Federal Court of Appeal  Cour d'appel fédérale

Date: 20210602

Docket: A-210-20

Citation: 2021 FCA 108

CORAM: **WEBB J.A.**
LASKIN J.A.
RIVOALEN J.A.

BETWEEN:

DOMENICO RICCIO

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard by online video conference hosted by the Registry

on May 27, 2021.

Judgment delivered at Ottawa, Ontario, on June 2, 2021.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

CONCURRED IN BY: WEBB J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

RIVOALEN J.A.

I. Introduction

[1] The applicant applied for a disability pension pursuant to paragraph 44(1)(*b*) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the CPP). His application was denied at every administrative level.

[2] The applicant now seeks judicial review of the decision of the Appeal Division of the Social Security Tribunal (the Appeal Division) rendered on April 9, 2020 (2020 SST 299) (the AD Decision).

[3] Prior to the hearing before the Appeal Division, the General Division of the Social Security Tribunal (the General Division) considered his application for a disability pension in light of subparagraph 42(2)(*a*)(i) of the CPP and dismissed the application on May 27, 2019 (2019 SST 1627). The applicant was granted leave to appeal to the Appeal Division.

[4] The Appeal Division determined that the General Division erred in law by failing to analyze the applicant's functional limitations at the time of his minimum qualifying period (MQP). Despite having found this error, the Appeal Division conducted its own analysis of subparagraph 42(2)(*a*)(i) of the CPP and dismissed the applicant's appeal on the basis that his limitations did not rise to the threshold of a "severe" disability in that he had "some residual capacity to work" (AD Decision, paras. 24-25, 56). As a result of this finding, the Appeal Division did not undertake an analysis under subparagraph 42(2)(*a*)(ii) to determine whether the disability was both severe and prolonged, as required under the CPP to receive a disability pension.

II. Standard of Review

[5] The standard of review in this application for judicial review is reasonableness. This Court need only consider whether the Appeal Division's reasons and conclusion are reasonable (see *Stavropoulos v. Canada (Attorney General)*, 2020 FCA 109, [2020] F.C.J. No. 738 (QL) at

para. 11, also citing *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at paras. 83, 86 [*Vavilov*]; see also *Stojanovic v. Canada (Attorney General)*, 2020 FCA 6, [2020] F.C.J. No. 15 (QL) at para. 34).

[6] For the following reasons, I am of the view that the Appeal Division's reasons and conclusion are unreasonable and I would allow the application for judicial review.

III. Background

[7] At the relevant time, the applicant was 61 years of age and had a grade 10 education. It is agreed that his MQP is December 31, 2016.

[8] In 2015, the applicant was self-employed as a driver, delivering medication and providing some light maintenance to nursing homes, when he sustained a number of injuries in a motor vehicle accident. Prior to the accident, the applicant had a painful knee condition that interfered with his ability to work regularly; occasionally, he was required to hire another driver to take over his route. He also had permanent field of vision loss in his left eye.

[9] Following the accident, the applicant suffered from chronic headaches, developed degenerative arthritis, degenerative disc disease and recurring rotator cuff tendonitis. He also experienced severe anxiety and depression. He was unable to return to work.

IV. Appeal Division Reasons and Conclusion

[10] The AD Decision describes in some detail its findings with respect to the applicant's numerous medical conditions, symptoms and functional limitations. For ease of reference, I will summarize some of those findings here**:**

Medical Conditions and Symptoms

- Degenerative arthritis resulting in right shoulder pain, knee pain and right elbow pain (AD Decision, paras. 27, 31-32);
- Degenerative disc disease in part of his back (AD Decision, paras. 27, 33-34);
- Rotator cuff tendonitis (AD Decision, paras. 27, 31);
- Depression in the "severe range" with associated symptoms of insomnia, appetite loss, fatigue, behaviour changes and mood changes which the applicant said affected him badly (AD Decision, paras. 29, 39);
- Reduced field of vision in the left eye (AD Decision, para. 27);
- Headaches and dizziness with headaches seeming to get worse as the day went on (AD Decision, paras. 35, 37);
- Difficulty sleeping (AD Decision, paras. 25, 37).

Functional Limitations

- Difficulty lifting over 90 degrees due to right shoulder pain (AD Decision, para. 32);
- Intermittent numbness and tingling with weakness in the right hand making it difficult and painful to grasp objects (AD Decision, para. 35);
- Simple tasks such as shaving or brushing his teeth were difficult and painful (AD Decision, para. 37);
- Problems with bending, stretching and carrying (AD Decision, paras. 42, 54);
- Ability to sit and stand were limited (AD Decision, para. 42);
- Ability to walk approximately half a kilometre (AD Decision, para. 42);
- Ability to carry 10 pounds for approximately 100 yards (AD Decision, para. 42);

- Inability to show up for a job at a certain time each day (AD Decision, para. 44);
- Inability to stand long enough to work part-time as a greeter in a store (AD Decision, para. 44);
- Inability to get out of bed on some days (AD Decision, para. 44);
- Ability to drive short distances of approximately 30 minutes when required (AD Decision, para. 54).

[11] Turning to its analysis, the Appeal Division recognized, at paragraph 48 of its reasons, that it must take a "real world" approach to considering whether the applicant's disability is severe. In other words, it had to take into account the applicant's particular circumstances such as age, education level, language proficiency, past work and life experience, all in accordance with this Court's decision in *Villani v. Canada (Attorney General)*, 2001 FCA 248, 205 D.L.R. (4th) 58 at paragraph 38 [*Villani*]. The Appeal Division found, at paragraph 50 of its reasons, that the applicant's "age and his education would act as a barrier to securing some (but not all) forms of more sedentary employment."

[12] The Appeal Division concluded that although the evidence of medical conditions and symptoms experienced by the applicant established that he had some functional limitations at the end of the MQP, he nonetheless had some capacity to work (AD Decision, para. 56).

[13] Further, despite the applicant's evidence that he could not reliably attend a job every day because of his symptoms, the Appeal Division found that the applicant "could have looked for a part-time opportunity within his limitations" (AD Decision, para. 57).

V. Applicant's Position

[14] The applicant rightfully points out that nowhere in the AD Decision are there any adverse findings regarding the quality of the applicant's evidence or his credibility. Rather, the AD Decision sets out the evidence describing the applicant's medical conditions and numerous symptoms which, when taken together, describe his functional limitations, as explained in paragraph [10] above.

[15] Given these factual findings, the applicant argues that the AD Decision is unreasonable. The applicant submits that the Appeal Division erred in interpreting the term "disabled" in paragraph 42(2)(*a*) of the CPP. It (a) effectively read out the term "regularly" from the statutory definition; (b) took an overly expansive view of the phrase "any occupation" in the statutory definition; and (c) failed to take a "real world" approach to the issues in accordance with this Court's jurisprudence. In so doing, the Appeal Division reached the unreasonable conclusion that the applicant had some residual capacity for work. In addition, the applicant submits that the AD Decision unreasonably imposed an additional burden on the applicant when its findings of fact supported a finding of severe and prolonged disability.

VI. Analysis

[16] There is no dispute that the only criterion in subsection 44(1) of the CPP that is in issue in the present application for judicial review is whether the applicant is disabled.

[17] For the purpose of the CPP, a person is deemed disabled if, under subparagraph 42(2)(*a*)(i), that person is determined to have a severe mental or physical disability, and as a result of the disability, they are "incapable regularly of pursuing any substantially gainful occupation". Once it is determined that the disability is severe, a further analysis under subparagraph 42(2)(*a*)(ii) is required to determine whether it is prolonged.

[18] Here, the only question the Appeal Division considered was whether the applicant's functional limitations resulted in him being incapable regularly of pursuing any substantially gainful occupation under subparagraph 42(2)(*a*)(i).

[19] As noted above, some years ago, our Court in *Villani* directed the decision-maker faced with this question to take a "real world" approach, such that the applicant's particular circumstances must be considered (*Villani* at paras. 38 and 39).

[20] Applying the jurisprudence to the matter now before this Court, I would agree with all of the applicant's submissions and I am of the view that the AD Decision is unreasonable.

[21] In the case before us, the Appeal Division found that the applicant could no longer perform his former duties and work full-time (AD Decision, paras. 53, 56-57). Further, the evidence accepted by the Appeal Division was that the applicant was unable to reliably attend a job every day because of his physical and emotional limitations. Those limitations included a limited ability to sit and stand and an inability to get out of bed some days (AD Decision, para. 55).

[22] Nonetheless, the Appeal Division leaped to the conclusion, without any explanation, that the applicant had some residual capacity for work. The Appeal Division did not provide any analysis linking the evidence it accepted to its conclusions that the applicant is capable of "regularly" pursuing any substantially gainful occupation. The lack of analysis renders the AD Decision unreasonable because we are unable to understand how the decision-maker came to her conclusion. In other words, the reasons for the AD Decision fail to reveal a rational chain of analysis (*Vavilov* at para. 103).

[23] Further, I am of the view that the AD Decision is unreasonable because it fails to take a "real world" approach, despite saying that it would. The Appeal Division properly articulated the test set out in *Villani*, yet, the reasons it provided do not reflect such an approach. For instance, the AD Decision found that the applicant could have looked for a part-time work opportunity within his limitations. However, the evidence proffered by the applicant is that because of his medical conditions, he is unable to reliably attend work; even part-time employees are expected to attend work on the dates and times that they are scheduled to do so. The use of the term "regularly" in the text of subparagraph 42(2)(*a*)(i) reflects this reality. Again, there is a disconnect between the evidence and the conclusion reached by the Appeal Division.

[24] As a whole, the decision lacks justification, transparency and intelligibility. The Appeal Division did not explain or offer any justification for the basis of its finding that the applicant had a residual capacity for work in the "real world". It cannot be ascertained from the AD Decision whether the Appeal Division disbelieved all or some of the applicant's evidence

regarding his functional limitations and capacity to work, or whether there was some other basis for the conclusion that he had a residual capacity for work.

[25] For these reasons, the AD Decision is unreasonable. The rational chain of analysis is lacking, rendering the decision incoherent and not defensible in light of the facts and the law.

VII. Conclusion

[26] In conclusion, I would allow the application for judicial review, with costs. I would quash the decision of the Appeal Division, and refer the matter back to the Appeal Division for redetermination by a different decision-maker.

[27] I thank counsel for the applicant for her excellent submissions, and counsel for the respondent for her candid approach during oral submissions.

"Marianne Rivoalen"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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