Citation: ***A. M. v. Minister of Employment and Social Development,*** **2015 SSTAD 982**

Date: August 17, 2015

File number: AD-15-417

APPEAL DIVISION

Between:

A. M.

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 August 17, 2015

DECISION

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

INTRODUCTION

[2] On September 4, 2008, the Respondent received the Applicant's application for a *Canada Pension Plan* (CPP) disability pension. The Respondent approved the application, deeming the Applicant disabled as of June 2007. Payment of the disability pension would commence in October 2007. The Applicant was not satisfied with the effective date of the commencement of the pension. He asked the Respondent to reconsider its determination. The Applicant took the position that he was entitled to a period of retroactivity greater than the 15 months the Respondent allowed. He argued that by reason of incapacity he had been incapable of forming the intention to apply for the disability pension any earlier than 2008.

[3] On reconsideration, the Respondent upheld its decision holding that there was no evidence to support the Applicant's claim of incapacity between 2002 and 2007. The Applicant appealed the reconsideration decision. In due course a Member of the General Division of the Tribunal heard the appeal. On March 19, 2015, the General Division issued its decision denying the appeal. The Applicant seeks leave to appeal from the decision of the General Division.

GROUNDS OF THE APPLICATION

[4] Through his representative, the Applicant submitted that the Application should be granted because the erroneous advice that CPP personnel provided induced errors in his application for a CPP disability pension. The Applicant also submitted that the General Division breached CPP subsection 58(1)(c) as it based its decision on erroneous findings of fact made in a perverse or capricious manner or without regard for the material before it.

SUBMISSIONS

[5] In setting out the grounds of the Application, the Applicant's representative made the following submissions:

a) CPP personnel instructed her to set out the Applicant's medical conditions as they existed on the date he completed the application and not on the date the disability first arose.

b) The Applicant has a long-standing and well documented history of mental illness brought on by his alcoholism.[1]

c) The Respondent had access to and, therefore, knowledge of the medical records that substantiate the Applicant's history of mental illness.

[6] In addition, the Applicant's representative submitted that the General Division did not consider his hearing loss and ignored relevant case law when it made its decision.

[7] The overall thrust of the submission is that the Applicant is entitled to a greater period of retroactivity than he was accorded. The arguments raised to support this position are not significantly different from the arguments that were made to the General Division. What appears to be new is the claim that the Applicant attended Dr. Cheung's clinic for two years before Dr. Cheung completed the Declaration of Incapacity. The Applicant's representative also provided additional evidence in regard to the treatment of alcoholism and alcohol use disorders in the Diagnostic and Statistical Manual of Mental Disorder, third edition (DSM III) and in the World Health Organization International Classification of Diseases.

[8] In making the point that the General Division reached its decision on the basis of erroneous findings of fact, the Applicant's representative submitted that, "consideration should have also been given to the fact that the Applicant's health care providers choose only to treat his cardiac condition from 1998 until 2008, despite the Applicant presenting clinically with a myriad of serious medical conditions including advance COPD." The myriad of complaints that the General Division ought to have considered include the Applicant's hearing loss[2]. Finally, the Applicant's representative relied on the findings in *Weisberg v. Canada 2004 LNCPEN 31 CP 21943* arguing that the principles that were applied in that case ought to be applied to the

[1] At question 31 of the disability questionnaire the Applicant indicted he was in an alcohol addiction rehabilitation programme from 2004 to 2005.

[2] The Applicant's representative also argued that the Applicant's hearing loss (noted on the disability questionnaire and for which the Applicant indicated that future treatment was planned), went unacknowledged and untreated until 2008.

Applicant's case, with a resultant finding that the Applicant had been incapacitated from March 2002 to 2007.

[9] The Respondent did not file any submissions.

ISSUE

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

THE LAW

[11] The law governing applications for leave to appeal to the Tribunal are set out in sections 56-59 of the *Department of Employment and Social Development* (DESD) *Act.* Leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.[3] 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 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.

[12] The relevant Provisions of the CPP that govern applications where a claim of incapacity is made are set out at subsection 60(8) et seq. They provide as follows,

> **60(8)** *Incapacity* - Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an intention to make an application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is later.
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> **(9)** *Idem* - Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that
> (a) the person had been incapable of forming or expressing an intention to make an application before the day on which the application was actually made,
> (b) the person had ceased to be so incapable before that day, and

[3] Sections 56 to 59 of the 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."

(c) the application was made
(i) within the period that begins on the day on which that person had ceased to be so incapable and that comprised the same number of days, not exceeding twelve months, as in the period of incapacity, or
(ii) where the period referred to in subparagraph (i) comprises fewer that thirty days, not more than one month after the month in which that person had ceased to be so incapable, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is later.

(10) *Period of Incapacity* – For the purposes of subsections (8) and (9), a period of incapacity must be a continuous period except as other prescribed.

(11) *Application* – Subsections (8) and (9) apply only to individuals who were incapacitated on or after January 1, 1991.

ANALYSIS

[13] In order for the Tribunal to grant leave to appeal, the Tribunal must be satisfied that the appeal would have a reasonable chance of success. This means that I must first find that at least one of the grounds of the Application relate to a ground of appeal that would have a reasonable chance of success if the matter were to proceed to a hearing. For the reasons set out below the Tribunal is not satisfied that the appeal would have a reasonable chance of success.

[14] The first issue that the Applicant raised touches on the nature of the advice the Applicant's representative alleged CPP personnel provided to her. She stated that "CPP personnel instructed her to complete the CPP disability application based on the Applicant's medical status at the time of the application (August 2008), not at the time of the onset of disability (September 2002)". This raises a question of erroneous advice and thus a natural justice issue is raised. While the Tribunal does not dispute the nature of the advice that was provided to the Applicant's representative, the Disability Questionnaire does ask applicants to "state the illnesses or impairments that prevent you from working. If you do not know the medical names, describe in your own words." Clearly this instruction is in the present tense and requires that an applicant respond in the present tense. Applicants are also asked to "Describe how these illnesses or impairments prevent you from working." The Tribunal finds that again the question requires applicants to respond in the present. The Tribunal is satisfied that it was

not an error for the Applicant's representative to be instructed to answer in reference to the actual date of the application.

[15] Furthermore, it is clear that the Disability Questionnaire anticipates that applicants would provide a fulsome report of their medical conditions as it includes the instruction: "If you have other health-related conditions or impairments, please describe them." As well, the disability questionnaire provides the opportunity for applicants to list all medical personnel consulted; to indicate the date they first saw that person; and to state whether the visits were related to the claimed disabling condition. (GT1-134) In the Tribunal's view, nothing in these instructions preclude the Applicant from stating that his impairments commenced at an earlier date. In fact, the latter instruction facilitates just this and the Applicant did do exactly that. At question 21, the Applicant indicates that he was forced to stop other activities in the late 1980's and early 1990's because of his medical conditions. Considering the foregoing, the Tribunal is not satisfied that the allegations relate to a ground of appeal that would have a reasonable chance of success.

[16] The Applicant's representative next submitted that he has a long-standing and well documented history of mental illness brought on by his alcoholism. She also submitted that the Respondent had access to and therefore knowledge of the Applicant's medical records that substantiate the Applicant's history of mental illness. This allegation implies that the Respondent did not disclose all of the pertinent material to the General Division. It is an implication that the Tribunal is not persuaded exists because other than the bald allegation, the Applicant's representative has not stated what the "omitted" records were, nor has she indicated who prepared them or when the Respondent came to have access to and knowledge of them.

[17] With regard to the Applicant's alcoholism the General Division Member set out in detail the medical evidence that was before him. This evidence included the "six-page summary of the Applicant's medical conditions that he submitted with his reconsideration application" and the CPP medical report completed by the Applicant's family physician as well "as numerous

other medical and investigative reports in the file covering the period from 1983 to 2009 (GD decision GT-121028)."[4]

[18] At paragraph 12 of the decision the General Division Member observed that,

> save for a Declaration of Incapacity by Dr. Cheung dated June 11, 2010 no report indicates the Appellant suffered from or had been diagnosed with any serious mental illness, or significant cognitive difficulty. The reports reference the Appellant's participation in various programmes, including cardiac wellness and treatment for alcoholism, and his interaction with treatment providers. None of the reports indicate that the Appellant was accompanied by anyone when he attended appointments, or had difficulty with comprehension or communication during appointments. There is no other report from Dr. Cheung in the hearing file, or indication Dr. Cheung saw the Appellant before or after completing the Declaration of Incapacity.

[19] The General Division Member went on to make a comprehensive analysis of the medical evidence and the findings of Dr. Cheung in regards to the Applicant's claimed incapacity and the requirements of the statute. At paragraph 20, the General Division Member observed that there was little evidence to support the Applicant's claim that he had been incapable of making his application any earlier than in 2008.

> [20] There is no evidence of any treating physician that the Appellant was unable to fully participate in assessments and treatment prior to the date his application for CPP disability pension was made. There is no evidence the Appellant suffered from any significant cognitive difficulty or mental illness prior to making his application for CPP disability pension. The Appellant has never been treated or diagnosed as suffering from any significant mental disability, or noted to have had any significant cognitive difficulty. There is no evidence that anyone, other than the Appellant, made decisions with respect to the Appellant's property and personal care prior to the date the Appellant submitted his application for a CPP disability pension. The Appellant did not suggest in the Questionnaire that accompanied his application for disability pension that he was unable to work because of any mental disability and the Appellant's family physician, who had treated the Appellant since 2005, did not indicate in his report dated August 28, 2008, the Appellant was suffering from any severe mental illness or had cognitive difficulties.

[20] As well, the General Division Member addressed the Declaration of Incapacity prepared by Dr. Cheung. He gave it little weight because while Dr. Cheung confirmed the period of incapacity, he also indicated that he had not been the Applicant's treating physician during his

[4] In addition to the adjudication summary at GT1-68, the following also refers to the Applicant's alcoholism, GT1-80 and in the report of Dr. Ahmed dated June 29, 2004 which notes that the Applicant is a recovering alcoholic who was at that time residing at the X for alcoholics.

incapacity. Further, the Declaration was not supported by clinical findings that could confirm the incapacity. Neither has the Applicant supplied the records that could support his contention that he had had a prior and continuing patient/doctor relationship with Dr. Cheung. In the Tribunal's view Dr. Cheung's admissions in the very document, undermines the submission of the Applicant's representative that the Applicant had been attending Dr. Cheung's clinic for two years prior to the date the Declaration of Incapacity was prepared. For this reason, the Tribunal finds that the submission that there had been a prior, two-year doctor/patient relationship between the Applicant and Dr. Cheung does not give rise to a ground of appeal that would have a reasonable chance of success.

[21] Further, the Tribunal finds that the General Division did not err when it found that there was not a reliable evidentiary basis by which the Member could conclude that between September 2002 and July 2007 the Applicant met the criteria for incapacity.

[22] The Tribunal is also not persuaded that the General Division erred by failing to consider the treatment strategies implemented by the Applicant's health care providers between 1998 and 2008. The Applicant's representative submitted that they chose to treat only his cardiac condition and the General Division should have given consideration to this decision. The General Division did not err because it has no control over the way in which the Applicant's medical practitioners chose to address his medical conditions, although the choice of medical actions could point to the practitioner's assessment of the seriousness of the medical condition.

[23] Nor is the Tribunal satisfied that the Applicant has made out an arguable case based on the failure to consider his hearing loss, evidence of which was before the General Division[5]. It must be remembered that the Application is an application for leave to appeal from a decision denying greater retroactivity, therefore, the alleged errors must be assessed in that context. With this in mind, the Tribunal is not satisfied that these submissions give rise to grounds of appeal that would have a reasonable chance of success. The case law, including the case law

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[5] See paragraph 10 of the General Division decision. The Applicant attached a six-page "clinical summary … of his medical conditions" to his request for reconsideration dated March 9, 2009, of the Respondent's initial decision that he was not entitled to a CPP disability pension. The summary highlighted the following medical conditions that precluded the Appellant working: Spine and Spinal Cord, Bilateral Carpal Tunnel, Cardiac, Asthma, Respiratory, and Alcoholism. Also the Applicant's hearing loss is documented by Dr. Abdallah at GT1-121.

relied on by the Applicant's representative, clarifies that what is required by subsection 60(8) of the CPP "is not consideration of the capacity to make, prepare, process, or complete an application for disability benefits, but only the capacity, quite simply, of forming or expressing an intention to make an application." *Canada (Attorney General) v. Danielson*, 2008 FCA 78.

[24] In *Weisberg v. Canada (Minister of Social Development), 2004, CP 21943*, the Pension Appeals Board, having considered all of the evidence of Mr. Weisberg's declining mental capacity, was able to find that, at the relevant time, he did not have the requisite capacity to form or express an intention to make an application.

> [25] On all of the evidence, I am satisfied that although the Appellant was aware that something was wrong with him, he was incapable of recognizing that it was a disabling condition. If I understand Dr. Fulton correctly, it was his view that persons with right hemisphere compromise suffer lack of awareness or insight into their own deficits. Someone like the Appellant would be incapable of appreciating his own difficulties, even when provided with feedback by his doctors. Although generally persons who are advised by their doctors of the nature and extent of their illness are capable of appreciating their deficits, Dr. Fulton felt that the Appellant was unable to do so. In my view, the Appellant's incapacity to appreciate his own deficits, even when told what they were, rendered him incapable of forming the intent to apply for a disability pension.

[25] As set out earlier, what is missing from the Applicant's case is a finding that there was uncontroverted evidence of incapacity. For that reason, the Tribunal is unable to find that the General Division erred by failing to apply *Weisberg* to the Applicant's case and to use its principles to find in favour of the Applicant.

CONCLUSION

[26] The Appellant submitted he was entitled to greater retroactivity of the CPP disability pension than provided for in paragraph 42(2)(b) and section 69 of the CPP, as he had been incapable of forming or expressing an intention to make an application before the day on which the application was actually made. On an application for leave to appeal an applicant is not required to prove the grounds of appeal, he or she has merely to raise an arguable case. On the basis of the foregoing the Tribunal finds that he has not and, thus, I am not satisfied that the appeal has a reasonable chance of success.

[27] Based on the date of his application for a CPP disability pension and the governing statutory provisions, the General Division correctly determined that the payment of the CPP disability pension should commence as of March 2007.

[28] Leave to appeal is refused.

Hazelyn Ross
Member, Appeal Division