Citation: *P. R. v. Minister of Employment and Social Development*, 2015 SSTAD 971

Appeal No. AD-15-331

BETWEEN:

P. R.

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: August 11, 2015

DECISION

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

INTRODUCTION

[2] On March 2, 2015, the General Division of the Social Security Tribunal (the Tribunal) issued a decision denying the Applicant a *Canada Pension Plan* (CPP) disability benefit. The Applicant has filed an application seeking leave to appeal (the Application) the General Division decision.

ISSUE

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

THE LAW

[4] Appeals of a General Division 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."

[5] 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." The grounds of appeal are set out in subsection 58(1). They include breaches of natural justice; errors of law and errors of fact.[1] These are the only grounds of appeal.

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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

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.

SUBMISSIONS

[6] On the behalf of the Applicant his Counsel submitted that the General Division made several errors of law as well as made its decision without regard for the material before it.

ANALYSIS

[7] 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 Development)*, [1999] FCJ No. 1252 (FC).

[8] 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.

Alleged Errors

[9] Counsel for the Applicant cited a number of instances in the General Division decision that she submits amounts to erroneous findings of fact made in a perverse and capricious manner or without regard for the material before it. In the context of deciding whether or not the Applicant has raised an arguable case, these are discussed below.

[10] The first point raised is that the General Division committed an error of law by concluding that the Applicant's receipt of regular Employment Insurance benefits in 2011 was relevant to his capacity to work as of his MQP. The impugned conclusion is contained in paragraph 53 of the decision, which paragraph states,

> [53] "Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117). The Appellant continued to receive regular EI benefits after stopping work, indicating that he was ready and able to perform gainful employment. The Appellant testified that he applied for a job with a

> catering company, was granted an interview but was not hired. There is no evidence that the Appellant has continued to look for any alternate work."

[11] I cannot agree with Counsel's position. In my view the question of the Applicant's statements when he received the EI benefits, albeit in 2011, some two years before the MQP, are directly relevant to the question with which the General Division Member was grappling. This question being "has the Applicant demonstrated that his health condition prevented him from regularly pursuing any substantially gainful employment?" Here the Member was recounting the steps that the Applicant took after he stopped working at his regular employment to find alternate employment. As the Member recounts the evidence, the Applicant stated in 2011 that he was ready and able to work; however, his attempt to find work was negligible as it consisted of one job interview. In these circumstances, I do not agree that the General Division Member committed an error of law. In my view, this submission cannot ground the appeal.

[12] The Applicant's next submission is closely tied to his first. He submits that the General Division erred by relying on *Inclima v. Canada (A.G.)*, 2003 FCA 117 for its conclusion that where there is evidence of work capacity a person must show that efforts at obtaining and maintaining employment have been unsuccessful by reason of the person's health condition. In the submission, Counsel for the Applicant states that this finding "ignores the fact that the Appellant had sought and maintained employment up until June 9, 2010 which ended due to his health condition (see letter from Hearthstone Communities Services Ltd at GTl-49)." Counsel for the Applicant also submitted that this finding "ignores that the Appellant's specialists had determined there was no capacity for gainful employment."

[13] As I see it, the difficulty with Counsel's submission is that the General Division Member was not making a finding but stating a principle of law: case law. It is settled that *Inclima* stands for the very principle set out by the General Division Member. It is the test the Applicant had to meet to show that his disability came within the CPP definition of severe. The General Division committed no error in this regard.

[14] The next point submitted by Counsel for the Applicant is that by questioning the support letter of the family physician, Dr. Singh, in which the condition of fibromyalgia is mentioned, the General Division ignored the fact that paragraph 18 of the decision states that the Applicant

was seeing Dr. Singh on an irregular basis. In my view, this submission requires that one make a leap from "seeing Dr. Singh on an irregular basis" to a diagnosis of fibromyalgia. Counsel for the Applicant has not drawn a clear link between the two events and I am unable to conclude that the General Division erred when it stated that there had been no prior diagnosis of fibromyalgia. Thus, this submission cannot ground the appeal.

[15] Counsel for the Applicant makes the further submission that by questioning Dr. Singh's statement that the Applicant's symptoms started in 2009 rather than after the motor vehicle accident in 2005 the General Division "ignored the fact that the Applicant returned to work after the MVA and stopped working in June 2010 after work related activities in 2009 to 2010 worsened his symptoms as indicated in the report of Dr. Boucher (GT3-24 second paragraph)."

[16] However, according to the Applicant's evidence as recorded at paragraph 11 of the decision, the Applicant did not stop working because of work-related activities but because his employer could not accommodate him and terminated his employment. While a proximate cause, it was neither the headaches nor the numbness in his arms that was the reason why the Applicant stopped working. The real reason the Applicant stopped working as a cook was the lack of accommodation and subsequent termination of his employment. Notwithstanding the Applicant's clear disagreement with the Member's finding, I find that the Member provided cogent reasons for the position he took concerning the diagnosis of fibromyalgia. The General Division decision is reasonable in that it demonstrates the existence of justification, transparency and intelligibility within the decision-making process. I find that the General Division did not err in this regard.

[17] Counsel for the Applicant makes the further submission that the General Division made erroneous findings of fact with regard to the weight the Member placed on the assessments by Dr. Turner and Dr. Bouchard. Counsel noted that the General Division "claimed" that in both cases the Applicant self-referred with the sole purpose of being evaluated regarding his application for CPP disability. Counsel submitted that this observation "presumes that these were one time assessments, which is factually inaccurate and not supported by the evidence."

[18] Counsel went on to state that both physicians had been treating the Applicant on an ongoing and regular basis since June 2012. Further, she pointed out that both physicians

qualified their reports by stating that they had attempted to minimize conflict of interest issues and maintain neutrality and objectivity for the report. It was the position of Counsel for the Applicant that the Tribunal erred by failing to give these reports appropriate weight.

[19] Assessing the weight to be given to a piece of evidence is in the purview of the General Division. In this case, despite the fact that the physicians may have stated that they had attempted to minimize conflict of interest issues and maintain neutrality and objectivity for the report, the General Division set out specific, sound reasons for the way in which it weighed each of the health care practitioners' reports, including the conclusion that investigative findings did not demonstrate any significant abnormalities that would suggest that the Applicant was incapable of working.

[20] Furthermore, I am unable to conclude that the General Division Member assumed that the visits at which the Applicant requested the assessment were one-time assessments. At paragraphs 17 and 18 of the decision, the Member notes that the Applicant had frequent consultations with both physicians. Thus this evidence was certainly before the Member when he made his conclusions:

> "[18] The Appellant testified that he had no confidence to do any type of work and has no transferrable skills. He cannot stand or walk for very long. He sees Dr. Bouchard for Botox injections to alleviate his severe headaches. He has pinched nerves in his left spine, which causes pain to shoot down the back of his legs. His sleep is poor. He is unable to do any heavy lifting or bending. He can't do any task for a long period of time. He lives with his common-law wife of 9 years who works for Canada Post.
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> [18] The Appellant sees Dr. Bouchard regularly for pain control. He still sees Dr. Turner, his psychiatrist, every 2 months and more often if he has a psychotic episode…"

[21] Accordingly, I am unable to conclude that the General Division made erroneous findings of fact with respect to the weight ascribed to the assessments in question.

[22] Counsel for the Applicant made the further submission that at paragraph 57 of the decision, the General Division relied solely on statements by the Applicant's family physician made in February and March 2012 that the Applicant was doing better. Counsel submitted that this was a finding of fact that ignored the fact that the Applicant's MQP is

December 2013 and that “he had an exacerbation of his mental health condition in 2013, with a psychotic episode as outlined in Dr. Turner's report of November 29, 2013 (GT3-3) and also his other reports on file February 22, 2013 (GT3-17) and March 22, 2013 (GT3-16).” The General Division Member referred to Dr. Turner’s report. However, the Member did not give significant weight to the report because of the circumstances that gave rise to it. Dr. Turner noted that the Applicant had self-referred for the sole purpose of being evaluated regarding his CPP application. In the circumstances, the Tribunal finds that the General Division’s position vis-à-vis the reliability of the report and the weight to be given to it, is reasonable. In the circumstances, the Tribunal is not satisfied that the appeal would have a reasonable chance of success on this ground.

CONCLUSION

[23] Counsel for the Applicant presented a number of arguments that he submitted supporting the granting of the Application. The Tribunal is not satisfied that any of these arguments give rise to a ground of appeal that would have a reasonable chance of success. Therefore, the Tribunal refuses the Application.

Hazelyn Ross
Member, Appeal Division