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

Citation: *D. T. v Minister of Employment and Social Development*, 2019 SST 676

Tribunal File Number: AD-19-98

BETWEEN:

D. T.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: July 19, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, D. T., was employed for many years as an electronics testing technologist. She has had a hearing impairment since childhood but was able to do her job because her bosses allowed her to communicate by email. In July 2015, her position was eliminated when her company moved its operations to Mexico. She claims that she has applied for many jobs but has had no offers because she cannot communicate by telephone or in person without captioning.

[3] The Appellant is now 52 years old. In July 2017, she applied for a Canada Pension Plan (CPP) disability pension, claiming that she could no longer work because of profound bilateral hearing loss. The Respondent, the Minister of Employment and Social Development (Minister), refused the application because it found that the Appellant's disability was not "severe and prolonged," as defined by the *Canada Pension Plan*.

[4] The Appellant appealed the Minister's decision to the General Division of the Social Security Tribunal. The General Division conducted an in-person hearing and, in a decision dated December 7, 2018, found that the Appellant had provided insufficient evidence that she was incapable regularly of performing substantially gainful work as of the hearing date.[1] The General Division also found that the Appellant had made insufficient effort to obtain alternative work that was suited to her limitations.

[5] On February 1, 2019, the Appellant requested leave to appeal from the Tribunal's Appeal Division, alleging that the General Division had committed errors in rendering its decision. The Appellant insisted that she was unable to apply for employment because her severe hearing loss prevented her from participating in the first stage of an interview by phone or in person. She also

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[1] The hearing took place on November 28, 2018. The General Division determined that, based on the Appellant's earnings and contributions to the CPP, her Minimum qualifying period would end on a future date—December 31, 2019.

took issue with the General Division's suggestion that she might be capable of data entry work, because it required communication with other people.

[6] In my decision dated February 28, 2019, I allowed leave to appeal because I saw a reasonable chance of success for the Appellant's submissions. Although the Appellant did not raise them in her submissions, I also identified two other instances in which the General Division had possibly committed errors.

[7] In written submissions dated April 1, 2019, the Minister defended the General Division's decision, arguing that the presiding member had weighed the available evidence and come to the defensible conclusion that the Appellant's hearing impairment did not prevent her from attempting jobs outside of her field.

[8] Having reviewed the parties' oral and written submissions, I find that the General Division committed errors of both fact and law. I am satisfied that the record is sufficiently complete for me to make my own assessment of the evidence and to find the Appellant disabled as of the hearing date.

ISSUES

[9] According to 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 that it made in a perverse or capricious manner or without regard for the material before it.[2]

[10] I must address the following issues:

Issue 1: Did the General Division err when it found that the Appellant was capable of alternative work?

Issue 2: Did the General Division base its decision on the irrelevant detail that the Appellant's daughter was involved in her mother's job search?

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[2] DESDA, s 58(1).

Issue 3: Did the General Division err by misinterpreting *Villani v Canada*?

ANALYSIS

Issue 1: Did the General Division err in finding that the Appellant was capable of alternative work?

[11] I am convinced that the General Division failed to give full consideration to the Appellant's employability in light of her impairment and her personal profile.

[12] I do not come to this conclusion lightly. I am aware that the General Division's primary mandate is to weigh evidence and make findings of fact.[3] I am also conscious of the wording of section 58(1) of the DESDA, which suggests that the General Division's findings of fact must be afforded a measure of deference.

[13] I agree that the General Division has the right to assess the available evidence as it sees fit, but only up to a certain point. The General Division risks crossing the threshold of error when its conclusions become so divorced from the record that they cannot be defended.

[14] In this case, the General Division accepted that the Appellant had a profound hearing impairment and that her hearing had deteriorated over the 16 years in which she held her last job. In its decision, the General Division found that the Appellant and her daughter had "testified in a straightforward manner that was consistent with the medical evidence."[4]

[15] The decision turned, not on the extent of the Appellant's hearing loss, but on her efforts to mitigate that loss, as required by the leading case *Inclima v Canada.*[5] The General Division summarized the Appellant's testimony on this point as follows:

> Since 2015 she estimated that she has applied online for between 50 and 100 different positions in the fields of electronic manufacturing, labour, assembly and data entry. Sometimes she identifies her hearing loss on the application and sometimes she does not. She estimated that she had heard from about 10 to 20 percent of the jobs she applied for. Where she has identified her hearing loss she has not heard further from prospective employers. If she does not identify her disability she has lots of calls for

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[3] *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[4] General Division decision at para 11.
[5] *Inclima v Canada (Attorney General)*, 2003 FCA 117.

> interviews. The [Appellant] testified that during the initial phone interviews, her daughter will pretend to be the [Appellant] so she can advance to the next stage in the interview process. However, where the [Appellant] has been able on two occasions to attend an interview in person she was unable to communicate with the interviewer as there was no caption interpretation provided and she did not advance in the hiring process. Further, once the employer became aware that she did not participate in the original phone call they were no longer interested in hiring her. She was able to provide the names of a few companies where she applied and was unsuccessful in the interview.[6]

[16] I have listened to the audio recording of the General Division hearing, and it largely confirms the above account. It indicates that the presiding member closely questioned the Appellant about what she had done to find work in the previous three years. It also indicates that the Appellant did her best to provide answers. Despite that, the General Division found that the Appellant's attempt to obtain alternative employment had fallen short:

> When I asked her how many data entry jobs she had received interview requests for she was uncertain. She said that of the 50-100 jobs she applied for around 5-10 were government jobs, but she heard nothing back. She was unable to provide further details regarding these positions. She was unsure why she would ask for an in person interview when this was not suitable. When I asked her why her daughter pretended to be her she would not simply ask for her mother's interview to be conducted in person she said that once she identified her hearing loss employers were no longer interested. **Overall I found her testimony to be vague and she did not have detailed information with respect to her job search.** Further, she had not looked for work in four months. I am mindful that the [Appellant's] hearing loss is a significant barrier to finding suitable work. However, there are job opportunities for people with profound hearing loss and I am not satisfied that, on a balance of probabilities, the evidence demonstrates the [Appellant] has not made efforts to find a suitable position [emphasis added].[7]

[17] I did not find the Appellant's testimony vague or lacking in detail. As indicated in the above passages, she was able to provide an estimate of the number of jobs to which she had applied. She was able to say what percentage of potential employers had replied to her. She was able to list the fields in which she had applied. She was able to describe the circumstances in

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[6] General Division decision at para 14.
[7] General Division decision at para 15.

which interviews were conducted and why she believed those interviews were ultimately unsuccessful. She was able to name some of the companies who had declined to hire her.

[18] Beyond this disregard for the record, the General Division sometimes displayed questionable logic. The General Division, which had previously found the Appellant credible when she was talking about her impairment, now found her unreliable on the subject of her job search. It seemed puzzled by the revelation that the Appellant's daughter sometimes impersonated her mother over the telephone, even though it was clear that this gambit was little more than a desperate attempt to get through the first stage of interviews. Finally, the General Division drew a negative inference from the fact that the Appellant had not looked for work for four months, although I am not aware of any requirement for a disability claimant to carry on a job search until the moment of the hearing.

[19] The Minister argues that the General Division rightly found the Appellant's job search too narrow, because she applied only to positions that were in keeping with her skills and experience. I must disagree. It is true that the Appellant testified, "I can do the job, but I can't get the job."[8] This statement expresses the Appellant's conviction that she has capacity, but it also reflects her actual employability in the competitive labour market. The Appellant's last job as a technology tester was largely sedentary, and it came with unusual accommodations (the right to communicate exclusively by email) that few employers would be willing to countenance. It appears that the Appellant applied only to jobs that suited her qualifications, but I do not doubt that if she had widened her job search to include lower-skilled occupations such as—to take three random examples—retail worker, data entry clerk, or restaurant server, she would have met with the same disappointing response.

Issue 2: Did the General Division base its decision on the irrelevant detail that the Appellant's daughter was involved in her mother's job search?

[20] In paragraph 11 of its decision, the General Division wrote: "The fact that her daughter assisted her with the process of looking for work is a further indication that the [Appellant] is capable of working in a suitable or accommodated work environment."

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[8] Recording of hearing, 47:10.

[21] As noted, the General Division placed weight on the revelation that the Appellant's daughter impersonated her mother in several telephone interviews. I agree that it served no useful purpose to fool prospective employers in this way, but I do not think that attempting to do so indicated capacity one way or another. In that respect, the General Division's statement constitutes an erroneous finding of fact, made without regard for the material before it. Indeed, looking at this evidence, one might more logically reach an opposite conclusion to the General Division's—that the Appellant's need for assistance, however misguided, was actually an indictor of disability, rather than ability.

Issue 3: Did the General Division err by misinterpreting *Villani v Canada*?

[22] On leave to appeal, I saw an arguable case that the General Division had erred in law by misapplying the "real-world" principle from *Villani v Canada.*[9] In its decision, the General Division wrote: "Since I am not persuaded that the [Appellant] suffered from a severe disability as of the MQP her personal circumstances are not relevant to the determination."[10]

[23] *Villani* makes it clear that a claimant's health condition and their background are inextricably linked and cannot be considered in isolation from each other: "[T]he hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant."[11] Here, the General Division explicitly declared that it had made an assessment about the severity of the Appellant's impairment without first considering her age, education, language skills, and life and work experience.

[24] The General Division appeared to be under the impression that it was relieved of the need to consider the *Villani* real world factors once it found that the Appellant had made insufficient effort to return to work. This is an error in law. In fact, a decision-maker cannot rely on a claimant's supposed failure to attempt alternative employment unless it first finds that they had the residual capacity to do so. However, when making a finding of residual capacity, the *Villani* factors must always be taken into account.

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[9] *Villani v Canada (Attorney General)*, 2001 FCA 248.
[10] General Division decision at para 16.
[11] *Villani* at para 38.

REMEDY

[25] The DESDA sets out the Appeal Division's powers to remedy errors by the General Division. Under section 59, 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.

The record is complete

[26] In oral submissions, both parties agreed that, if I were to find 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.

[27] The Federal Court of Appeal has stated that a decision-maker should consider the delay in bringing a disability claim to conclusion. The Appellant applied for a disability pension two years ago. If I were to refer this matter back to the General Division, it would add further delay to what is already a protracted proceeding. The Tribunal is obliged to conduct its affairs as quickly as considerations of fairness and natural justice allow, and I doubt that the evidence would be materially different if the General Division were to rehear the matter.

[28] I am satisfied that the record before me is complete. None of the General Division's errors prevented the admission of relevant evidence. The Appellant has had an adequate opportunity to submit medical documents, and there is considerable information on file about her employment history and her efforts to find another job after she was laid off in 2015. There is an audio recording of the hearing, and I have listened to all of it. It reveals that the General Division conducted a full oral hearing and heard the Appellant's testimony about her hearing impairment and its effect on her ability to work.

[29] As a result, I am in a position to assess the evidence that was on the record before the General Division and to give the decision that it should have given, had it not erred. In my view,

if the General Division had (i) properly assessed the Appellant's evidence of her efforts to return to work; (ii) attached minimal significance to the role of the Appellant's daughter in her mother's job search; and (iii) correctly applied the *Villani* principles, then it would have come to a different conclusion. My own assessment of the record satisfies me that the Appellant had a severe and prolonged disability as of the hearing date.

The Appellant has a severe disability

[30] To be found disabled, a claimant must prove, on a balance of probabilities, that they had a severe and prolonged disability at or before the end of the minimum qualifying period (MQP) or the hearing date, which comes first. 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."[12]

[31] There is no doubt that the Appellant has a significant hearing impairment. She has submitted several audiograms from the past decade and all show bilateral hearing loss in the range of moderately severe to profound.[13] She is not a candidate for a cochlear implant, and further treatment is unlikely to improve her condition. Of course, the Appellant has been hearing impaired since she was a child, but that did not prevent her from earning a college degree and pursuing a fruitful career for many years. The Appellant testified that when her last employer hired her in 1999, she was still able to communicate over the phone and her supervisors were willing to accommodate her. She said that they continued to do so even as her hearing deteriorated over the years, leaving her unable to communicate by any means other than email.

[32] The real question here is whether the Appellant's hearing has, in fact, deteriorated since 1999. Twenty years ago, she was able to convince an employer to give her a chance to prove her worth despite her impairment. If that impairment has become worse, can she now reasonably be expected to find another substantially gainful job, even with her excellent qualifications?

[12] CPP, s 42(2)(a)(ii).
[13] March 7, 2000 (GD2-46), October 29, 2009 (GD2-47), May 28, 2010 (GD2-13), April 3, 2014 (GD2-48), October 29, 2015 (GD2-12), April 13, 2016 (GD2-50), and June 22, 2018 (GD3-3).

[33] I am satisfied that the Appellant’s hearing has deteriorated in the past two decades. Above all, there is the Appellant’s testimony. Like the General Division, I found the Appellant credible on the subject of her medical condition, and I believed her when she said that she could no longer function in a work environment as she once had. The Appellant’s account is made more plausible in light of the widely recognized fact that hearing generally declines as one ages. The Appellant is also supported by the available medical evidence. Comparing the earliest audiogram on file with the latest, I do see evidence of deterioration. In 2000, the Appellant’s right and left ears were each able to detect sound at 500 hertz in the 40 to 50 decibel range; by 2018, their acuity had diminished to the point where they were only able to detect the same frequency at a higher volume—100 decibels.

[34] Just as the Appellant’s hearing has significantly declined during the past 20 years, so has her employability. Her age does not help matters. Although the Appellant has accrued years of work experience as a technology tester, she is now over 50. It is an unfortunate reality of the labour market that, all else being equal, employers tend to favour younger job candidates over older ones.

[35] I have discussed the Appellant’s efforts to secure alternative employment elsewhere in this decision, so I need not repeat myself here. She told the General Division that, after she was laid off, she applied to between 50 and 100 positions in manufacturing and data entry. She said that when she disclosed her hearing impairment on an application, she received no call-backs. When she omitted her impairment, she saw plenty of interest, but she was unable to manage interviews—either by telephone or in person—because captioning was not an option. I am satisfied that the Appellant fulfilled her obligation, imposed by the *Inclima* case, to make a reasonable effort to retrain or find work better suited to her limitations. I do not doubt that the Appellant has at least some residual capacity, but her job search was extensive enough to convince me that her attempts to find another job failed because of her hearing loss. She would face insurmountable challenges in re-entering the workforce, whatever the sector.

[36] The Appellant’s testimony before the General Division conveyed forthrightness, and her description of her hearing loss and its effect on her ability to function in a vocational setting was credible. I also gave weight to the Appellant’s lengthy work history, which included 29

consecutive years of remunerative earnings. One can reasonably surmise that an individual with this kind of demonstrated work ethic would not have left the labour market unless there was some good reason.

The Appellant has a prolonged disability

[37] The medical evidence indicates that the Appellant has had a hearing impairment since childhood and has suffered from profound hearing loss since the early 2000s. Hearing aids have produced only a limited benefit, and the Appellant has become effectively unemployable. It is difficult to see how the Appellant's condition will significantly improve, even with additional therapy. In my view, these factors qualify the Appellant's disability as prolonged.

CONCLUSION

[38] I am allowing this appeal. The General Division discounted, without reason, evidence that the Appellant had made a reasonable effort to return to work and instead based its decision on irrelevant information that her daughter had assisted with her job search. Above all, the General Division erred in law by dispensing with an analysis of the Appellant's personal circumstances in assessing her employability.

[39] Having decided that there was sufficient evidence on the record to permit me to give the decision that the General Division should have given, I find that the Appellant has a disability that became severe and prolonged as of July 2017, her date of application and the month she cited as her date of disability. According to section 69 of the CPP, payments start four months after the date of disability. The Appellant's pension therefore begins as of November 2017.

Member, Appeal Division

HEARD ON:	July 8, 2019
METHOD OF PROCEEDING:	Personal appearance
APPEARANCES:	D. T., Appellant Viola Herbert, representative for the Respondent

	Anne Crowe, close-caption interpreter