Citation: *E. G. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 25

Appeal No: CP29099

BETWEEN:

E. G.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Decision on Preliminary Motion

SOCIAL SECURITY TRIBUNAL MEMBER:	Shu-Tai CHENG
HEARING DATE:	February 5, 2014
TYPE OF HEARING:	In person
DATE OF DECISION:	April 7, 2014

PERSONS IN ATTENDANCE

Appellant	E. G.
Counsel for the Appellant	Duncan Macgillivray
Counsel for the Respondent	Linda Lafond
Witness for the Respondent	Jean-Guy Baribeau

DECISION

[1] The Tribunal dismisses the motion made by the Appellant, as a preliminary matter in the Appeal, to preclude Dr. Baribeau from testifying as an expert witness.

INTRODUCTION

[2] On November 1, 2012, a Review Tribunal determined that a *Canada Pension Plan* (the "CPP") disability pension was not payable.

[3] The Appellant filed an Application for Leave to Appeal that Review Tribunal decision with the Pension Appeal Board (PAB) on December 20, 2012.

[4] The PAB granted leave to appeal on January 22, 2013. Pursuant to section 259 of the *Jobs, Growth and Long-term Prosperity Act* of 2012, the Appeal Division of the Tribunal is deemed to have granted leave to appeal on April 1, 2013.

[5] The hearing of this appeal was scheduled to be conducted in person for the reasons given in the Notice of Hearing dated December 10, 2013.

BACKGROUND

[6] By letter of December 19, 2013, the Respondent provided the résumé of Dr. Baribeau, the expert witness that the Respondent would call at the hearing of the appeal. By letter of January 3, 2014, the Respondent provided Dr. Baribeau's updated résumé.

[7] On January 22, 2014, the Respondent sent a summary of the proposed testimony of Dr. Baribeau to the Appellant and the Tribunal. The summary of proposed testimony was updated and a copy provided to the Appellant on January 31, 2014.

[8] By letter of January 29, 2014, Appellant's Counsel gave notice that "either at the outset or during the course of the hearing, I will be challenging Mr. Baribeau's [sic] expertise, bias and ability to give expert testimony" and the basis upon which this challenge will be made was stated ("the expert evidence challenge").

[9] At the outset of the hearing on February 5, 2014, the Appellant's Counsel challenged Dr. Baribeau's qualification and proposed testimony as an expert witness. In essence, the Appellant made a motion to preclude the Respondent's proposed expert evidence prior to the appeal on the merits.

[10] The parties, through Counsel, were given the opportunity to present evidence and argument on this preliminary point.

LAW

[11] It is well settled that the factors to consider when assessing the admissibility of expert evidence are:

a) Logical relevance;

b) Necessity;

c) A properly qualified expert; and

d) Absence of an exclusionary rule.

R. v. Mohan, [1994] 2 S.C.R. 9.

[12] If these four preconditions are satisfied, the expert evidence will be admitted provided it survives the gate-keeping function during which the trier of fact determines

whether the benefits of admissibility outweigh its costs: D. Paciocco and L. Steusser, "Essentials of Canadian Law: The Law of Evidence" p.201 ("*The Law of Evidence*").

ISSUE

[13] Whether the four preconditions to the admissibility of expert evidence are satisfied by the proposed evidence of Dr. Baribeau.

[14] If yes, whether the benefits of admissibility outweigh its costs.

EVIDENCE

[15] Dr. Baribeau obtained a degree in medicine in 1969 from the University of Ottawa. After an internship at Wayne University, Detroit, Michigan in 1969, he completed his residency in 1970-1972, with one year in pediatrics and one year in internal medicine, at the Ottawa Civic Hospital.

[16] Dr. Baribeau has worked as a family physician since 1972, in clinics and hospitals in the National Capital Region. Since 2001, Dr. Baribeau has worked full-time for Human Resources and Skills Development Canada (HRSDC) as a Medical Advisor, and he has continued his work in family medicine. Currently, he sees patients at a walk-in clinic every second week-end and is involved in providing other community based healthcare services.

[17] Dr. Baribeau has been accepted as an expert witness in many CPP disability pension matters in the past, before the Pension Appeals Board and before this Tribunal.

[18] The role of the Medical Advisor for HRSDC is to review files in CPP disability applications and employment insurance matters. Dr. Baribeau explained that someone else has reviewed the files he is assigned, prior to him, and that he usually gets involved when the matter is difficult or is going to a hearing. There are about 17-18 Medical Advisors who do this kind of work, at the current time. There is a Team Leader who assigns the files to the Medical Advisors. There are specialists, recognized by the Royal College of Physicians and Surgeons, in the team of Medical Advisors, including three

psychiatrists, one orthopaedic surgeon and other specialists, and Dr. Baribeau explained that they consult with one another as needed.

[19] One of the tasks of a Medical Advisor in respect of appeals of this type is to make a recommendation to HRSDC on whether or not to proceed to the hearing of the appeal. For example, if Dr. Baribeau recommends proceeding to the appeal to get a final determination from the Tribunal, then the Respondent will usually do this. Conversely, if he recommends that a CPP pension be paid to the Appellant, then the Respondent will likely settle the matter on the basis of payment of a CPP pension to the Appellant.

[20] According to Dr. Baribeau, at the current time, a Medical Advisor may be scheduled to testify at about 40 hearings a year. That person's assigned files also include cases "in the office" for which appearance at a hearing is not necessary. Dr. Baribeau described the Medical Advisor's function when he or she appears in hearings as one of assisting the decision maker with the medical evidence.

[21] When asked "why do we need you today?" Dr. Baribeau answered that the role of the Medical Advisor came about because the PAB wanted to have medical expertise at appeal hearings. He described his role at a PAB or Tribunal hearing as "informing", specifically informing the Board or Tribunal. Dr. Baribeau stated that he does not like the term "expert"; he would prefer a word that means "to counsel" or "to advise".

[22] Appellant's Counsel asked how Dr. Baribeau can have specific expertise on this file, when he has not examined the Appellant. Dr. Baribeau replied that he reviews and analyses the content of the medical documentation, and he assists the Tribunal to understand what is in this documentation. His role is not to conduct another medical examination of the Appellant and to diagnose and recommend treatment; that was done and the notes, tests and reports are in the file.

[23] Dr. Baribeau stated that he has treated patients with shoulder injuries, with spine injuries and with chronic pain, and that these medical problems are within the expertise of a general practitioner. He agreed that he is not a physiatrist, an orthopaedist or a rheumatologist and that he does not conduct functional capacity or vocational

assessments himself. However, he is able to review and understand the reports generated by these healthcare providers and to help the Tribunal to better understand them.

[24] When asked how he can be independent and unbiased when he is an employee of the Department under which HRSDC operates, Dr. Baribeau replied that he is informing and giving a medical opinion as he was asked to do by the PAB and now by the Tribunal.

SUBMISSIONS

[25] The Appellant submitted that Dr. Baribeau should not be permitted to testify as an expert witness in this appeal because:

a) This evidence does not meet the preconditions of relevance and necessity;

b) Dr. Baribeau is not a properly qualified expert; in particular, he does not have expertise in orthopaedics, physiatry, rheumatology, chronic pain or vocational assessment, and he is not independent and impartial;

c) This evidence does not surmount the gate-keeping function; and

d) The Respondent is able to use an independent medical expert to evaluate the Appellant and provide a report, but it has not done this.

[26] The Respondent submitted that Dr. Baribeau should be permitted to testify as an expert witness because:

a) This expert evidence meets all four preconditions of relevance, necessity, absence of any exclusionary rule and a properly qualified expert;

b) This witness is impartial, irrespective of what entity employs him, as he is testifying strictly to give his expert assistance and opinion to the Tribunal;

c) He has been qualified as an expert witness and has given evidence at many PAB and Tribunal hearings in the past; and

d) An independent medical examination of the Appellant by someone on behalf of the Respondent but not employed by it is not a precondition to a medical expert giving evidence at the appeal.

ANALYSIS

[27] Appellant's Counsel has mounted a vigorous challenge to Dr. Baribeau's participation at this hearing as a medical expert for the Respondent. He challenged the doctor's expertise and his ability to give impartial, unbiased evidence. He also took issue with the relevance and the necessity preconditions set out in *Mohan*. Further, he invited the Tribunal to use the gate-keeper function in not allowing Dr. Baribeau to give expert evidence.

[28] Despite this, Appellant's Counsel preferred to have all the evidence presented at the hearing and for this Tribunal to rule on the "expert evidence challenge" in conjunction with the overall decision on the appeal.

[29] However, Respondent's Counsel was concerned with this approach on the basis that the Respondent would be severely prejudiced if the Tribunal eventually ruled that Dr. Baribeau is not accepted as an expert. In this event, the Respondent would be left with no evidence in the appeal and, even if permitted an adjournment to allow another medical expert to testify, that person would not have been present for the Appellant's testimony.

[30] In the circumstances, I decided not to proceed with the evidence on the merits of the appeal and to adjourn the matter until after I had considered the arguments and the jurisprudence and had provided a written decision on the preliminary motion.

[31] I will start with the four *Mohan* conditions.

[32] **Logical Relevance:** Dr. Baribeau's proposed evidence relates to the documentation on file, which is a record of over 350 pages, the majority of which is medical in nature. This evidence would also include making a link between the medical evidence and whether someone is able to work. The proposed evidence is clearly

relevant, as this Tribunal must determine whether the Appellant had a severe and prolonged disability prior to his minimum qualifying period (MQP) and his capacity to work is central to whether the disability is severe.

[33] **Necessity:** The medical and vocational documentation is technical in nature. There are reports from medical specialists including orthopedic surgeons, radiologists, endocrinologist, and reports from x-rays, MRIs and other testing. There are also notes and reports written by a family doctor, a psychologist, kinesiologists and physiotherapists. The Appellant argues that there is expert opinion evidence already on file and, therefore, Dr. Baribeau's proposed evidence is not necessary. Dr. Baribeau is able to assist the Tribunal with the interpretation of the findings and recommendations in the medical and vocational documents. As such, I find that the proposed evidence meets the necessity condition.

[34] **Absence of an exclusionary rule:** This issue was not argued and no exclusionary rule was advanced by the Appellant.

[35] **A properly qualified expert:** The Appellant argues that Dr. Baribeau's expertise does not meet the qualification requirement because he is not a specialist in orthopaedics, chronic pain, or vocational or occupational assessment, rather he is a family doctor employed full-time for HRSDC. It is further argued that his full-time employment status means that he is not independent and impartial. The Respondent relies on Dr. Baribeau having been qualified as an expert in PAB and Tribunal hearings numerous times in the past and, on impartiality, argues that Dr. Baribeau is testifying at the appeal strictly to give his expert evidence and to assist the Tribunal.

[36] "Expertise" is a modest status that is achieved when the expert possesses special knowledge and experience going beyond that of the trier of fact in the matter testified to: *The Law of Evidence* p.198. Where this threshold exists, deficiencies in expertise can affect the weight of the expert evidence, but not its admissibility: *Ibid*. p.198.

[37] Dr. Baribeau possesses special knowledge and experience going beyond that of the Tribunal, specifically medical and vocational in nature. I find that he meets the "expertise" threshold.

[38] There is a body of opinion that the "expertise" requirement to admissibility should be used to curb an expert witness being used as a hired gun by excluding the testimony of partial experts, even when they have the technical knowledge: *The Law of Evidence* p.199. Appellant's Counsel relies firmly on this proposition. He asks how Dr. Baribeau can be impartial when he is an employee of HRSDC and the decision-making employee on whether an applicant for CPP disability pension is granted or denied that pension.

[39] The more conventional view is simply to treat indications of partiality as matters of weight, not admissibility, though it has become increasingly common to create protocols requiring experts to assert, before testifying, that they understand that their role is to assist and to present their evidence impartially: *Ibid.*p.199.

[40] In the current appeal, Dr. Baribeau has described his role as a Medical Advisor within HRSDC and also described his role, as he sees it, before this Tribunal. They are not one in the same. He has stated that as an expert witness he is informing the Tribunal, helping it to understanding the documents on file, and, in this appeal, giving an opinion on the Appellant's capacity to work based on all the information in the case.

[41] I find that Dr. Baribeau understands that his role as an expert witness in this appeal is to assist the Tribunal and to present his evidence impartially. In any event, I ascribe to the more conventional view that treats indications of partiality as matters of weight, not admissibility.

[42] Given my findings, above, I have concluded that the four *Mohan* preconditions are satisfied.

[43] Counsel for the Appellant argues that I should use the gate-keeping function to preclude Dr. Baribeau's evidence from being proffered.

[44] **The gate-keeping function** is a determination of whether the benefits of admissibility outweigh its costs. It is not an "all or nothing proposition", and the trier of fact may admit part of the testimony, modify the nature or scope of the proposed opinion, or edit the language used to frame the opinion (*R. v. Abbey* (1990), 97 OR (3d) 330 (CA) at para. 63).

[45] The inquiry on benefits (an examination of probative value) and costs (negative consequences that admitting the expert evidence are apt to produce) is best done after the expert evidence has been proffered, in this case, after the medical expert testifies at the appeal hearing. This can be done in a *voir dire* or after presentation of the Respondent's evidence; the format to adopt can be discussed at the return to the hearing of this appeal.

Caselaw

[46] In *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211, the Appellant on a CPP disability matter brought an application for judicial review of a decision of the PAB confirming the decision of a Review Tribunal denying a disability pension. One of the grounds of appeal was that the medical expert who testified for the Respondent gave the opinion that she "still had a certain capacity to work" and another specialist also testified, and that this testimony was accepted by the PAB over that of the applicant's family physician. The FCA found that it was open to the PAB to accept the testimony of the expert witness and other medical witnesses over the evidence of the family physician. The FCA allowed the application for judicial review on other grounds.

[47] The Respondent submits that the *Lalonde* case shows that the Respondent can call expert evidence of the type it proposes in this appeal and that the Tribunal can allow it and give it weight.

[48] In *Spears v. Canada (Attorney General)*, 2004 FCA 193, a specialist in occupational medicine had testified as an expert witness for the Minister at a PAB hearing. In arriving at its conclusion that the appellant was not severely disabled, the PAB had considered the opinion of this expert in addition to the appellant's medical

evidence. The appellant Spears made an application for judicial review to the FCA. The disability was hearing impairment and dizziness, and the appellant argued that the PAB erred: (1) in relying on this expert testimony because he had never examined or treated her and (2) he had no expertise in audiology or otolaryngology. The FCA concluded that while the CPP Regulations enable the Minister to require an applicant to undergo such examinations the Minister deems necessary, these provisions are not a barrier to the adducing of expert evidence by the Minister from a witness such as the expert in that case. The FCA also stated "In the final analysis, it was for the Board to weigh that evidence along with the balance of the appeal record and to base its decision thereon." The appellant also argued that the only purpose of this expert's testimony was to assist the PAB in the interpretation of the medical reports in the appeal record and that he should not have been allowed to testify on possible alternative employment. The FCA rejected this argument and noted that the expert had provided a copy of a "Testimonial Summary" more than a month before the hearing and that document had made it apparent that the expert's evidence would not be limited in this way.

[49] The Appellant's argument that the Respondent is able to use an independent medical expert to evaluate the Appellant and has not done so was advanced in the *Spears* case. The regulations relied upon in *Spears* are similar to the current ones relating to independent medical evaluation. These provisions are not a barrier to the Respondent adducing expert evidence of the sort that Dr. Baribeau intends to proffer at the appeal.

[50] *Gill v. Canada (Attorney General)*, (2011) FCA 195 dealt with an application for judicial review of the dismissal of an appeal by the PAB. One of the grounds of appeal was that the Crown's medical expert was biased, and, therefore, the opinion of the applicant's family physician should have been preferred. Specifically, the applicant argued that the expert appeared cold; he treated the case as if it was unimportant; and he heavily influenced the decision of the Board by giving a negative synopsis of her file. The FCA concluded that the applicant failed to show that the expert had a predisposition against her that would have tainted his objectivity resulting in the PAB being misled as to the contents of the medical records or being negatively influenced in its decision.

[51] Applying the FCA's reasoning in *Gill* to this appeal, the Appellant has failed to show that Dr. Baribeau has a predisposition against him that would taint his objectivity. In any event, as the FCA stated in *Spears*, in the final analysis, it is for the Tribunal to weigh that evidence along with the balance of the appeal record.

[52] In *Canada (Minister of Human Resources Development) v. Cantwell*, (2006) FCA 75, the Minister was successful on an application for judicial review. Before the PAB, the applicant had objected to the Minister's expert medical witness expressing an opinion on an issue raised in the testimony of the applicant's witness. The PAB precluded the Minister's expert from testifying on this point because it went beyond the summary of his testimony, which was served five days before the hearing. The expert medical witness was allowed to give the evidence summarized in the written document, but he was not allowed to express an opinion on something raised in the appellant's evidence at the hearing. The FCA found that this was a breach of procedural fairness and allowed the application.

[53] Here, the Tribunal is asked to disallow the evidence of the Respondent's medical witness in its entirety. This is a much broader exclusion (or preclusion) and could be found to be a breach of procedural fairness, if *Cantwell* was applied.

CONCLUSION

[54] The motion by the Appellant to preclude Dr. Baribeau from testifying as an expert witness at the hearing of the appeal is dismissed.

[55] The hearing of this appeal will be held in person in Thunder Bay. The parties are to provide their dates of availability in May and June 2014, within 10 days.

Shu-Tai Cheng
Member, Appeal Division