Citation: ***D. A. v. Minister of Employment and Social Development*****, 2015 SSTAD 685**

Date: June 3, 2015

File number: AD-15-168

APPEAL DIVISION

Between:

D. A.

Applicant

and

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

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

Decided on the Record on June 3, 2015

REASONS AND DECISION

DECISION

[1] Leave to appeal to the Appeal Division of the Social Security Tribunal of Canada is refused.

INTRODUCTION

[2] On January 8, 2015, the General Division of the Social Security Tribunal of Canada, (the Tribunal), determined that the Applicant was not entitled to a Canada Pension Plan, (CPP), disability pension. The Applicant has filed an application for leave to appeal, (the Application), with the Appeal Division of the Tribunal. On his behalf, Counsel for the Applicant submits that the Application should be granted because of numerous errors on the part of the General Division.

GROUNDS OF THE APPLICATION

[3] The Application is based on s. 58 of the Department of Employment and Social Development (DESD) Act. Counsel for the Applicant submits that the General Division,

a) based its decision on an erroneous finding of fact and without regard for the material and evidence before it;

b) erred in law in making its decision; and

c) failed to observe principles of natural justice and refused to exercise its jurisdiction.

ISSUE

[4] The Tribunal must decide whether the appeal has a reasonable chance of success.

THE LAW

[5] Subsections 56(1) and 58(3) of the DESD Act provide that, "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal."

[6] Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

SUBMISSION

[7] Counsel for the Applicant submitted that the General Division,

1. Referred to a doctor who never treated the Applicant;
2. Misquoted the opinions of several medical practitioners;
3. Ignored medical evidence;
4. Did not consider the totality of the Applicant's medical conditions;
5. Made erroneous findings about the Applicant's compliance with recommended medical treatments;
6. Failed to follow or apply legal precedent;
7. Failed to consider both aspects of the definition of "severe and prolonged"; and
8. Breached natural justice by failing to hold a hearing within a reasonable time.

ANALYSIS

[8] The rationale for the General Division decision is that, as of the minimum qualifying period date, (the MQP), the Applicant had retained work capacity but had made no effort to seek alternative work despite medical practitioners clearing him for sedentary, less labour intensive work. The first error complained of is, that the General Division referred to a Dr., Heng, when no such medical practitioner ever treated the Applicant. While the Applicant was seen by a Dr. Hagen, the Decision refers to a Dr. Heng. Clearly, this is an error. The Tribunal is not implying that the intended reference was to Dr. Hagen, who treated the Applicant well prior to the motor vehicle accident. However, as the reference to Dr. Heng was made simultaneously with a reference to three other medical practitioners the Tribunal is not

persuaded that the error is so material that it likely could have changed the outcome of the decision had it not been made.[1]

[9] Counsel for the Applicant raises as a ground of the Application that the General Division has misquoted the opinions of medical practitioners, specifically Drs. Chen and Vitelli as well as that of Dr. V. Levitin who performed a Functional Abilities Evaluation of the Applicant. Counsel for the Applicant submits that, contrary to the statement of the General Division, the medical practitioners found the Applicant to be disabled. He notes that Dr. Chen found that the Applicant was suffering "from serious and permanent impairment, that prognosis for return to pre-accident activities are poor, that impairments are severe to interfere with functioning in own and any occupation and that vocational rehabilitation will be unsuccessful for multiple reasons and for which the early retirement is necessary."

[10] It is helpful to examine what the medical practitioners found on examining the Applicant. On August 24, 2010, Dr. Chen provided the following prognosis,

> "It has been approximately 13 months since the claimed accident. The examinee still experiences persistent pain and impairments. The prognosis for full recovery to a pre- accident functional and physical level, in my professional opinion is poor."

[11] Dr. Chen went on to opine of the Applicant that there was "a substantial limitation in the ability to resume the pre-accident employment (and that) given his current age and limited education, I do not see any attempt at vocational retraining to be successful and early retirement may be required." In the Tribunal's view Dr. Chen's opinion is somewhat ambiguous. It is not an unequivocal finding that the Applicant is disabled from all work. Further, the opinion begs the question of whether vocational retraining is a required component of alternative employment. This is a position that the Tribunal does not take. In the Tribunal's view it is possible to obtain alternative employment without first having to undergo vocational retraining. In fact, the opinions of Drs. Vitelli and Levitin would seem to support the Tribunal's position with regard to the Applicant.

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[1] At paragraph 21, the General Division writes,

"The Appellant has not made any effort to seek any type of alternative work since his accident July 1, 2009, even though attending physicians (Drs. Heng, Chen, Vitelli and Levitin) had cleared him for sedentary, less-labour intensive employment areas."

[12] On September 20, 2010, Dr. Vitelli carried out a psycho-vocational assessment of the Applicant. He found that the Applicant had transferable skills that made him suitable for certain jobs. At the same time, Dr. Vitelli found that the Applicant's physical condition likely hindered his capacity to engage in those jobs. The results of the Functional Abilities Evaluation are expressed in similar terms. Dr. Levitin stated that, "based on the results of the assessment he [meaning the Applicant] does not currently meet the requirements of his employment activities as a machine operator. He does not meet the lifting requirements of up to 40 lbs. His lifting tasks should be limited to 13 lbs. based on testing and he should be able to change positions frequently." Significantly, Dr. Levitin evaluated the Applicant as being in the light to medium category for work.

[13] The Applicant submitted medical reports from some 8 or 9 medical practitioners, including the medical report that was completed for the application for benefits by his family physician, Dr. Garber. Dr. Chen is the only medical practitioner to express doubt that the Applicant could be retrained for alternative employment. Dr. Gallay opined in January 2010 that the likelihood of the Applicant returning to his pre-accident employment was poor to fair. This, of course is not the test. The test being "any, substantially gainful employment". Dr. Vitelli acknowledged the prognoses made by Dr. Chen and Dr. Gallay, however, he found that the Applicant could engage in positions such as "surveillance system monitoring; parts/order clerk; or gate guard." Dr. Vitelli did not address the issue of retraining.

[14] Based on the above, there appears to be something of a conflict in the medical evidence that was before the General Division. Given that the preponderance of the medical evidence did not support a finding of the Applicant being disabled from all work, the Tribunal is not satisfied that despite the alleged errors by the General Division, namely, misinterpreting or misquoting the medical practitioners, that the appeal would have a reasonable chance of success.

[15] Counsel for the Applicant submitted that the General Division ignored the medical evidence of orthopaedic surgeons and the Applicant's family physician. He also submitted that the General Division ignored the Applicant's medical history of diabetes and hypertension and related injuries from the accident. The Tribunal finds these allegations not

to be well founded. With respect to his other medical conditions, the Applicant lists diabetes. In the medical report that was submitted with the application for disability benefits, Dr. Garber lists diabetes and elevated cholesterol as constituting his diagnosis of the Applicant's medical condition. Dr. Garber did not list hypertension as one of the Applicant's medical conditions.

[16] *Demers*[2] stands for the proposition that "entitlement is not based on a diagnosis of a condition but on capability of work." Thus, the test for severity is not met on the mere diagnosis of diabetes and high cholesterol. The Applicant has argued only that his disabling conditions were the result of the motor vehicle accident. This is in keeping with the fact that it was neither diabetes nor high cholesterol that caused him to stop working. The Tribunal agrees that where an applicant lists several disabling conditions it would be an error not to consider the totality of the medical conditions. However, in the circumstances of this Applicant's case, the Tribunal is at a loss to understand how, in these circumstances, the General Division is expected to consider the Applicant's diabetes and elevated cholesterol in its analysis. Accordingly, the Tribunal rejects this submission, finding that it cannot ground the Application.

[17] As well, the Tribunal finds that it cannot be said that the General Division ignored medical evidence. In its decision, the General Division makes several references to the medical evidence, thus it cannot be said that it ignored medical evidence. Ultimately, the General Division came to rest its decision on the finding that the Applicant retained work capacity and had made no attempt to seek and maintain alternative employment. In the Tribunal's view, the Applicant's true complaint is that the General Division weighed the medical evidence in a manner with which he disagrees. However, disagreement with the decision is not sufficient to ground the Application.

[18] Counsel for the Applicant also contended that the General Division committed further errors vis-as-vis its finding at paragraph 12 of the decision, that the Applicant did not attend physiotherapy treatments; or remains employed. As well, Counsel for the Applicant

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[2] *Demers v. M.H.R.D.* (June 11, 1999) CP 06825 CEB & PG 8764

submitted that the General Division erred in law by failing to follow *Villani*[3] as well as by failing to consider the prolonged aspect of the test for severe and prolonged.

[19] The Tribunal finds that the General Division made no finding concerning the Applicant's attendance at physiotherapy sessions. Rather, at paragraph 12, the General Division is merely repeating the Applicant's oral testimony. Accordingly, the Tribunal rejects this aspect of the Applicant's argument.

[20] With respect to the submission that the General Division erred by failing to consider that the Applicant remains employed, the Tribunal is at a loss to understand this submission. The Tribunal is also unable to reconcile continued employment with an application for CPP disability benefits.

[21] With respect to the submission that the General Division failed to follow *Villani* by taking a summary approach in its too brief analysis of the Applicant's *Villani* factors, the Tribunal agrees that the severity test requires a "whole person" assessment of a claimant that is consistent with the "real world" approach taken in *Villani*. However, there is case law to the effect that having found that an Appellant did not have a severe medical condition, it was not necessary To apply the real world approach to the Appellant's case. In *Giannaros*[4] the Federal Court of Appeal opined that whenever the decision maker is not persuaded that there is a serious medical condition, it is not necessary to undergo the "real world approach" analysis. *Giannaros* remains good law. Therefore, having found that the Applicant did not meet the test for a severe medical condition, the Tribunal finds it was not an error for the General Division to not engage in a more fulsome analysis of the factors set out in *Villani.*

[22] Counsel for the Applicant further asserts that the General Division breached the Applicant's right to natural justice by failing to hold a hearing within a reasonable time. He submits that while the Applicant indicated that he was ready to proceed with the hearing as far back as June 11, 2013, by holding the hearing in January 2015, the Tribunal failed to review the Applicant's evidence within a reasonable time.

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[3] *Villani v. Canada (A.G.),* 2001 FCA 248.
[4] *Giannaros v. Canada (Minister of Social Development),* 2005 FCA 187

[23] This submission raises the issue of the scope of the Appeal Division's jurisdiction in cases where it alleged that the General Division committed a breach of natural justice. Subsection 58(1)(a) gives the Appeal Division broad jurisdiction to hear an appeal on the ground that "the General Division failed to observe a principle of natural justice." Additionally, subsection 3(1)(a) of the *Regulations*[5] mandates that the Tribunal must conduct proceeding as informally and quickly as the circumstances and the considerations of fairness and natural justice permit. An eighteen month delay in scheduling a hearing may well not qualify as being "as quickly as the circumstances permit", however, where the hearing has, in fact, taken place the Tribunal is not certain what remedies could flow from the Applicant's submission. Accordingly, the Tribunal finds that this is not a ground that would have a reasonable chance of success on appeal.

[24] Finally, the Applicant argues that the General Division erred by failing to consider the "prolonged" prong of the definition. The Tribunal rejects this argument. The Federal Court of Appeal has clarified the position in this regard. In *Klabouch*t[6] he Federal Court of Appeal described the test in paragraph 42(2)(a) as "containing cumulative requirements so that if an applicant does not meet one or the other condition his application for a disability pension under the CPP fails." By the reasoning of the Federal Court of Appeal "it was not an error for the PAB to have concentrated primarily on the 'severe' part of the test and made any finding regarding the 'prolonged' part of the test." The Tribunal applies the same reasoning to the General Division decision to find that, having found that the Applicant did not have a severe disability it was not an error for the General Division to make no finding concerning the prolonged aspect of the Applicant's medical conditions.

CONCLUSION

[25] The Applicant alleged that the General Division breached natural justice as well as based its decision on an erroneous finding of fact which it made in a perverse or capricious manner or without regard for the material before it. On the basis of the foregoing, the Tribunal finds that these allegations have not been made out. Therefore, the Tribunal is not satisfied that the Applicant's appeal would have a reasonable chance of success.

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[5] *Social Security Tribunal Regulations*, SOR/2013-60 effective April 1, 2013 as amended.
[6] *Klabouch v. Canada (Minister of Social Development),* 2008 FCA 33.

[26] The Application is refused.

Hazelyn Ross
Member, Appeal Division