence before the General Division indicated that the Appellant, whose spoken and written English language skills are limited, attended school up to the equivalent of Grade 12 in Sri Lanka. There was nothing in the file to indicate whether he had completed his formal education. There was no information about the quality of that education.

[13] I do not see how a high school education—even for an individual born and raised in Canada—can any longer be characterized as "good," particularly at a time when employers, in all sectors of the economy, are demanding more educational credentials from employees. In my view, the General Division committed an error.

[14] More than that, it was a material error—one that formed part of the foundation of the General Division's decision. As is typical in CPP disability cases, the General Division was

obliged to consider *Villani v Canada* and to consider the severity of the Appellant's impairments in the context of his education level, among other personal characteristics and background factors.[2] In finding that a high school education obtained overseas in a foreign language was not an impediment to retraining or future employment, the General Division removed one of the major supports of the Appellant's claim.

[15] The General Division, as finder of fact, is to be afforded a measure of deference in how it weighs evidence. However, that role is constrained by the terms of section 58(1)(c) of the DESDA, which allows the Appeal Division to intervene only when an error crosses the boundary into being "perverse or capricious." The courts have had little to say about what those terms mean in the specific context of the DESDA, although they have discussed similarly worded provisions in other statutes. In *Rahal v Canada*,[3] the Federal Court elaborated on the meaning of "perverse or capricious," as used in the *Federal Courts Act*:

> [36] In the seminal case interpreting section 18(1)(d) of the FCA, *Rohm & Haas*, Chief Justice Jacket defined "perversity" as "willfully going contrary to the evidence" (at para 6). Thus defined, there will be relatively few decisions that may be characterized as perverse.
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> [37] The notion of "capriciousness" is somewhat less exacting. In *Khakh v Canada (Minister of Citizenship and Immigration*) (1996), 116 FTR 310, [1996] FCJ No 980 at para 6, Justice Campbell defined capricious, with reference to a dictionary definition, as meaning "marked or guided by caprice; given to changes of interest or attitude according to whim or fancies; not guided by steady judgment, intent or purpose." To somewhat similar effect, Justice Harrington in *Matando v Canada (Minister of Citizenship and Immigration)*, 2005 FC 416 (CanLII) at para 1, [2005] FCJ No 509, defined "capricious" as being "so irregular as to appear to be ungoverned by law." Many decisions hold that inferences based on conjecture are capricious.

[16] In my view, the General Division's finding was irregular and unguided by steady judgment. The Appellant's level of education may be common, average, or typical, but by no means is it "good" by the standards of an industrialized society in the 21st century.

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[2] *Villani v Canada (Attorney General)*, 2001 FCA 248.
[3] *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319.

[17] The Minister submits that what the Appellant is really alleging is not an error of fact, but rather an error of mixed fact and law and therefore beyond the Appeal Division's jurisdiction. The Minister relies on recent Federal Court of Appeal decisions[4] suggesting that disagreement with the application of settled law to the facts is not reviewable by the Appeal Division. In this case, the Minister argues that the Appellant is barred from challenging **how** the General Division applied *Villani* to the available facts, and it claims that this is precisely what the Appellant did in his notice of appeal, when he criticized as "highly speculative" the General Division's finding that he could retrain, describing it as "removed from the real world context which faces this particular applicant…."

[18] I disagree with the Minister on this point. *Quadir v Canada* and the line of cases flowing from it implicitly require the Tribunal to ask whether a reason for appealing can be discretely classified as an alleged error of law or an erroneous finding of fact under section 58(1) of the DESDA. If it can, then the decision-maker can proceed with its analysis, applying the ground of appeal that the allegation happens to fall into. In this instance, it is clear, despite his awkward framing of the issue, that the Appellant's complaint was essentially about how the General Division characterized his education. At heart, this was an allegation purely concerned with factual error. Having erroneously found that the Appellant had a good education, the General Division then made use of that finding in its *Villani* analysis, but that does not take away from the fact that it correctly understood and interpreted the principle behind *Villani* itself.

Issue 2: Did the General Division err by dismissing expert reports for irrelevant reasons?

[19] The Appellant alleges that the General Division erred by assigning lesser weight to two key reports for misplaced reasons—the fact that both were dated after the MQP and the fact that one relied on documents that were not produced in the hearing file.

[20] The General Division has a fact-finding mandate, and it should be afforded a degree of deference in how it assesses the material before it, but there must also be some rational basis for the weight it chooses to assign competing items of evidence. In this case, the General Division discounted Dr. Stephen Brown's November 21, 2016, medical-legal report because it was "dated

[4] *Quadir v Canada (Attorney General)*, 2018 FCA 21; *Cameron v Canada (Attorney General)*, 2018 FCA 100; *Garvey v Canada (Attorney General)*, 2018 FCA 118.

well-passed [*sic*] the MQP and is of limited use in determining whether the Appellant had a severe disability as of the MQP."[5] Temporal distance from the eligibility period is not, in and of itself, an indefensible reason to discount a medical report, given the reality that an assessment of a claimant's condition conducted during the MQP will usually be more accurate and relevant than an account made after it.

[21] However, David Cohen's November 7, 2017, vocational assessment[6] is another matter. It was also dated after the MQP, but it was concerned with more than just the Appellant's impairments; it also assessed his vocational prospects in the context of his background, including his age, education, English language skills, and work experience. These factors, and their impact on the Appellant's employability, would have been the same whether they were assessed during or after his MQP. The date of Mr. Cohen's report therefore had less bearing on its evidentiary value.

[22] More significant was the General Division's decision to discount the Cohen report because it relied on medical reports that were not on the record. In its decision, the General Division wrote:

> More specifically, Mr. Cohen found that the Appellant is only suited to employment that was physically demanding and elemental in nature and that he would be unable to seek employment at such elemental levels given his lack of transferrable worker skills and inabilities in the English language. However, this report is dated well-passed [*sic*] the MQP and the findings are based in part upon documents that were not made available to the Tribunal.[7]

In this passage, the General Division does not specify what documents were mentioned in the Cohen report but not included the hearing file. The General Division does not explain how the absence of those underlying documents undermined the value of Mr. Cohen's findings. There is nothing in the record to indicate that the General Division requested the missing documents and that the Appellant failed to provide them.

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[5] General Division decision, at para 45.
[6] GD5-2.
[7] General Division decision, at para 48.

[23] David Cohen is presumably an expert in his field who has experience synthesizing and analyzing information. It seems to me that his report stood on its own, and I fail to see how it would have necessarily carried more weight if all of the primary evidence associated with it had been available to the General Division. If the General Division was suggesting that it needed to verify the results of the vocational assessment in order to give it due weight, I cannot agree, if for no other reason than it lacked the professional qualifications to do so.

DISPOSITION

[24] The DESDA sets out the Appeal Division's powers to remedy errors by the General Division. Under section 59(1), I may give the decision that the General Division should have given; refer the matter back to the General Division for reconsideration in accordance with directions; or confirm, rescind, or vary the General Division's decision. Furthermore, under section 64 of the DESDA, the Appeal Division may decide any question of law or fact that is necessary for the disposition of any application made under the DESDA.

[25] In oral submissions, both parties agreed that, in the event I found errors in the General Division's decision, the appropriate remedy would be to give the decision the General Division should have given. Of course, the parties disagreed about what that decision should be, with the Appellant arguing that the available evidence proved disability and the Minister arguing the opposite.

[26] The Federal Court of Appeal has stated that a decision-maker should consider the delay in bringing an application for a disability pension to conclusion. The Appellant applied for a disability pension nearly three years ago. If this matter were referred back to the General Division, it would lead only to further delay. In addition, the Tribunal is required to conduct proceedings as quickly as the circumstances and the considerations of fairness and natural justice allow. I doubt that the Appellant's evidence would be materially different if the matter were reheard.

[27] I am satisfied that the record before me is complete. The Appellant has filed numerous medical reports with the Tribunal, and I have considerable information about his employment and earnings history. The General Division conducted a full oral hearing and questioned the

Appellant about his impairments and their effect on his work capacity. As discussed earlier, the Appellant now wishes to admit new information about his attempts to pursue alternative employment, but he and his legal counsel were given ample opportunity to submit relevant evidence before, during, and even after, the hearing before the General Division.

[28] As a result, I am positioned to assess the evidence that was on the record before the General Division and to give the decision that it would have given, if it had not erred. As I have already noted, the General Division based its decision, in part, on erroneous findings that the Appellant had a good education and that David Cohen's vocational assessment report had limited value because certain documents to which it referred were not included in the hearing file.

Did the Appellant have a severe disability as of the MQP?

[29] To be found disabled, claimants must prove on a balance of probabilities that they had a severe and prolonged disability at or before the end of the MQP. A disability is severe if a person is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

[30] Having reviewed the record, I am not convinced, on balance, that the Appellant had a severe disability as of December 31, 2014. While I do not doubt that the Appellant experiences physical restrictions, I do not see compelling evidence—even when I take into account the conclusions of David Cohen's vocational assessment report—that the Appellant was unable to regularly pursue substantially gainful employment as of the MQP. Like the General Division, I place significant weight on the Appellant's failure to pursue alternative employment that might have been suited to his limitations.

The Appellant had residual capacity

[31] *Inclima v Canada*,[8] a decision of the Federal Court of Appeal, obliges claimants to demonstrate their disability by showing that they attempted and failed to remain in the productive workforce: "Where there is evidence of work capacity, a person must show that efforts at obtaining and maintaining employment have been unsuccessful by reason of their

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

health condition." In order to invoke *Inclima*, a decision-maker must first determine whether the claimant had the residual capacity to make such efforts.

[32] In this case, there is no doubt that the Appellant sustained MVA-related injuries to his neck, back, and shoulders that have left him unable to perform physically demanding jobs such as those he held throughout his working life; however, I have also concluded that the Appellant had at least the residual capacity to seek alternative work during the MQP. In coming to this conclusion, I was influenced by the following factors:

- In a CPP medical report dated January 30, 2016,[9] Dr. Panchasheila Sivakumar, family practitioner, indicated that the Appellant had pain in his back, right shoulder, and right leg, but he did not say that the Appellant was incapable of working. Asked for his prognosis, Dr. Sivakumar wrote, "Unknown."
- In the questionnaire accompanying his CPP disability application dated February 4, 2016,[10] the Appellant wrote that he could stand for 10 minutes and sit "comfortably" for 15 minutes.
- The evidence indicates that the Appellant takes minimal pain medication: Vimovo (slow release naproxen) every second day and Tylenol or Advil as needed.
- In a letter dated June 25, 2014,[11] Dr. Read Abughaduma, orthopedic specialist, wrote that the Appellant complained of a continuous dull, aching pain in his right shoulder but was otherwise "healthy." Dr. Abughaduma noted MRI evidence of a torn rotator cuff (which he disputed) and, on examination, he found that the Appellant showed good range of motion in both shoulders, good rotator cuff strength, and only localized tenderness around the trapezium.
- In his November 2016 independent medical examination report, Dr. Brown, whose specialties are anesthesia and pain management, diagnosed the Appellant with chronic pain syndrome, rotator cuff tendinopathy, mechanical back pain, and obstructive sleep apnea. Dr. Brown concluded that the Appellant's medical

[9] GD2-47.
[10] GD2-68.
[11] GD2-63.

> conditions prevented him from "fully engaging in substantially all of the activities in which he ordinarily engaged." However, Dr. Brown did not rule out the possibility of low-impact employment, and he held out the possibility of improvement if the Appellant received pain management counselling in tandem with psychiatric care.

[33] I did not find any evidence that the Appellant's psychological condition significantly contributed to his impairment, either. I note that Dr. Sivakumar's CPP medical report made no mention of any mental health conditions. The only psychiatric or psychological assessment documented in the file did not emerge from treatment; it was commissioned by the Appellant's legal counsel. In a report dated January 3, 2014,[12] Helen Ilios and Andrew Shaul diagnosed the Appellant with an adjustment disorder with anxiety, major depressive disorder, and specific phobia (travelling in a vehicle). They concluded that he was completely unable to return to his pre-accident job and that he was unlikely to be able to return to any type of employment. However, despite this bleak prognosis, Ms. Ilios and Dr. Shaul recommended what strikes me as a fairly light treatment regimen: an initial three to four months of counselling sessions with a focus on alleviating the Appellant's fear and anxiety of being in a car. I also note that Ms. Ilios and Dr. Shaul did not advise the type of intensive psychotherapy, delivered by a medically trained psychiatrist, that one might expect to see in more serious cases, nor did they contemplate the use of psychoactive prescription drugs, which are commonly indicated for major depression and anxiety.

[34] The most compelling evidence in the Appellant's favour was David Cohen's November 2017 vocational evaluation and transferrable skills analysis report. It considered all aspects of the Appellant's work and medical history and subjected him to a series of tests designed to measure his skills and aptitudes. It considered nearly two dozen documents, including medical-legal reports commissioned by the Appellant's insurer that found him capable of performing the essential tasks of his previous employment. Even so, it found that the Appellant's pain, predominantly in his right shoulder, prevented him from doing the kind of repetitive, physically demanding factory work that he performed prior to his MVA. It found that the Appellant was able to have basic conversations in English but that his reading comprehension and written skills

[12] GD7-2.

were lacking. It found that the Appellant scored low in reasoning and cognition but attributed his poor performance, in part, to the deficit in his English-language skills.

[35] Mr. Cohen concluded that the Appellant's vocational skills were not compatible with alternate employment that would require "enhanced decision-making, future skill developments in English and overall reasoning abilities." He also found that the Appellant had a severe and prolonged disability, according to the criteria set out in the CPP, noting that it had been 4½ years since the MVA and that the Appellant had become "physically and mentally deconditioned," although he had yet to reach maximum medical improvement.

[36] The Cohen report was only one of many items of evidence that I took into consideration but, in the end, I found that it did not outweigh the factors, listed above, indicating capacity. First, it was dated nearly three years after the MQP, limiting its usefulness as a tool to gauge whether the Appellant's impairments were severe and prolonged at the most relevant time. Second, the report adopted Dr. Brown's finding that the Appellant's chronic pain would benefit from further physiotherapy, structured exercise, cognitive behavioural therapy, and a multidisciplinary comprehensive rehabilitation—all of which suggest that there were avenues of treatment that had yet to be fully explored. Finally, the report noted the Appellant's interest in sales and clerical work, although it found that he would require "extensive vocational rehabilitation assistance" to acquire the necessary skill sets for those jobs. Here, the assessors were sounding a cautionary note, but they nevertheless saw a possibility that the Appellant could eventually return to work if he upgraded his skills.

[37] I see nothing in the Appellant's profile that would prevent him from upgrading his skills and, eventually attempting some form of non-physical work. At the end of his MQP, he was only 33 years old—young enough to adapt and learn new skills. Although his spoken English is rudimentary, it is good enough that he could understand and participate in significant portions of his hearing before the General Division unassisted by an interpreter—he has a base of knowledge on which he can build. As the vocational assessment noted,[13] some sales jobs require high school diplomas, but that leaves many that do not, and, in any event, the Appellant has completed secondary school, albeit in another country. In my view, there is nothing in the Appellant's

[13] GD5-26.

profile to suggest that retraining or sedentary work was beyond his physical or mental capabilities.

The Appellant did not attempt to pursue alternative employment

[38] Ultimately, the Appellant's appeal fails because, even though he has residual capacity, he has never attempted to find work that might be compatible with his limitations. His failure to do so makes it difficult to determine with any certainty whether he was capable of a substantially gainful occupation as of the MQP.

[39] At the hearing before the General Division, the Appellant was asked what types of work he had attempted since his June 2013 MVA and the subsequent loss of his bakery job.[14] He testified that he had obtained a specialty driver's licence and had worked as a part-time limousine driver from September to December 2014. He said that he worked two hours per day and had difficulty loading and unloading heavy luggage for airport passengers. He said that each trip was 60 to 90 minutes but that every 30 minutes he had to stop his vehicle so that he could get out and stretch his muscles. He did not mention any other attempted jobs.

[40] *Inclima* requires disability claimants in the Appellant's position to show that **reasonable** attempts to obtain and secure employment have been unsuccessful because of their health condition. In this case, the Appellant has tried alternative employment, but it was never likely that his efforts would succeed. It was unreasonable for an individual with a right shoulder injury and back pain to expect that he could sustain a job that required him to hoist baggage weighing 30 or 40 pounds. Low-skilled, low-impact jobs still exist, but the Appellant did not offer any evidence that he had ever pursued one, much less worked at one.

[41] Applicants for disability entitlement should demonstrate a good-faith preparedness to pursue alternative employment that, given their limitations, they might be able to manage.[15] In this case, the Appellant has not done so.

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[14] Audio recording of the General Division hearing at 18:00.
[15] *Lombardo v Minister of Human Resources Development* (July 23, 2001), CP12731 (PAB).

Did the Appellant have a prolonged disability as of the MQP?

[42] Since the Appellant's evidence falls short of the severity threshold, there is no need to consider whether his disability can be characterized as prolonged.

CONCLUSION

[43] I am dismissing this appeal. Although the General Division committed two significant errors in assessing the evidence, I do not think that it would have come to a different conclusion if it had not made those errors. Having conducted my own review of the record, I am not persuaded that the Appellant had a severe disability as of December 31, 2014.

Member, Appeal Division

HEARD ON:	October 23, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	V. P., Appellant Andrea Triolo, Representative for the Appellant Christian Malciw, Representative for the Respondent