Citation: *M. J. v. Minister of Employment and Social Development*, 2015 SSTAD 1015

Appeal No. AD-15-212

BETWEEN:

M. J.

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 26, 2015

DECISION

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

INTRODUCTION

[2] On January 20, 2015, the General Division of the Social Security Tribunal, (the Tribunal), issued a decision denying the Applicant a *Canada Pension Plan*, (CPP), disability pension. The Applicant has filed an application seeking leave to appeal the decision (the Application).

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] Counsel for the Applicant has submitted that the General Division breached natural justice and committed errors of law by failing to admit certain documents that were submitted after the period for filing documents had passed; by failing to give proper weight to the documents; and by holding a teleconference.

[7] Counsel also submitted that the General Division erred in law in relying solely on a lack of objective medical evidence to support its findings. As well, Counsel for the Applicant submitted that the General Division based its decision on erroneous findings of fact, without regard for the materials before it, including the late submitted documents.

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

[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.

Alleged Errors of Law

[10] Counsel for the Applicant complains that the General Division erred in law in "relying solely on the lack of objective medical evidence to support its findings, and failed to attribute proper weight to the medical evidence that supported the Appellant's psychological issues and pain-focused behaviours as significantly contributing (to) and aggravating the Appellant's medical conditions." In its essence, this is a complaint about the way the General Division weighed the evidence that was before it.

[11] The Tribunal finds that the complaint is not supported by the decision.

[12] The Applicant's minimum qualifying period (MQP) date is December 31, 2010. He injured himself on October 28, 2008 and stopped working in December 2008. The Applicant consulted a number of medical personnel in the period between the date of his injury and the MQP, including a psychologist who he saw from April 2009 to April 2010. The General Division notes that the psychologist found that the Applicant had a pain disorder and moderate depression. In August 2010, the Applicant also participated in a five-day, chronic pain management treatment programme. The programme directors reached similar conclusions and recommended that the Applicant participate in a further 15 sessions.

[13] The General Division concluded that prior to the MQP the Applicant did not suffer from severe depression. At paragraph 73 of the decision, the General Division comments on the psychologist's findings; and notes that depression was not listed as a disabling condition in the Medical Questionnaire. As well, in coming to its decision, the General Division did consider both the Applicant's oral testimony concerning his medical condition as well as the medical evidence that Counsel refers to (GD decision GT -116799 paras. 26-20). It is clear from this that the General Division did not rely solely on a lack of objective medical evidence to support its conclusions. In the circumstances, this is not a ground that would have a reasonable chance of success.

[14] Counsel for the Applicant also contended that the General Division erred by addressing the relevance and the weight to be put on the late documentation while at the same time refusing to admit the late documentation which contained the Applicant's ODSP file and decision to extend benefits to the Applicant. The Tribunal rejects this argument. First, the General Division Member expressly excluded the late documentation because he found that while it was disclosed to the Tribunal on October 30, 2014, the file and ODSP decision to grant benefit to the Applicant had been available a year earlier. Secondly, the General Division Member noted a discrepancy between the date that the Applicant's then representative stated the documents had been sent to the Tribunal and the content of a letter that directly contradicted this assertion. The General Division Member also remarked that the Applicant's then representative never made any submissions on the admissibility of the documents. Further, the

General Division Member's discussion of the relevance and weight to be given to the late documentation was put forward in the alternative, namely, in the event that he was wrong to exclude the late documentation.

[15] On the Record, as described by the General Division Member at paragraphs 17-19 of the decision, the Tribunal is not persuaded that the late documentation was improperly excluded. Secondly, while Counsel for the Appellant argues that the ODSP test is substantial impairment and substantial restrictions and not simply impairment as the Member stated, which it well might be, the General Division Member's analysis highlighted and relied on the differences between the ODSP criteria and the CPP criteria for eligibility for a disability pension. He concluded that the CPP had more stringent criteria for eligibility for benefits; therefore, the ODSP determination was not helpful to the Member's assessment of whether the Applicant met the CPP criteria for severe and prolonged.

[16] *Halvorsen v. Canada (Minister of Human Resources Development),* 2004 FCA 377 has, generally, been taken as support for the proposition that the granting, or not granting of benefits under a provincial scheme, is irrelevant to a determination of eligibility for CPP disability benefits, unless it can be established that the criteria for eligibility is identical in both schemes. Further, the Tribunal is not persuaded that the case of *Birtch v. Canada (Minister of Human Resources Development),* (2003) CP18930 (PAB) significantly alters this position as submitted by Counsel for the Applicant. *Birtch* is a PAB decision, while *Halvorsen* is both a later decision and a decision of the Federal Court of Appeal, that the Tribunal is bound to follow. Thus, given the General Division Member's finding that the criteria for granting pensions under the two schemes differ significantly, the Tribunal is satisfied that the General Division Member did not err in his alternative position that the late- filed, ODSP documentation should be given little weight.

[17] It should be noted that in response to the Tribunal's questions, Counsel for the Applicant submitted that *Birtch,* as well as the CPP Adjudication Framework, component #5-1.3 and 5-1.3.1 support the Applicant's position that the General Division ought to have considered the ODSP documentation and decision in its determination. The Tribunal being an independent body, is not persuaded that the CPP Adjudication Framework, which is a document prepared

for and intended to guide the decision-making process of the Respondent's employees, could have significant suasion on the General Division decision of whether or not to admit specific documents.

Alleged Errors of Fact

Counsel for the Applicant argued that the General Division based its decision on a number of erroneous findings of fact without regard for the material before it, primarily the late filed documents, including the decision of the Social Benefits Tribunal. Counsel relied heavily on the decision of the Social Benefits Tribunal to make this submission (AD1-9-11). Given the General Division's conclusions regarding the more stringent requirement that underpins the CPP determination of severe disability, the Tribunal finds that the Social Benefits Tribunal decision is not persuasive of the General Division determination. Thus, the General Division decision, in so far as it distinguished between the determinations under the Social Benefits Tribunal and the CPP is not based on an erroneous findings of fact.

[18] Further, in relation to the errors regarding Dr. Jhawar's report that Counsel states the General Division made, the Tribunal is of the view that given that Dr. Jhawar is a specialist in neurosurgery, he could not be expected to comment on other issues that the Applicant might be facing. Thus, there is no error in the General Division's treatment of Dr. Jhawar's report and the Tribunal is not satisfied that the alleged errors of fact present grounds on which the appeal would have a reasonable chance of success.

Alleged Breaches of Natural Justice

[19] Counsel for the Applicant submitted that the General Division breached natural justice by holding a telephone hearing as opposed to an in-person hearing. In response to the Tribunal's request for a statutory or other basis for this position, Counsel provided two studies that aimed to show how a defendant or an applicant might be prejudiced by the use of technology in the courtroom or hearing room. The Tribunal does not dispute that in some instances, some parties may be detrimentally affected by the absence of an in-person hearing however, the Tribunal is not persuaded that this was the case here.

[20] Counsel for the Applicant submits that the General Division Member would have benefitted from seeing the Applicant in person. The General Division advised the parties that it intended to hold a teleconference hearing on December 1, 2014 (GT0b, see also the earlier notice GT0a). Neither party objected to the hearing proceeding by teleconference. Indeed the Respondent requested that the hearing proceed in writing (GT-4). The Applicant has been represented by Counsel throughout the proceedings before the Tribunal, however, during the hearing neither he nor his Counsel raised any objection to the hearing proceeding by teleconference. In *Benitez v. Canada (MCI)* the Federal Court of Appeal stated clearly that such objections should be made at the earliest opportunity.[2] Normally this would be during the course of the hearing. Evans, J.A. (writing for the Court) in *Benitez,* stated,

> [31] An appellant may not normally raise issues for the first time on an appeal, because that would put the appellate court in the position of having to decide an issue without the benefit of the opinion of the lower court. The role of an appellate court is generally confined to examining the decision of the court below for reversible error.

[21] Thus, the Applicant cannot come now to take an objection to the teleconference. As well, while the hearing before the Social Benefits Tribunal was an oral hearing, the Tribunal has no way of assessing the basis on which the Social Benefits Tribunal decides the format of its hearings, while a teleconference is expressly included as one of the forms by which this Tribunal may hold a hearing.

[22] Furthermore, even if an oral hearing had been held, this alone would not have assisted the General Division to form a true picture of the Applicant's physical condition as of his minimum qualifying period of December 31, 2010 because the hearing was held almost four years after the MQP. The most the General Division could have been able to derive of the Applicant's physical condition from seeing him at the hearing would have been a view of his current condition. The Applicant may well have been suffering from a severe disability as of the hearing date, but seeing him at the hearing would not necessarily have gone to establish that, on or before the MQP, he was suffering from a severe and prolonged disability. For these reasons, the Tribunal finds that no breach of natural justice arises from the fact that the General Division hearing proceeded by teleconference.

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[2] *Benitez v. Canada (MCI),* 2006 FC 391 at paras. 204-220

Did the General Division rely solely on a lack of objective medical evidence?

[23] Counsel for the Applicant charges that the General Division relied solely on a lack of objective medical evidence to reach its conclusion that the Applicant was not suffering from a severe disability. While this submission has been discussed previously, the Tribunal would like to add that, in its view, the decision belies this submission. In the Analysis section of the decision, the General Division Member analyses the content of the various medical reports. However, the Member's findings about the severity of the Applicant's medical conditions are not solely based on the medical evidence. The Member has clearly taken into account the Applicant's *viva voce* evidence about why he is disabled (GD decision GT -116799 paras. 67; 71 & 75). In the end, after weighing the conclusions of the various medical reports against the Applicant's subjective reporting of his disability, the General Division Member preferred the objective medical evidence to the Applicant's testimony, which he is unquestionably permitted to do. The Member provided reasonable explanations for why he was giving preference to the objective medical evidence. Accordingly, the Tribunal is not persuaded that the appeal would have a reasonable chance of success on this ground.

CONCLUSION

[24] Counsel for the Applicant presented a number of arguments that she submitted supporting the granting of the Application. Having examined the arguments, the Tribunal is not satisfied that an arguable case has been raised in relation to any of them. Accordingly, the Tribunal is not satisfied that the appeal would have a reasonable chance of success.

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

Hazelyn Ross
Member, Appeal Division