Citation: ***F. S. v. Minister of Employment and Social Development,*** **2015 SSTAD 478**

Date: April 9, 2015

File number: AD-15-52

APPEAL DIVISION

Between:

F. S.

Applicant

and

Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

REASONS AND DECISION

DECISION

[1] The Social Security Tribunal (the "Tribunal"), refuses leave to appeal.

BACKGROUND

[2] The Applicant seeks leave to appeal the decision of the General Division issued on November 12, 2014. By that decision, the General Division Member determined that a *Canada Pension Plan* ("CPP"), disability pension was not payable to the Applicant. The General Division Member found that, as of the date of her minimum qualifying period of December 31, 2010, the Applicant was not suffering from a severe and prolonged disability.

[3] The Tribunal received the Application requesting Leave to Appeal (the "Application"), on February 04, 2015, which is well within the time limit for making the Application.

GROUNDS OF THE APPLICATION

[4] Counsel for the Applicant submits that, in making its decision, the General Division committed errors of mixed fact and law. Specifically, that the General Division failed to consider relevant evidence; misapprehended evidence and substituted its own opinion for that of the experts.

[5] Counsel for the Applicant alleges the following errors of law; namely that the General Division failed to apply the following case law:

> *Attorney General of Canada v. Dwight St. Louis*, 2011 FC 492 in that the General Division Member failed to address the statement by the Applicant's family physician, Dr. Bates that she would not be able to return to any type of employment.
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> *L. F. v. Canada (Minister of Human Resources and Skills Development)* CP 26809 September 20, 2010 (PAB); arguing that the PAB decision should be binding on the Tribunal. Counsel for the Applicant contends that the General Division Member erred in equating to work capacity the Applicant's attendance at and completion of her studies at X College and subsequent job placement.
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> *E.J.B. v. Canada (Attorney General)*, 2011 F.C.A. 47 which decision required the application of a "real world" context to the determination of whether a disability is

severe. Counsel for the Applicant submits that General Division Member failed to apply a real world context to the Applicant's medical conditions and her ability to obtain and maintain substantially gainful employment.

D'Errico v. Canada (Attorney General) 2014 FCA 95. Counsel for the Applicant argues that the General Division Member failed to address the "regular" aspect of the disability test, thereby committing an error of law.

[6] Counsel for the Applicant also contended that the General Division Member committed an error of fact by misapprehending when the Applicant began treatment for depression. Counsel for the Applicant argued that the General Division Member erroneously stated that the Applicant was prescribed the anti-depressant Elavil only in October 2011 when, in fact, the Applicant had complained of depression for many years and her family physician prescribed the drug in December 2009. Counsel for the Applicant submitted that by stating that, it was not until October 2011 that the Applicant was prescribed Elavil; the General Division Member substituted her own judgement and committed an error of fact.

ISSUE

[7] The issue before the Tribunal can be stated as,

Does the appeal have a reasonable chance of success?

THE LAW

[8] The applicable statutory provisions governing the granting of Leave are found at ss. 56(1), 58(1), 58(2) and 58(3) of the *Department of Employment and Social Development* (DESD) *Act*. Ss. 56(1) provides that an Applicant must first seek and obtain leave to bring his or her appeal to the Tribunal's Appeal Division which, following ss. 58(3), must either grant or refuse leave appeal.

[9] The grounds of appeal are set out at ss. 58(1) 58(2) and 58(3) and states that the only grounds of appeal are the following:

a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

c) The General Division 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.

ANALYSIS

[10] In order to grant leave to appeal, the Tribunal must be satisfied that the appeal would have a reasonable chance of success. To do this the Tribunal must first determine whether any of the Applicant's reasons for the Application fall within any of the enumerated grounds of appeal. For the reasons set out below the Tribunal is not satisfied that the appeal has a reasonable chance of success.

[11] Counsel for the Applicant has alleged that the General Division Member committed errors of law in her assessment of the medical evidence and with respect to the view she took of the Applicant's efforts to work and/or retrain.

[12] A reading of the decision shows that the General Division Member was not only alive to the Applicant's medical conditions, she was also alive to the prognoses for recovery that were made by the several medical practitioners who treated the Applicant.

Did the General Division Member err by failing to address the Statement of the Applicant's Family Physician that she would not be able to return to any type of Employment?

[13] Counsel for the Applicant contends that the Applicant's family physician Dr. Bates made a statement that she would not be able to return to any type of employment and goes on to argue that the General Division Member ignored this statement when she made her decision. In the submission of Counsel for the Applicant the General Division Member is bound by the decision of St. *Louis*.[1] Therefore, the General Division Member was obliged to directly address Dr. Bates' statement when she made her decision.

[1] *Attorney General of Canada v. Dwight St. Louis*, 2011 FC 492.

[14] In fact, Dr. Bates did not state that the Applicant could not return to any type of work. In completing the medical report of June 10, 2012, Dr. Bates states that the prognosis for the Applicant's return to work was poor and a "return to her old job is unlikely."[2] Thus, Dr. Bates' comment is equivocal and, in the Tribunal's view cannot be taken to rule out a return to any work. Indeed, it appears that earlier Dr. Bates had actually recommended that the Applicant return to work on modified duties.[3]

[15] It is settled law that a Tribunal need not refer to every piece of evidence that was before it. However, in this case, the Tribunal would distinguish *St. Louis* as in *St. Louis* the Federal Court found that the Tribunal never referred to a letter, dated May 31, 2005, by Dr. Gupta, the Respondent's cardiologist, to Dr. Mathur, a cardiac surgeon,. The Federal Court found this letter "was not mentioned by the Tribunal in its decision, despite the fact that the Tribunal explicitly stated that it "considered all of the health care evidence on file" and took "excerpts from those reports which we found to be the most significant in arriving at our decision".

[16] The same cannot be said of the General Division decision. Dr. Bates' comments are expressly mentioned at Paragraph 25 of the decision and must be taken to have factored into the General Division Member's findings concerning the recommendations made by the various medical practitioners. Accordingly, the Tribunal is not satisfied that the appeal would have a reasonable chance of success on this ground. The Application cannot succeed on this basis.

[17] With respect to the submission of Counsel for the Appellant that PAB decisions are binding on the Tribunal, the Tribunal is not persuaded that PAB decisions are other than persuasive on the Appeal Division, since by Counsel's own argument, the PAB occupied the same position as the Appeal Division. This divergence notwithstanding, the Tribunal finds that the PAB has issued a number of decisions that contradict *L. F. v. Canada (Minister of Human Resources and Skills Development)* CP 26809 September 20, 2010 (PAB). Thus, for example, in *Dupuis*, the PAB stated that "the ability to pursue a reasonably demanding course of study can be equated to the capability of pursuing a substantially gainful employment."[4] Again in *R.B. v. MHRSD*, the PAB equated the Applicant's ability to complete a Certificate of Architectural

[2] Medical Report dated June 14, 2010, Box 10.
[3] Report of Dr. Israel, July 10, 2009.
[4] *MNHW v. Dupuis* (July 1985) CCH 8502.

Technology (spending some 30 to 40 hours in class and home study, despite constant pain) to work capacity.[5]

[18] Perhaps, what can be said of the PAB case is that each case turns on its own facts. A point that was made in *Fraser v. MHRD.*[6]

[19] In the instant case, the Applicant apparently maintained regular attendance while completing a course of studies at X College. She then completed a ten-week job placement. Counsel for the Applicant contends that the General Division Member ought to have factored into her decision the fact that the Applicant utilized services for students with disabilities and was accommodated during the job placement. With respect, in the Tribunal's view these are precisely the types of assistance that is contemplated by the concept of modified duty. Thus, even recognising that a student on a temporary job placement might be treated somewhat differently the Tribunal is not persuaded that the General Division Member erred in her treatment of the Applicant's study and work placement. Thus, the Application cannot succeed on this ground.

[20] Counsel for the Applicant has also submitted that the General Division Member failed to take into account the Applicant's entire medical condition. For this proposition, Counsel relies on the decision in *E.J.B. v. Canada (Attorney General)*, 2011 F.C.A. 47. He cites the Applicant's conduct during the hearing as the basis for his case that the General Division Member did not consider the impact of her cognitive impairments and the side effects of her medication on the Applicant's ability to sustain regular substantially gainful employment. The Tribunal does not dispute that at three points during the hearing, the Applicant complained that her concentration was impaired as a result of her chronic pain, inability to sleep and the medication she was taking which made her sleepy and tired. However, the hearing was held in November 2014 while September 2011 was the latest date by which a severe and prolonged disability had to be established. Thus, the question is not what the Applicant's capabilities are as of the hearing date, but what they were as of the MQP.

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[5] *R.B. v. MHRSD* (June 14, 2012) CP 2805 (PAB)
[6] *Fraser v. MHRD* (September 20, 2000) CP 11086.

[21] The General Division Member found that the medical and other evidence did not support a finding that as of the MQP the Applicant had a severe and prolonged disability. Based on the Analysis carried out by the General Division Member, this Tribunal is not persuaded that her conclusions were arrived at in error. The Tribunal may have preferred a more fulsome analysis of the medical conclusions and recommendations; however, this does not mean that the General Division Member failed to provide a rational basis for her decision such that it could be considered unreasonable. The decision of the General Division Member is grounded in the finding that despite her chronic pain, the Applicant was able to complete several courses of study both pre and post the MQP, thus evidencing retained work capacity. Further, the decision of the General Division Member found that as of the MQP, the Applicant's medical practitioners were not satisfied that she was suffering from a severe disability as the medical practitioners continued to encourage the Applicant to be active. For these reasons, this Tribunal is not satisfied that the appeal would have a reasonable chance of success on this ground.

[22] Counsel for the Applicant has also argued that the General Division Member failed to consider *D'Errico v. Canada (Attorney General)* 2014 FCA 95. He submits that when the Applicant was asked whether she would be able to adhere to a work schedule, she replied she could do so only if cured of pain. Counsel submits that in her decision the General Division Member failed to address the "regular" aspect of the disability test, which was an error of law.

[23] The concept of "regular" has been explored in numerous decisions, most recently in *Atkinson v. Canada (Attorney General)*[7] where the Federal Court of Appeal stated that "predictability is the essence of regularity within the CPP definition of "disability." In *Atkinson*, the Federal Court was echoing *Chandler v. MHRD* where it was stated that "regularly means that the applicant must be capable of coming to work as often as is necessary. Predictability is the essence."[8] The General Division Member found that at the time of her MQP, the Applicant had retained work capacity. Accordingly, then it was not necessary for the General Division Member to address the question of regular. In this Tribunal's view the concept of "regular" is implicit to a finding of retained work capacity. For this reason the Tribunal finds that the appeal cannot be grounded on this argument.

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[7] *Atkinson v. Canada (Attorney General)* 2014 FCA 187.
[8] *Chandler v. MHRD,* (November 25, 1996) CP 4040.

Did the General Division Member misstate the date when the Applicant was prescribed the anti-depressant Elavil?

[24] The Tribunal finds that the General Division Member did misstate the date the Applicant was prescribed Elavil. At paragraph 7 of the decision the General Division Member notes that the physician's clinical record show that in June 2010, the Applicant was taking 12.g of Elavil at night and Celebrex 200 mg once a day for pain. Therefore, if Elavil had been prescribed for the purpose of addressing the Applicant's depression, the General Division Member's statement that "Dr. Bates did not feel the need to prescribe an antidepressant until October 2011" would be an error.

[25] Dr. Bates notes show that on December 1, 2009, the Applicant was started on 10 mg of Elavil. Her prescription appears to have been renewed at least until March 15, 2010. On August 19, 2010, the dosage was upped to 12.5 mg. In August 2011, the dosage reverted to 10 mg. The Elavil was discontinued on February 10, 2012. However, while Counsel for the Applicant states she was prescribe Elavil for her depression, it is not clear to the Tribunal exactly why the Applicant was prescribed Elavil. In Dr. Avila's referral letter to Dr, P. Bright, dated February 15, 2012, he notes that the Applicant was prescribed Cipralex for depression.

[26] Dr. Bates' clinical notes show that on October 17, 2011, he prescribed and started the Applicant on 10 mg of Cipralex for her depression. Dr. Bates' clinical notes also show that initially, the Applicant was unable to fill the prescription for Cipralex as she could not afford to do so. However, eventually, the Applicant was able to fill the prescription on November 10, 2011. Furthermore, all of the references to Elavil are in the context of pain management, and in response to the question "is the patient currently on medication as a result of the main medical condition, Dr. Bates listed Elavil 12.5 mg as one of two medications the Applicant was taking to treat her main medical condition. The other medication was Celebrex.

[27] In these circumstances the Tribunal is not satisfied that the General Division Member committed the error of fact that Counsel for the Applicant alleged she did. Therefore, the Application cannot succeed on this ground.

CONCLUSION

[28] The Applicant has filed an Application for Leave to Appeal the decision of the General Division issued on November 12, 2014 that denied her payment of a CPP disability pension. On her behalf, her Counsel has alleged a number of errors of law and fact. The Tribunal is not persuaded that the General Division Member committed the alleged errors of fact and law. Therefore, the Applicant has failed to satisfy the Tribunal that she has an arguable case. Accordingly, the Tribunal refuses the Application.

[29] The Application is refused.

Hazelyn Ross
Member, Appeal Division