Federal Court of Appeal | Cour d'appel fédérale

Date: 20210805

Docket: A-117-20

Citation: 2021 FCA 164

CORAM: **DE MONTIGNY J.A.**
GLEASON J.A.
LEBLANC J.A.

BETWEEN:

ELIZABETH BALKANYI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard by online video conference hosted by the Registry on April 22, 2021.

Judgment delivered at Ottawa, Ontario, on August 5, 2021.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

LEBLANC J.A.

I. Introduction

[1] The applicant, Ms. Balkanyi, seeks to set aside a decision of the Appeal Division of the Social Security Tribunal (the Appeal Division) dated March 6, 2020 (2020 SST 214), dismissing her appeal from a decision of the General Division of that Tribunal (the General Division) (2019

SST 1591). In its decision, the General Division found that the applicant was not entitled to a disability pension under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the CPP) because she retained some capacity to regularly pursue a substantially gainful occupation and failed to establish that her efforts to obtain and maintain employment were unsuccessful due to her health condition. The Minister of Employment and Social Development (the Minister) had previously denied the applicant's application for a disability pension, both initially and on reconsideration.

II. Background

[2] The applicant is a resident of British Columbia. On December 18, 2015, she was injured in a motor vehicle accident. At the time of the accident, she was working as a resident care aide and as a helper at her husband's plumbing business. These were two physically demanding jobs. Following the accident, she received temporary total disability (TTD) benefits from the Insurance Corporation of British Columbia (ICBC), a provincial Crown corporation involved in the administration of British Columbia's public insurance plan for victims of car accidents.

[3] In the fall of 2017, ICBC required the applicant to apply for CPP disability benefits as TTD benefits are reduced by CPP disability benefits after 104 weeks of payment. The applicant did so on October 31, 2017. She was 57 years old at the time. The applicant reported that the accident had left her with limited range of motion in her right arm; persistent pain in her right arm, shoulder, and neck; swelling of her right hand; impaired ability to sit and stand for long periods; and sleep disturbance due to pain.

[4] On September 6, 2019, the applicant was discharged from ICBC occupational therapy treatment because she was found to be unable to work. It is not disputed, however, that for the purposes of her CPP application, it is the applicant's medical condition at the end of her Minimum Qualifying Period (MQP) (December 31, 2017), that matters.

III. The General Division's Decision

[5] The General Division found that the applicant was not entitled to a disability pension under the CPP on the basis that by the end of her MQP, her disability was not "severe" within the meaning of paragraph 44(2)(*a*) of the CPP. In the General Division's view, though the applicant's condition prevented her from returning to either of her previous jobs, the medical information on record showed that on December 31, 2017, she still had some work capacity and could therefore pursue a gainful occupation suitable to her situation.

[6] In concluding as it did, the General Division placed greater weight on occupational therapy reports than on the evidence provided by Dr. Ervine, the applicant's family doctor, and Dr. Cameron, a neurologist. The General Division stated that it had no clinical office notes from Dr. Ervine to review at the applicant's MQP. As for Dr. Cameron's evidence, which consisted of two reports, one dated August 31, 2017, and the other March 26, 2019, the General Division noted that the applicant was not seeing Dr. Cameron on a regular basis as a patient and that the second of the two reports was dated well after the MQP. The General Division preferred the occupational therapists' evidence because they had considered the applicant's overall condition,

taken note of all her concerns, and seen her several times in a two-year period, which included the year of her MQP.

[7] The General Division also found that the applicant "ha[d] not made any attempts at working since her [motor vehicle accident] in 2015", though she was required to demonstrate that efforts to obtain and maintain employment had been unsuccessful because of her health condition (General Division's decision at paras. 29-30). It stated that had the applicant "tried lighter, sedentary work and failed, that might have persuaded [the General Division] her condition was severe despite what the medical evidence showed" (General Division's decision at para. 31).

IV. The Appeal Division's Decision

[8] In upholding the General Division's decision, the Appeal Division stressed that an appeal is not a re-hearing of the original claim. Instead, in deciding whether to intervene in the General Division's decision, the Appeal Division must base itself on the grounds of appeal listed under subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (DESDA).

[9] The Appeal Division first dismissed the applicant's contention that the General Division had erred in law by failing to consider whether her incapacity to pursue a substantially gainful occupation was "regular". It noted the General Division's references to the variability of the applicant's condition; the fact that she could sit for one to two hours, walk and stand for 20

minutes; and the means by which she managed her pain. This, the Appeal Division found, demonstrated that the General Division had considered whether the applicant's incapacity was regular.

[10] The Appeal Division then dismissed the applicant's submission that the General Division had further erred in law by failing to consider her personal characteristics in assessing whether she had some work capacity, as mandated by this Court in *Villani v. Canada (Attorney General)*, 2001 FCA 248, 205 D.L.R. (4th) 58 (*Villani*)). It held that the applicant's claim in that respect amounted to a disagreement with the manner in which the General Division had weighed the evidence.

[11] Finally, the applicant submitted that the General Division had based its decision on two important factual errors in that it had (1) placed greater weight on the occupational therapists' evidence, and (2) ignored evidence of the pain afflicting her and of its impact on her functioning. With respect to the first alleged error, the Appeal Division determined that the General Division had considered the evidence of Drs. Ervine and Cameron and explained why it had given greater weight to the occupational therapists' evidence. The Appeal Division was also satisfied that the General Division had considered the applicant's pain and its impact on her functioning, but noted that despite the evidence on this point, she is "able to look after her grandchildren some days after school and [go] to church once each week" (Appeal Division's decision at para. 23).

V. Issue and Standard of Review

[12] The issue before the Court is whether the Appeal Division could reasonably conclude that the General Division had not committed an error, within the meaning of subsection 58(1) of DESDA, in concluding that the applicant was not disabled under the CPP by the end of her MQP.

[13] It is not disputed that the applicable standard of review in this case is reasonableness (see *Riccio v. Canada (Attorney General)*, 2021 FCA 108, 2021 CarswellNat 1618 (WL Can) at para. 5 (*Riccio*); *Parks v. Canada (Attorney General)*, 2020 FCA 91, [2020] F.C.J. No. 618 (QL) at para. 8 (*Parks*); see also *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) (*Vavilov*)). As the Supreme Court of Canada held at paragraph 85 of *Vavilov*, "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (see also *Parks* at para. 8).

[14] For the reasons that follow, I am of the view that the Appeal Division's reasons and conclusion are unreasonable and that the present application for judicial review should be allowed.

VI. Analysis

[15] A person is considered to be disabled under the CPP if they are determined to have a severe and prolonged mental or physical disability. “Severe” and “prolonged” are defined in subparagraphs 42(2)(*a*)(i) and (ii) of the CPP. Paragraph 42(2)(*a*) reads as follows:

When person deemed disabled	**Personne déclarée invalide**
(2) For the purposes of this Act,	**(2)** Pour l’application de la présente loi :
(*a*) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,	***a*)** une personne n’est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d’une invalidité physique ou mentale grave et prolongée, et pour l’application du présent alinéa :
(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and	**(i)** une invalidité n’est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice,
(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and	**(ii)** une invalidité n’est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès;
…	[…]

[16] Only subparagraph 42(2)(*a*)(i) is at issue in this application for judicial review. According to *Villani*, that provision is to be construed generously, albeit within the limits of the language it contains, and the test for severity requires that each word in the definition, including

the word “regularly”, be treated as contributing something to the statutory requirement (*Villani* at paras. 29, 44). The meaning of those words “must be interpreted in a large and liberal manner, and any ambiguity flowing from [them] should be resolved in favour of a claimant for disability benefits” (*Villani* at para. 29).

[17] In *Villani*, this Court also stated the importance of applying the severity requirement set out in subparagraph 42(2)(*a*)(i) in a “real world” context. This necessitates taking into consideration a claimant’s particular circumstances, including age, education level, language proficiency, and past work and life experience (*Villani* at paras. 38-39; see also, e.g., *D’Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167 at para. 4 (*D’Errico*)).

[18] Where there is evidence of work capacity, a claimant must also demonstrate that efforts to obtain and maintain employment have been unsuccessful due to their health condition (*Inclima v. Canada (Attorney General)*, 2003 FCA 117, 2003 CarswellNat 579 (WL Can) at para. 3; see also *D’Errico* at para. 4). Put differently, a finding of residual work capacity “is a prerequisite for the relevance of efforts to obtain alternative employment” (*Canada (Attorney General) v. Poirier*, 2020 FCA 98, 2020 CarswellNat 1669 (WL Can) at para. 17).

[19] Before this Court, the applicant asserts that the definition of “severe” adopted to deny her application is not defensible in respect of the law as both the General Division and the Appeal Division failed to consider whether her incapacity to pursue a substantially gainful occupation was “regular”. She contends that the Appeal Division, and the General Division before it, failed

to adopt the “real world” approach mandated by *Villani* in assessing her capacity to regularly pursue any substantially gainful occupation.

[20] The applicant further contends that the General Division fundamentally misapprehended the evidence as to her work capacity and that the Appeal Division erred in not interfering with the General Division’s findings in that regard. In particular, the applicant submits that there was no evidence before the General Division, including in the occupational therapists’ reports, supporting a finding that by December 31, 2017, she had any work capacity. The only evidence that might have supported such a finding, she says, was purely prospective in the sense that it pointed to the possibility that her situation might improve to a point where she could contemplate working again.

[21] As indicated previously, capacity to regularly pursue any truly remunerative occupation is not to be assessed in the abstract, but in light of all of the claimant’s circumstances, both in terms of background and medical condition. In *Villani*, the Court warned CPP decision makers against ignoring the language of the statute “by concluding, for example, that since an applicant is capable of doing certain household chores or is, strictly speaking, capable of sitting for short periods of time, he or she is therefore capable in theory of performing or engaging in some kind of unspecified sedentary occupation which qualifies as ‘any’ occupation within the meaning of subparagraph 42(2)(a)(i) of the [CPP]” (*Villani* at para. 47).

[22] This, in my view, may well be what happened here.

[23] The applicant's evidence, as described by the General Division, can be summarized as follows:

> a) she "does not know what each day will be like";
>
> b) she "can sit for one or two hours, but then her head gets heavy and she has to lie down";
>
> c) she "can be up and functioning for one to three hours and then she needs to rest";
>
> d) she "cannot lift her arm above her shoulder, and she cannot do any lifting of heavy items";
>
> e) at night, she "has difficulty sleeping and feels pressure on her shoulder" with the result that "[s]ometimes she gets five hours of sleep and sometimes she only gets two."
>
> f) she "recalled that her condition in 2017 is the same as 2019"
>
> (See the General Division's decision at para. 11)

[24] The General Division stated that the applicant's view of how her condition affects her ability to work was important (General Division's decision at para. 16) but it preferred the occupational therapists' reports which it found "more reliable than the [applicant]'s memory" (General Division's decision at para. 31). As mentioned earlier, the General Division gave more weight to these reports than to those of the applicant's doctors. The applicant's doctors were of the opinion that the applicant had been rendered completely disabled by the residual adverse effects of the injuries sustained at the time of her car accident.

[25] The Appeal Division acknowledged that a person's incapacity must be "regular" for them to be disabled within the meaning of the CPP. However, it disagreed with the applicant and held that the General Division had considered this component of the disability simply because the General Division had noted the applicant's testimony "that her condition varies from day to day, and that she could sit for one to two hours, walk and stand for 20 minutes", and "[manage] her pain with Tylenol when needed, herbal medications, and creams for her shoulder." The Appeal Division did not provide any analysis as to how the General Division's references to (i) the applicant's testimony on the variability of her condition, as well as on her ability to sit for one to two hours, walk and stand for 20 minutes, and (ii) the fact that the applicant managed her pain with Tylenol when needed, could be connected to the General Division's finding that the applicant had some capacity for work.

[26] Absent any analysis explaining how this evidence supports the conclusion that the applicant had some work capacity, there is no foundation for the Appeal Division's determination that the General Division had actually considered whether the applicant's incapacity to work was regular. This lack of analysis indicates that both the Appeal Division and the General Division may well have misapprehended the applicable legal test and effectively read out the term "regularly" from the statutory definition of "disabled".

[27] Again, each word in subparagraph 42(2)(*a*)(i) of the CPP must be given meaning (*Villani* at para. 38). This signals Parliament's view that a disability is severe if it "renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation" (*Villani* at para. 38 (emphasis added)).

[28] In *Villani*, the Court considered the dictionary definitions of the words “regular” (“usual, standard or customary”) and “regularly” (“at regular intervals or times”) (*Villani* at para. 37, citing *Patricia Valerie Barlow v. Minister of Human Resources Development*, CP 07017 (November 22, 1999)). It then emphasized that subparagraph 42(2)(*a*)(i) of the CPP does not require that an applicant be “incapable at all times of pursuing any conceivable occupation”, but that they be “incapable regularly of pursuing any substantially gainful occupation” (*Villani* at para. 38 (emphasis in the original); see also *Atkinson v. Canada (Attorney General)*, 2014 FCA 187, [2015] 3 F.C.R. 461 at para. 37 (*Atkinson*). The Court also cautioned, as we have seen, against findings that do not give weight to each word of the statutory definition of “severe”, and which conclude for example that because a claimant can sit for short periods of time, they are capable of sedentary work (*Villani* at paras. 47-48).

[29] In *Atkinson*, this Court reiterated what it had affirmed in *Canada (Minister of Human Resources Development) v. Scott*, 2003 FCA 34, 300 N.R. 136, namely that it is the incapacity to work that must be “regular”, not the employment (*Atkinson* at para. 37, referring to *Scott* at para. 7). It also noted that predictability is the essence of regularity (*Atkinson* at para. 38), a statement echoed in *Riccio*, where the Court held that the term “regularly” reflects the reality that employees, be they full-time or part-time, “are expected to attend work on the dates and times that they are scheduled to do so” (*Riccio* at para. 23).

[30] In the present matter, the paucity of the Appeal Division’s reasons regarding whether the General Division had considered if the applicant’s incapacity to work was regular reveals the same disconnect that was found in *Riccio*. To borrow from the language of *Riccio* at

paragraph 22, the Appeal Division "leaped to the conclusion, without any explanation," that the General Division had actually considered whether the applicant's incapacity to work was regular. This cannot, in my view, be endorsed in light of the "culture of justification" propounded in *Vavilov* (see *Vavilov* at para. 14; see also *Canada (Attorney General) v. Kattenburg*, 2021 FCA 86, 2021 CarswellNat 1291 (WL Can) at para. 9).

[31] For the foregoing reasons, I find the Appeal Division's decision to be unreasonable. It lacks transparency, intelligibility, and justification, making it impossible to discern within it a rational chain of analysis that is justified in relation to the facts and the law that constrained the Appeal Division.

VII. Conclusion

[32] I would allow the applicant's application for judicial review, set aside the Appeal Division's decision and remit the matter to a different member of the Appeal Division for redetermination. Given her success in this Court, I would award costs to the applicant.

"René LeBlanc"
J.A.

"I agree.
Yves de Montigny J.A. "

"I agree.
Mary J.L. Gleason J.A. "

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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