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

Citation: *T. C. v Minister of Employment and Social Development*, 2019 SST 36

Tribunal File Number: AD-18-747

BETWEEN:

T. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: January 18, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, T. C., was born in Cambodia and came to Canada as a refugee in 1986. She is now 61 years old. She has spent her working life as a manual labourer, most recently as X in X. She has not worked since September 2015, when she was involved in a motor vehicle accident that aggravated existing back and left shoulder strain. In November 2017, she had a stroke.

[3] In June 2016, the Appellant applied for a disability pension under the *Canada Pension Plan* (CPP), claiming that she could no longer work because of pain, weakness, headaches, anxiety, and depression. The Respondent, the Minister of Employment and Social Development (Minister), refused the application because it found that her disability was not "severe and prolonged," as defined by the CPP, as of her minimum qualifying period (MQP), which ended on December 31, 2017.

[4] The Appellant appealed the Minister's refusal to the General Division of the Social Security Tribunal. The General Division conducted a teleconference hearing and, in a decision dated September 26, 2018, concluded that the Appellant was, more likely than not, able to perform substantially gainful work as of the MQP. The General Division based its decision, in part, on a finding that the Appellant had not attempted to upgrade her education, improve her English language proficiency, or otherwise obtain employment within her limitations.

[5] On November 13, 2018, the Appellant's representative requested leave to appeal from the Tribunal's Appeal Division, alleging various errors on the part of the General Division. In particular, the Appellant's representative submitted that the General Division:

(i) breached a principle of natural justice by conducting the hearing by teleconference, in the process, depriving itself of the opportunity to observe the Appellant's tone and demeanour directly and not through an interpreter;

(ii) erred in law by failing to analyze the Appellant's impairments in accordance with *Villani v Canada*;[1] and

(iii) based its decision on an erroneous finding that the Appellant's chronic pain did not amount to a severe disability.

[6] In a decision dated November 28, 2018, I granted leave to appeal because I saw an arguable case that the General Division had invoked the Appellant's obligation to pursue alternative employment without having first properly assessed her residual capacity in light of background factors such as her age, education, and English proficiency.

[7] On January 4, 2019, the Appellant's representative asked for the matter to be returned to the General Division for a new hearing to be conducted in person or by videoconference. In a letter dated January 11, 2019, the Minister agreed, describing the hearing before the General Division as unsatisfactory because the teleconference format forced the Appellant to deliver her testimony in a separate location from her interpreter.

[8] I have decided that an oral hearing is unnecessary for this appeal. I am proceeding solely on the basis of the documentary record because there are no gaps in the file and no need for clarification. Having reviewed the record and considered the parties written submissions, I have concluded that the Appellant's submissions have sufficient merit to warrant a new hearing.

ISSUES

[9] According to section 58 of the *Department of Employment and Social Development Act* (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 before it.

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

[10] The issues before me are as follows:

Issue 1: Did the General Division fail to observe a principle of natural justice when, knowing that the Appellant required an interpreter, it chose to conduct the hearing by teleconference?

Issue 2: Did the General Division err in law by failing to analyze the Appellant's impairments in accordance with *Villani*?

Issue 3: Did the General Division base its decision on an erroneous finding that the Appellant's chronic pain did not amount to a severe disability?

ANALYSIS

[11] I will limit my remarks to the two issues for which I see merit.

Issue 1: Did the General Division fail to observe a principle of natural justice when, knowing that the Appellant required an interpreter, it chose to conduct the hearing by teleconference?

[12] I agree with the parties that language interpretation at the hearing was problematic, but not for the reasons that they have put forward. The Appellant submits that the process was fundamentally flawed because she, as a stroke victim, was required to testify through an interpreter who, like her, participated in the hearing by teleconference. The Appellant added:

> It is submitted that the Learned Member received translated evidence and did not have the benefit of observing the Appellant including her demeanor and the tone of her voice. In the circumstances where the medical conditions include both chronic pain and depression, a teleconference is not a reasonable appropriate process for a hearing. In effect, the Learned Member is adjudicating based upon the voice of an interpreter.[2]

[13] I have difficulty accepting that a teleconferenced hearing was necessarily unfair in these circumstances. Section 21 of the *Social Security Tribunal Regulations* states that the General Division may hold a hearing by one of several methods. The word "may" in the text—without qualifiers or conditions—suggests that the General Division has discretion to make this decision.

[2] Schedule A to the Appellant's leave to appeal application, AD1-16.

This is not to suggest that the General Division's discretion can be completely divorced from reason. However, the Federal Court of Appeal has confirmed that setting aside a discretionary order requires an appellant to prove that the decision-maker committed a "palpable and overriding error."[3] I see nothing like that in the General Division's decision to hold the hearing by teleconference.

[14] Once the Appellant requested interpretation, her testimony was always going to be mediated, whether the hearing was held by teleconference, videoconference, or personal appearance. In this case, the Appellant was given an opportunity to describe her symptoms and their effect on her capacity to work. Her words had to be translated from Khmer to English and back, and something was inevitably lost in that process, but the General Division was still in a position—even by telephone—to hear emotion in the Appellant's voice. I do not see how visual inspection of the Appellant, as she testified about her chronic pain and depression, was necessary to properly assess the severity of those conditions. Moreover, by referencing her stroke, the Appellant comes perilously close to suggesting that the General Division member himself should have conducted a personal assessment of the severity of her symptoms—something that I think is better left to clinicians.

[15] That being said, I still have reason to believe that the Appellant did not receive a fair hearing. I have reviewed the audio recording of the teleconference that took place before the General Division on August 22, 2018. It reveals that the hearing started without the services of an interpreter, even though the Appellant had earlier requested one in writing.[4] At one point,[5] the Appellant's son can be heard speaking to his mother in her native language in an apparent attempt to clarify one of the General Division's questions. Later,[6] the presiding General Division member asked the Appellant's representative whether he was satisfied that his client understood what was being said. Nearly 20 minutes into the 91-minute hearing, after the General Division

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[3] *Imperial Manufacturing Group Inc. v Decor Grates Incorporated*, 2015 FCA 100; *Horseman v Horse Lake First Nation*, 2015 FCA 122; *Budlakoti v Canada (Citizenship and Immigration)*, 2015 FCA 139.
[4] Email from Shelley Chornaby of Shuh Cline & Grossman, LLP, July 24, 2018, GD13.
[5] Hearing recording, part 1, 8:55.
[6] Hearing recording, part 1, 16:25.

member's introductory remarks and well into questioning, the interpreter finally joined the call.[7] When asked whether he wanted to use the interpreter, the Appellant's representative agreed.

[16] All of this suggests to me that the Appellant genuinely needed an interpreter. In any case, if there was uncertainty about the matter, the General Division should not have proceeded until or unless an interpreter was present. I presume that, before the hearing formally began and the voice recorder was activated, the Appellant and her legal representative consented to proceed in the absence of an interpreter. However, that did not relieve the General Division of its own responsibility to ensure that the Appellant was able to express herself at the hearing and to understand what was being said. While the Appellant may have apparently consented to proceed, there remained the possibility that she did not appreciate what was being asked of her, that she overestimated her English language proficiency, or that she did not want to risk further delay and simply wanted the hearing behind her.

Issue 2: Did the General Division err in law by failing to analyze the Appellant's impairments in accordance with *Villani*?

[17] The Appellant suggests that the General Division misapplied *Villani*, which requires disability to be considered in a real-world context, taking into account a claimant's employability, given their age, work experience, level of education, and language proficiency. The Appellant specifically alleges that the General Division erred when it found that her disability fell short of severe, despite evidence that she cannot realistically work in a sedentary position.

[18] In this case, I am satisfied that the General Division erred in law. In paragraph 16 of its decision, the General Division correctly cited *Villani* and noted some of the Appellant's personal characteristics, but I am not sure that it actually applied the real-world principle to the facts at hand:

> The [Appellant] was 60 years of age at the time of the MQP. She has a limited education and English is not her first language. Her employment has been manual and has not given her significant transferable skills. She has not made any effort to upgrade her education or improve her English language proficiency. She testified she does not have significant

[7] Hearing recording, part 1, 18:30.

> problems with memory and there is no indication she is incapable of learning new skills to obtain employment within her limitations. There is insufficient medical evidence and lack of employment efforts. The [Appellant] may not be capable of returning to her regular employment however she did not prove on a balance of probabilities she was incapable regularly of pursuing any substantially gainful occupation in a real world context.

This passage addresses not just *Villani*, but also *Inclima v Canada*,[8] which requires claimants to show that their attempts to obtain and maintain employment have been unsuccessful because of their health conditions. However, the duty to make such attempts applies only if the claimant is first found to have residual capacity. *Villani* makes it clear that a claimant's health condition and their personal characteristics are inseparably linked and cannot be considered in isolation from each other: "the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant."[9]

[19] In combining its *Villani* and *Inclima* analyses, the General Division referred to the Appellant's obligation to pursue alternative employment without having first properly assessed her residual capacity in light of her age, education, and English proficiency. The General Division is permitted to draw an adverse inference from a claimant's failure to seek work, but only if it first finds that the claimant has residual capacity; however, a claimant's failure to seek work cannot by itself be used to make a finding that their disability is severe.

REMEDY

[20] 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.

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[8] *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[9] *Villani supra* note 1 at para 38.

[21] Under section 3 of the *Social Security Tribunal Regulations*, the Appeal Division is required to conduct proceedings as quickly as circumstances and considerations of fairness allow, but I feel my only option is to refer this matter back to the General Division for rehearing.

[22] I do not think that the record is complete enough to allow me to decide this matter on its merits. I have reason to believe that the Appellant's testimony was compromised because she may not have fully understood the General Division's introductory remarks and thus may not have been apprised of the applicable law and relevant issues. There is also the fact that, for a significant portion of the hearing, the Appellant spoke without the benefit of a qualified interpreter.

CONCLUSION

[23] For the above reasons, I find that the General Division erred in law and failed to observe a principle of natural justice. Because the record is not sufficiently complete to allow me to decide this matter on its merits, I am referring it back to the General Division for a new hearing.

[24] In view of the Appellant's strongly expressed views on the subject, I am directing the General Division to conduct the hearing either by videoconference or in person. Either way, I encourage the General Division to ensure that, when the hearing occurs, the next interpreter is in the same location as the Appellant.

Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVES:	Mark S. Grossman, for the Appellant Sandra Doucette, for the Respondent