Citation: ***R. M. v. Minister of Employment and Social Development*****, 2015 SSTAD 890**

Date: July 20, 2015

File number: AD-15-371

APPEAL DIVISION

Between:

R. M.

Applicant

and

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

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

Decided on the Record on July 20, 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 May 22, 2015, the General Division of the Social Security Tribunal of Canada (the Tribunal), determined that the Applicant was not entitled to a disability pension. On or before his minimum qualifying period (MQP) date of December 31, 2009, the Applicant did not have a mental or physical disability that was "severe and prolonged" as defined by the *Canada Pension Plan* (CPP). The Applicant filed an application for leave to appeal (the Application), with the Appeal Division of the Tribunal.

GROUNDS OF THE APPLICATION

[3] On his behalf, Counsel for the Applicant submitted that the General Division decision breached subsection 58(1) of the *Department of Employment and Social Development* (DESD) *Act* in that the decision contained breaches of natural of justice; errors of law; and erroneous findings of fact that the General Division made in a perverse or capricious manner or without regard for the material before it.

ISSUE

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

THE LAW

[5] Leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.[1] To grant leave, the Appeal Division must be satisfied that the appeal would have a reasonable chance of success. The Federal Court of Appeal has

[1] 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."

equated a reasonable chance of success to an arguable case: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[6] The Grounds of Appeal are set out in section 58 of the DESD Act.[2] These are the only grounds on which an Applicant may appeal a decision of the General Division. For the following reasons the Tribunal is not satisfied that the appeal has a reasonable chance of success.

ANALYSIS

[7] The crux of the General Division decision is that while the Applicant may, in fact, suffer from several health conditions; on or before his MQP, these conditions did not meet the definition of severe and prolonged disability.

The Alleged Breaches of Natural Justice

[8] Counsel for the Applicant submitted that the General Division breached natural justice by rrendering its decision almost four months after the hearing. In Counsel's submission this reduced the "impact of the submissions and crucial testimony." The Tribunal rejects this submission. While there is an expectation that the Tribunal will conduct proceedings as quickly as the circumstances and the considerations of fairness and natural justice permit, and also, while there is a requirement that the Tribunal issue reasons for its decision, there is no express time limit set for the issuance of a decision. At any rate, the Tribunal finds that the delay in the issuance of the decision is not inordinate. The hearing took place on February 4, 2015. The General Division issued its decision on May 22, 2015, a delay of three and a half months. The Tribunal is not persuaded that the "impact of the submissions and crucial testimony" could have

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[2] **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
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.

been so lessened during this period as to render the Applicant so disadvantaged as to support a finding that a breach of natural justice has occurred. This is not a ground of appeal.

[9] Counsel also submitted that a breach of natural justice arose because while the General Division Member cited *Villani v. Canada (Attorney General)*, [2002] 1 FCR 130, 2001 FCA 248, she failed to properly apply the whole person approach thereby denying the Applicant the consistent application of the *Villani* principles.

[10] The Tribunal rejects this submission. In the Tribunal's view the analysis that the General Division Member engaged in, particularly at paragraphs 35 & 36 as well as at paragraphs 48 &4 9, refutes this allegation. In the event, the Tribunal finds that the General Division did not breach a principle of natural justice.

Alleged Errors of Law

[11] Counsel for the Applicant alleged that the General Division committed an error of law by failing to give the proper weight to the balance of probabilities proving that the Applicant had a severe disability. This submission does not disclose a ground of appeal. The balance of probability is a test establishing the burden of proof in civil that is, non-criminal cases. The question of weight does not arise in respect to the test itself but rather to evidence that a party puts forward.

[12] Counsel for the Applicant again cited what she saw as the General Division's failure to apply the whole person test in *Villani*. As stated earlier, the Tribunal rejects this submission as giving rise to a ground of appeal. The Member's analysis and application of *Villani* commenced at paragraphs 35 and 36. She continued her analysis in paragraphs 48 and 49. In these paragraphs, the Member expressly discusses the Applicant's age, education and work experience in the context of making a determination as to whether his medical conditions were severe and prolonged.

[13] In this regard, the Member noted the Applicant's relative youth; that he was proficient in the English language; and that despite his low level of education and learning difficulties, the Applicant had had management experience. In applying the "whole person" assessment, the member found that it was reasonable to expect that the Applicant should have been able to

retrain and find employment suitable to his limitations, provided that he followed recommended treatment recommendations. Accordingly, the Tribunal finds that the General Division did not commit an error in its assessment of the Applicant's *Villani* factors.

[14] Counsel for the Applicant also submitted that the General Division improperly relied on excerpts from different medical reports which indicated that the Applicant could not perform heavy work. She argued that the Member implied from these reports that the Applicant could do light work.

[15] The Tribunal finds that the General Division did not improperly rely on excerpts from the medical reports to make a finding that the Applicant could do light work. In the Tribunal's view, where the medical practitioners who examined the Applicant had concluded that he could not perform heavy duties but had not said he could not perform light or sedentary work, it was reasonable for the General Division to infer that the Applicant could perform such work. In the Tribunal's view, it is a reasonable inference that unless expressly excluded, a finding that an applicant could not do heavy work does not exclude a finding that an applicant could do light or sedentary work. Furthermore, the Supreme Court of Canada has ruled that while "reasons may not include all the arguments, statutory provisions, jurisprudence and other details the reviewing judge would have preferred, but that does not necessarily impugn the validity of either the reasons or the result under the reasonableness analysis." *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 at paras. 14-16, 18, 20-22.

[16] Accordingly, the Tribunal finds that the General Division did not commit errors of law as submitted by Counsel for the Applicant.

The Alleged Erroneous Findings of Fact

[17] Counsel for the Applicant also alleged that the General Division made erroneous findings of fact without regard for the material before it. She submitted that the General Division Member relied on excerpts from medical reports which were provided as assessments of his back disability exclusively. In Counsel's submission, the General Division Member chose to interpret these medical assessments that Counsel described as coming from "mostly

transient (not treating) doctors" as proof that the Applicant was able to perform light work without considering the whole person.

[18] The Tribunal confesses to having difficulty with this submission. The medical evidence was tendered to support the Applicant's claim that he was disabled. Therefore, the General Division is entitled to rely on that evidence. The General Division cannot reject evidence solely on the basis that the medical practitioner was not the Applicant's regular physician. To do so would be an error of law. Furthermore, in the absence of error, the General Division, as the trier of fact, is entitled to give weight to evidence differently. Accordingly, the Tribunal is not satisfied that this is a ground of appeal that would have a reasonable chance of success.

[19] The next objection raised by Counsel for the Applicant is that the Member noted but failed to consider the effects of the Applicant's medication on his ability to work and to perform and be reliable to a potential employer. The Tribunal is not persuaded by this submission. At paragraph 37, the General Division Member expressly considered the effect of the Applicant's medication regime to his overall functioning. Consequently, the Tribunal is not satisfied that this is a ground of appeal that would have a reasonable chance of success.

[20] Similarly, the Tribunal is not satisfied that the submission that the General Division erred by failing to properly consider the Applicant's testimony about the true nature of his work as a construction supervisor. The General Division Member noted the Applicant's supervisory experience in the context of assessing the *Villani* factors and the possibility of the Applicant finding alternative employment. If there was, in fact, an error in the General Division's analysis, which the Tribunal does not find, the Tribunal finds that the error was not material to the decision.

[21] Counsel for the Applicant also submits that it was an error for the General Division Member to state that none of the doctors and specialists had indicated that the Applicant has no capacity to perform any type of work. Counsel pointed to paragraph 14 of the decision where the General Division Member noted that "On April 30, 2007, Dr. Woolfrey reported that an MRI confirmed a herniated disc at the L4-L5 level on the right side impinging the right 15 nerve root. He noted that the Appellant could not stand or walk for a long period of time and could only sit for less than 10 minutes at a time. He concluded that the Appellant was unable to

work (at the time) and could not do sedentary duties involving lifting, twisting of his back or standing for a prolonged period of time. He recommended rehab and physiotherapy."

[22] Counsel for the Applicant relies on this statement to support her submission that the General Division erred. The Tribunal rejects this submission. The General Division Member clearly points out that in April 2007, Dr. Woolfrey's opinion was limited to that time period. The Tribunal concurs in this assessment. In fact, in April 2007, Dr. Woolfrey was echoing a finding he had made the month before. Accordingly, this submission cannot ground the appeal.

[23] Counsel for the Applicant made the further submission that the Member relied on erroneous findings of fact when she concluded in paragraph 39 that "there is no evidence on file that the [Applicant's] disability is permanent…" Counsel pointed out that the Workplace Safety and Insurance Board (WSIB), had assessed the Applicant as being 28% disabled and had made the appropriate award. The Tribunal finds that the General Division did not err. The case law has made it pellucidly clear that as the focus of the two schemes are different, a finding of disability under the WSIB does not necessarily translate to a finding of disability under the CPP. In *Michaud v. MHRD,* (July 1997), CP 4510 the Pension Appeals Board stated that the focus of Worker's compensation is causation, while the focus of the CPP is capacity. This reasoning was applied in *Halvorsen*[3] where the Federal Court of Appeal stated that the "the fact that a provincial workers' compensation board determined that the specific injury was not compensable was irrelevant, since the CPP does not make it a condition that the disability be work-place related." Therefore, a determination under the WSIB that the Applicant has a 28% disability does not assist him with his CPP application. Furthermore, a 28 % disability is a far cry from the requirement of the CPP that an applicant for disability benefit be unable to do any kind of work, as in the Tribunal's view, it leaves open the possibility of some kind of work.

[24] Finally, Counsel for the Applicant submits that the General Division Member failed to consider evidence that supports that the Applicant is prevented from obtaining and performing the skills required to perform the paced light work. Counsel argued that the Member ignored

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[3] *Halvorsen v. Canada (Minister of Human Resources Development)* 2003 FCA 377.

the Applicant's additional disabilities including major depression from pain, shoulder and knee disabilities, his limited education, learning disability and the effects of the medication. The Tribunal finds that this submission is not supported. At paragraph 43 of the decision the General Division Member expressly considered the Applicant's efforts to retrain and the impact of the said limitations on his ability to obtain and perform alternative skills and employment. The Tribunal is not satisfied that the appeal would have a reasonable chance of success on this ground.

CONCLUSION

[25] The Applicant applied for leave to appeal the decision of the General Division refusing his Application for a Canada Pension Plan disability benefit. Counsel for the Applicant made several submissions alleging errors on the part of the General Division. On the basis of the foregoing analysis the Tribunal finds that it is not satisfied that the grounds of appeal raised give rise to grounds of appeal that would have a reasonable chance of success.

[26] The Application is refused.

Hazelyn Ross
Member, Appeal Division