

Federal Court of Appeal



Cour d'appel fédérale

Date: 20200116

Docket: A-234-19

Citation: 2020 FCA 11

**CORAM: NADON J.A.
PELLETIER J.A.
DE MONTIGNY J.A.**

BETWEEN:

SUE HILLIER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on January 14, 2020.

Judgment delivered at Toronto, Ontario, on January 16, 2020.

**REASONS FOR JUDGMENT BY:
CONCURRED IN BY:**

**DE MONTIGNY J.A.
NADON J.A.
PELLETIER J.A.**

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This application for judicial review comes to this Court after a protracted history. The applicant applied for a disability pension under the Canada Pension Plan (CPP) in May 2014. The Minister of Employment and Social Development denied this application, initially and on reconsideration, on the basis that the applicant did not suffer from a severe and prolonged disability as of the relevant date, known as the minimum qualifying period (established as

December 31, 2015). On appeal, the Social Security Tribunal – General Division confirmed that decision, and the Social Security Tribunal –Appeal Division dismissed the appeal from that decision. On application for judicial review, this Court quashed the decision of the Appeal Division, finding that it should have considered and determined all of the grounds raised by Ms. Hillier in her notice of application for leave to appeal, and returned the matter to a different member of the Appeal Division. The Appeal Division therefore held an oral hearing on all issues raised by the applicant, and dismissed the appeal on May 17, 2019. This is the decision now being challenged before this Court.

[2] Despite the able arguments of counsel for the applicant, I am of the view that this application for judicial review should be dismissed. There is no dispute that it is for the General Division to assess the facts and to weigh the evidence, and then to determine on the basis of its findings whether the legal test for disability is met. Pursuant to paragraph 58(1) of the *Department of Employment and Social Development Act*, SC 2005, c 34, the role of the Appeal Division is to determine if the General Division erred in law or in fact or failed to observe a principle of natural justice. In the absence of such error, the Appeal Division cannot intervene.

[3] On judicial review, this Court must ensure that the decision of the Appeal Division is reasonable. In other words, we must determine whether the Appeal Division could reasonably have concluded that the General Division did not misapply the law or misapprehend the evidence. Following the recent decision of the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at para. 83 [Vavilov], this exercise entails a review both of the decision-maker's reasoning process and of the outcome. The Supreme Court

cautioned reviewing courts against making their own yardstick and measuring the administrative decision against that yardstick, and reminded us that reasons ought not to be assessed against a standard of perfection. The institutional constraints within which an administrative decision-maker operates must be taken into account, and one should not necessarily expect the same degree of sophistication and thoroughness that might be expected of a judge (*Vavilov*, at para. 92).

[4] Counsel for the applicant raised a number of errors of fact and law in the Appeal Division's decision. Having carefully considered both the outcome and the reasons for this decision, coupled with the reasons of the General Division, I am unable to conclude that the Appeal Division could not reasonably dismiss the appeal. For the most part, the applicant's submissions amount to mere disagreements with the General Division's assessment of the evidence and with the "failure" of the Appeal Division to share her views.

[5] The applicant submitted that the Appeal Division erred in fact and law and therefore came to an unreasonable decision when it endorsed the General Division's finding that the applicant was capable regularly of pursuing any substantially gainful occupation, thereby disregarding the applicant's family physician's opinions to the contrary without even explaining why they were insufficient to establish the severity of her disability. Yet an attentive reading of the Appeal Division's reasons in this respect shows that it duly noted the lengths to which the General Division went in considering all the objective medical evidence, including the evidence favorable to the applicant. The Appeal Division also explained why the General Division was not bound by a medical opinion: it is for the General Division, whose task it is to weigh the

evidence, to determine in the last resort the eligibility of an applicant for a disability pension on the basis of its own findings. Counsel for the applicant failed to demonstrate the unreasonableness of this reasoning.

[6] Counsel for the applicant also argued that the Appeal Division erred in law by adopting the General Division's finding that the applicant had some capacity to work. She claimed this offends the principle established in *Inclima v Canada (Attorney General)*, 2003 FCA 117, at paragraph 3, according to which applicants who have a limited capacity for work must show that their efforts to obtain employment were unsuccessful by reason of their health condition.

[7] Once again, this argument goes to the weighing of the evidence. As noted by the Appeal Division, the General Division found the applicant's evidence of her capacity to work to be unreliable and her claim of a severe disability as defined in the CPP to be insufficiently supported by objective medical evidence. In my view, the Appeal Division could reasonably conclude that such finding was supported by the record. Having thus found the applicant had some capacity to work, the General Division was then required to determine whether the applicant had failed to obtain or maintain employment by reason of her health condition. Having reviewed the evidence, the General Division opined that the applicant had not made reasonable efforts to engage in retraining or to find alternative employment, and therefore came to the conclusion that her inability to find work did not result from her health condition. The Appeal Division could reasonably find that the General Division's reasoning is consistent with the law and grounded in the evidence.

[8] Finally, counsel for the applicant contended that the General Division erred in law by failing to employ a “real world” approach and to consider the applicant’s background and all of her medical conditions and personal characteristics, and that the Appeal Division could not simply adopt that reasoning. At the risk of repeating myself, this argument amounts to a disagreement with respect to the proper assessment of the evidence. As noted by the Appeal Division, the General Division accurately set out the applicable legal principles as developed in *Villani v Canada (Attorney General)*, 2001 FCA 248, [2002] 1 FC 130, and then considered all of her impairments. The applicant obviously disagrees with the General Division’s finding that her impairments, when considered in their totality, do not constitute a severe disability as defined in the Act; it was nevertheless open to the Appeal Division to conclude on a standard of reasonableness that the General Division identified the relevant legal principles and did not base its decision on an erroneous finding of fact made in a perverse or capricious manner.

[9] For all of the above reasons, I would therefore dismiss the application for judicial review, without costs.

“Yves de Montigny”

J.A.

“I agree
M. Nadon J.A.”

“I agree
J.D. Denis Pelletier J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-234-19

**(APPEAL FROM A DECISION OF THE SOCIAL SECURITY TRIBUNAL APPEAL
DIVISION DATED MAY 21, 2019, NO. AD-19-172)**

STYLE OF CAUSE:

SUE HILLIER v. THE ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING:

Toronto, Ontario

DATE OF HEARING:

JANUARY 14, 2020

REASONS FOR JUDGMENT BY:

DE MONTIGNY J.A.

CONCURRED IN BY:

NADON J.A.
PELLETIER J.A.

DATED:

JANUARY 16, 2020

APPEARANCES:

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