Citation: *X. O. v. Minister of Employment and Social Development,* 2015 SSTAD 740

Appeal No. AD-15-284

BETWEEN:

X. O.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Hazelyn Ross

DATE OF DECISION: June 16, 2015

DECISION

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

INTRODUCTION

[2] On February 5, 2015, the General Division of the Social Security Tribunal of Canada, (the Tribunal), granted the Applicant's appeal from a decision refusing payment of a *Canada Pension Plan,* (CPP), disability pension. The General Division Member found that the Applicant became disabled in April 2011. Disability payments would commence as of August 2011.

[3] The Applicant seeks leave to appeal this decision. Through his Counsel he argues that in finding that his disability began in April 2011 the General Division erred by,

- failing to observe a principle of natural justice in that it failed to provide reasons in the decision for choosing a later date instead of the date of injury as the date of onset;
- relying on a test that is not contemplated by the CPP;
- basing its decision on an erroneous finding of fact that was made in a perverse or capricious manner without regard for the material before it.

ISSUE

[4] The Tribunal frames the issues before it in the following manner:

(a) did the General Division err in law in its determination of the date on which the Applicant became entitled to CPP disability payments?

(b) Does the appeal have a reasonable chance of success?

THE LAW

[5] Several legislative provisions govern this Application. First, the provisions governing the grant of leave to appeal and the grounds of appeal apply[1]. Appeals of a General Division

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[1] **58(1) Grounds of Appeal** –

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

decision are governed by sections 56 to 59 of the *Department of Employment and Social Development Act*, (DESD Act). Subsections 56(1) and 58(3) govern the grant of leave to appeal, providing 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." To grant leave the Appeal Division must be satisfied that the appeal would have a reasonable chance of success, a reasonable chance of success being equated to an arguable case.

[6] The legislative statutory provision governing the time when an applicant for CPP disability benefits may be deemed to be disabled also applies. This latter is found at ss. 42(2)(b) of the CPP, namely that,

> b) A person is deemed to have become or to have ceased to be disabled at the time that is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person - including a contributor referred to in subparagraph 44(1)(b)(ii) – be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made. (S.C. 1992, c. 1, s. 23; 2009, c. 32, s. 31.)

SUBMISSIONS

[7] Counsel for the Applicant submitted that the General Division ought to have provided reasons for why it chose April 12, 2011 as the date of onset of disability. Counsel also submitted that in its decision making the General Division used a standard of "maximal medical recovery" which is not a standard iterated by the CPP. Further, Counsel for the Applicant submitted that the choice of date of the onset of disability was an arbitrary choice that ignored medical reports supporting an earlier date of onset.

ANALYSIS

[8] Applications for leave to appeal are the first stage of the appeal process. The threshold is lower than that which must be met on the hearing of the appeal on the merits. However, in order to be granted leave to appeal, the Applicant must present some arguable ground upon which the proposed appeal might succeed: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

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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.

[9] The Federal Court of Appeal has found that an arguable case at law is akin to whether, legally, an applicant has a reasonable chance of success: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63. Therefore, the Tribunal must first determine if the reasons for the Application relate to a ground of appeal that would have a reasonable chance of success.

Did the General Division fail to provide reasons for its choice of date of onset?

[10] Counsel for the Applicant submits that the General Division did not provide its reason for deciding on April 12, 2011 as the date of onset. In Counsel's submission, this omission was both a breach of natural justice and an indication that the General Division based its decision on an erroneous finding of fact. Counsel cites paragraph 57 of the decision in which the General Division sets out its finding regarding the date of onset of disability. However, Counsel finds the rationale set out at paragraph 58 to be an insufficient explanation of the General Division's decision-making process. The Tribunal is not persuaded of Counsel's position for the following reasons.

[11] It is well settled that objective medical evidence is required in order to establish disability.[2] At the same time the door is open to the credible, subjective evidence of an applicant. In the instant case, the General Division Member determined that the Applicant had provided credible testimony. At the same time the General Division Member had several medical reports on which he placed reliance before him.[3] It is clear from his analysis that the General Division Member examined these medical reports, which he termed key reports, at some length before coming to the conclusion that is expressed in paragraph 58.

[12] Furthermore, having examined the reports, the General Division Member expressly stated that his finding concerning the onset of disability was based on the assessment of disability that had been made by Dr. Matthews on April 12, 2011. It might have been preferable for the Member to expand on his rationale, however he did not. Nonetheless, assessing the decision using a standard of review of "reasonableness", the Tribunal finds that

[2] See, for example, *Warren v. Canada (A.G.)* 2008 FCA 377: a claimant must provide some objective medical evidence of his or her disability; see also *Villani v. Canada (A.G.)*, 2001 FCA 248, Objective medical evidence will still be needed as will evidence of employment efforts and possibilities.
[3] See paragraphs 44-46 of the decision.

the decision, taken as a whole, falls within the range of possible acceptable outcomes which are defensible in respect of the facts and the law. In the Tribunal's view, paragraph 58 must be read in the context of and referencing paragraphs 44-46. At paragraph 44, the General Division Member examines the much quoted report of Dr. Mihic, in which Dr. Mihic opines that "the applicant will not be able to return in the foreseen future to any kind of temporary and or permanent job." The Tribunal finds that this is not an unequivocal statement of disability. The first such opinion appears to be that of Dr. Matthews in April 2011. Therefore, the General Division did not err in selecting this opinion as establishing a date of onset. In the Tribunal's view, the decision, taken as a whole, does not support either the error of law or breach of natural justice that Counsel for the Applicant submits the General Division Member made. The Tribunal is not satisfied that these are grounds on which the appeal might succeed.

Did the General Division apply an Incorrect Test?

[13] Counsel for the Applicant submitted that the General Division used the wrong test to assess the severity of the Applicant's disability. In Counsel's submission, the General Division applied a test of "maximal medical recovery" and "permanently disabled" both of which statements bear no relation to the test set out in the CPP. The test for severe disability being "incapable regularly of pursuing any substantially gainful occupation."[4]

[14] It is clear from its analysis that the General Division was alive to the requirements of the test, which it quoted at paragraph 52 of the decision. It is also clear that when the Member referred to the impugned terms, he was directly quoting the statements of the relevant medical reports. For example, at paragraph 56, the Member stated that he was placing more weight on Dr. Bringleson's report as opposed to that of the orthopaedic surgeon. The Member noted that Dr. Bringleson "wrote that the results of all the rehabilitation programs and specialist consultations concluded the Appellant had reached "maximum medical recovery" and would

[4] 42(2) When person deemed disabled – For the purposes of this Act,
(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,
(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.

live with a "permanent disability". The General Division Member makes a similar reference with respect to the conclusions of Dr. Matthews in April 2011.[5]

[15] It becomes even clearer that the General Division did not apply the wrong test when his statement that "in short, the Tribunal finds that on a balance of probabilities the Appellant was incapable regularly of pursuing any substantially gainful occupation as of April 2011." This statement is found at paragraph 57, which is the paragraph that immediately follows the one in which the Member discussed and set out why he preferred the Bringleson medical report. The Tribunal finds no error on the part of the General Division, therefore, leave will not be granted on this basis.

CONCLUSION

[16] Counsel for the Applicant submitted that the General Division erred by applying the wrong test and by ignoring evidence that the Applicant became disabled on the date he was injured. Counsel also submitted that the General Division breached natural justice by failing to provide reasons in its decision for choosing a later date rather than the date of injury as the date of onset of disability. For the reasons set out above the Tribunal finds that Counsel's submissions are not well founded.

[17] At the Application stage an Applicant need only succeed in raising one ground of appeal. The Tribunal finds that the Applicant has not done so. The Tribunal is not satisfied that the appeal would have a reasonable chance of success.

[18] The Application for Leave to Appeal is refused.

Hazelyn Ross
Member, Appeal Division

[5] Paragraph 57.