Citation: ***S. M. v. Minister of Employment and Social Development,*** **2015 SSTAD 1050**

Date: September 4, 2015

File number: AD-15-861

APPEAL DIVISION

Between:

S. 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 September 4, 2015

DECISION

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

INTRODUCTION

[2] This is an application for leave to appeal (the Application), the decision of the General Division issued April 23, 2015, in which it was found that the Applicant did not meet the criteria for payment of a *Canada Pension Plan* (CPP) disability pension.

GROUNDS OF THE APPLICATION

[3] Counsel for the Applicant provided the following two reasons for the Application. He submitted that

1. The General Division failed to observe the principles of natural justice in that it was biased and did not base its decision on the evidence before it; and

2. The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner.

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[2]. In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 as well as in *Fancy v. Canada*

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[1] 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."

[2] The DESD Act, subsection 58(2) sets out the criteria on which leave to appeal is granted, namely, "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

(Attorney General), 2010 FCA 63, the Federal Court of Appeal equated a reasonable chance of success to an arguable case. In *Calihoo v. Canada (Attorney General)* (2000) FC T-859-99 (Fed. T.D.), the Federal Court articulated the following test for granting leave,

> The proper test on an application for leave to appeal to the PAB from the Review Tribunal is whether the application raises an arguable case, without otherwise assessing the merits of the application. In the absence of significant new or additional evidence not considered by the Review Tribunal, an application for leave may raise an arguable case where the leave decision-maker finds the application raises a question of error of law, measured by a standard of correctness, or an error of significant fact that is unreasonable or perverse in light of the evidence.

[6] Section 58 of the *Department of Employment and Social Development* (DESD) *Act* sets out three grounds on which an appellant may bring an appeal. These are the only grounds of appeal and are,

> (1) a breach of natural justice;
> (2) that the General Division erred in law; and
> (3) the General Division based its decision on an error of fact made in a perverse or capricious manner or without regard for the material before it.[3]

[7] In light of the appeal grounds set out in the DESD Act section 58, and the fact that the DESD Act specifically provides for applications to rescind or amend decisions based on new facts, the applicability of the dicta in *Calihoo* must be expanded to include situations where a breach of natural justice is claimed while at the same time excluding applications that are based on new facts.

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[3] 3 **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.

ANALYSIS

[8] In order to grant leave to appeal the Tribunal must be satisfied that the appeal would have a reasonable chance of success. This means that the Tribunal must first find that, were the matter to proceed to a hearing,

(a) at least one of the grounds of the Application relate to a ground of appeal; and

(b) there is a reasonable chance that the appeal would succeed on this ground.

For the reasons set out below the Tribunal is not satisfied that this appeal would have a reasonable chance of success.

SUBMISSIONS

[9] Counsel for the Applicant made a number of submissions in support of the Application. His major submission was that the General Division "misapprehended evidence provided by medical experts and weighed that evidence in a biased and capricious manner." (AD1-3) Counsel took issue with statements in paragraph 65 of the General Division decision, namely, that the General Division indicated that "it gave relatively little weight" to the independent medical examinations; and described the "medical experts who performed medical examinations as "… to a large extent … informed advocates for their respective clients" without having a factual basis for this conclusion. Counsel noted that the independent medical examiners whose reports the General Division referred to were, Dr. Wong; Dr. Gouws; Dr. MacCallum; Dr. Dancyger; the Occupational Therapist, Sarah McDonald; and Kinesiologist, Lisa Minello. Counsel stated that Drs. Wong and Gouws were retained by the Applicant, while the other four medical practitioners had been retained by the insurer in the claims disputes. The Tribunal infers from this distinction that these practitioners would not have been advocates for the Applicant and the General Division had incorrectly implied they were. (AD1-3)

[10] Further, Counsel for the Applicant submitted that the General Division gave substantial weight to independent medical examinations that were carried out by individuals retained by the Applicant's insurers and little or no weight to those retained by the Applicant. He submitted that the General Division did not provide a basis for the distinction, and that the manner in

which the General Division assessed weight to be given to the various medical examinations was contrary to its own statements concerning how it weighed evidence.

[11] Counsel made the further submission that the General Division substituted its medical opinion for those for those that had been provided in evidence and made conclusions about the Applicant's psychiatric condition which were not supported by the evidence. It refused to consider her supported anxiety disorder. (AD1-5)

[12] As well, Counsel for the Applicant submitted that, "without giving reasons, the Tribunal dismissed or refused to consider the evidence of the Applicant and Adam Kent, giving little or no analysis or weight to their evidence, in a capricious manner." (AD1-5)

Did the General Division commit a Breach of Natural Justice?

[13] Counsel for the Applicant has alleged that the General Division breached natural justice, in that it was biased and did not base its decision on the evidence before it. Counsel made several submissions regarding the way in which the General Division made its decision. However, he did not clearly state what constituted the alleged bias. The Tribunal was left to infer the precise nature of the alleged breach or breaches of natural justice from his submissions. Notwithstanding this difficulty, the Tribunal is of the view the bar is set high with regard to allegations of bias with the onus being on the Applicant to establish bias. The seminal statement of the test of whether there is a reasonable apprehension of bias was set out by the Supreme Court of Canada (SCC), in the case of *Committee for Justice and Liberty v. Canada (National Energy Board)* 1978 1S.C.R. 369 at 386. The SCC stated,

> the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining there on the required information … the test is "what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude"

[14] Subsequent SCC decisions have further clarified the test. In *R V.* S. *(R.D.)* the SCC noted that the test, as established by de Granpre, J, contains a two-fold objective. The first part being that the person considering the allegation of bias must be reasonable in the sense that the person must be an informed person with the knowledge of all the relevant circumstances,

including "the tradition of integrity and impartiality that form part of the background and appraised also of the fact that impartiality is one of the duties that judges swear to uphold." [4]

[15] The second part of the test is an examination of whether the apprehension of bias itself is, in all the circumstances of the case, reasonable. The SCC noted that the test also requires that “the reasonable person” be informed and knowledgeable of all the relevant circumstances.

[16] The SCC provided further considerations that are to be kept in mind when determining bias. The threshold for a finding of bias is high and the onus of demonstrating bias lies with the person who alleges its existence. The reason for this high threshold is, as the SCC observed in *Roberts v. R,* that "the standard refers to an apprehension of bias that rests on serious grounds in light of a strong presumption of judicial impartiality".[5]

[17] The standard is no different where an administrative tribunal is the subject of an allegation of bias. In *Arrachch*[6] the Federal Court remarked that an allegation of bias, whether actual or apprehended, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. Therefore, because of the serious nature of an allegation of bias, the SCC clarifies that a real likelihood or probability of bias must be demonstrated and a mere suspicion is not enough. Bias denotes a state of mind that is in some way predisposed to a particular result that is closed with regard to particular issues. Not every favourable or unfavourable disposition attracts the label of prejudice.[7]

[18] This, then, is the standard that the Applicant must meet if her allegation of bias is to be borne out. In the Tribunal’s view, Counsel’s submissions suggest three possible avenues where a breach of natural justice might occur. First, in reference to the weight the General Division placed on certain medical evidence, a breach of natural justice might arise by the General Division contradicting itself on the way in which it stated it would weigh evidence and the manner in which it actually did. Secondly, it might arise by the General Division improperly substituting its own medical opinion for that of medical practitioners and experts. Thirdly, a

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[4] *R v. S. (R.D.)* [1997] 3 S.C.R. 484 at p. 111-113.
[5] *R v. S. (R.D.), supra,* at p. 111-113.
[6] *Arrachch v. Canada (Minister of Citizenship & Immigration),* 2006 FC 999.
[7] *R v. S. (R.D.), supra,* at p. 111-113; *Zundel v. Citron,* (2000) 4 F.C. 225 at para.38.

breach of natural justice might arise by the General Division failing to provide reasons for dismissing or refusing to consider the evidence of the Applicant and the witness.

Did the General Division act in a contradictory manner in weighing the evidence?

[19] The first question the Tribunal must deal with is whether the General Division breached natural justice, or otherwise erred, by contradicting itself with respect to its treatment of medical reports. Counsel submitted that at paragraph 65 of the decision, the General Division stated that it was putting little reliance on the evidence of the medical experts who performed independent medical examinations. However, the General Division then went on to rely on the evidence of Dr. MacCallum, the physiatrist. Counsel for the Applicant took the view that this was a contradiction because Dr. MacCallum was also an independent medical examiner. Thus, taking Counsel's argument to its logical conclusion, it was a breach of natural justice for the General Division to rely on statements in Dr. MacCallum's report while excluding the reports of other "independent medical examiners."

[20] As the Tribunal sees it, the problem stems from the fact that the statement at paragraph 65 is somewhat ambiguous. The General Division did not clarify which specific medical examiners' reports it would give little weight to. However, the Tribunal is of the view that paragraph 65 must be read in conjunction with and cannot be divorced from paragraph 64 of the decision. In paragraph 64 the General Division named the medical examiners, Drs. Wong, Gouws and Dancyger, whose reports he was rejecting and gave reasons why, namely:

> a) the reports were dated well after the Applicant's minimum qualifying period (MQP), of December 31, 2009;
> b) while the reports "supported a severe medical condition" these doctors had maintained a conservative treatment regime;
> c) the doctors gave opinions on some of the questions that the General Division was required to decide. (GT-1, para 65)

[21] When paragraphs 64 and 65 are read together, the Tribunal is not persuaded that an informed person, viewing the matter realistically and practically and having thought the matter

through would conclude that the General Division Member was biased or had committed a reviewable error. The Tribunal relies on *Giannaros*[8] for this position.

[22] Furthermore, weighing evidence is within the purview of the General Division. The decision shows that the General Division Member considered and addressed the content and timing of the medical evidence in reaching its conclusions. While, as Counsel for the Applicant submits, the General Division placed significant reliance on the report of Dr. MacCallum, the physiatrist, it is equally true that the General Division also placed significant reliance on the medical findings and opinions of Dr. Tunks, who the Applicant testified she saw or sees every 1- 3 months. As well, Dr. MacCallum's report unlike those of Drs. Wong, Gouws and Dancyger predates the MQP. When all of these circumstances are considered, the Tribunal finds that the General Division did not contradict itself. Thus the Tribunal finds that the General Division did not act with bias when it weighed the medical evidence before it. Accordingly, the Tribunal finds that this is not a ground of appeal that would have a reasonable chance of success.

[23] Counsel for the Applicant also took issue with the General Division's statement that the medical examiners had been "informed advocates for their respective clients." Counsel argues that the General Division failed to provide a basis for this assessment. The Tribunal finds that this assessment falls within the ambit of the General Division and does not give rise to either a breach of natural justice or a reviewable error. Even if wrong, the Tribunal is not persuaded that, in the context of the General Division's explanation for why it was giving little weight to the particular medical reports that its failure to explain why it saw the writers as informed advocates would have been material to the decision, which ultimately was based on finding that the reports from the Applicant's main treatment provider did not support a severe disability. Thus applying the test for a "reasonable apprehension of bias" the Tribunal is satisfied that there is little question of a conclusion that the General Division Member either consciously or unconsciously decided the issue in an unfair manner.

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[8] *Giannaros v. Canada (Minister of Social Development),* 2005 FCA 187 in which the Federal Court of Appeal stated "this Court should not intervene because it is of the opinion that the PAB failed to express themselves in a way acceptable to the Court. The reasons under review should be fairly considered and in performing that exercise, the Court should examine the record on which the decision under review is based. Judicial review should not be granted on this basis where the Court can discern the PAB's reasoning from the language it has used, although it is obvious that the PAB could have explained its reasoning more fully.

[24] Nor does the Tribunal find that either bias or error is demonstrated in the General Division's apprehension of the basis of Dr. MacCallum's report; or of which medical practitioners were the independent examiners and which were treatment providers. The Tribunal comes to the same conclusion with regard to the submission that the General Division gave disproportionate weight to the examinations that had been carried out by "individuals retained by the Applicant's insurers and little weight to those retained by her." In the Tribunal's view, these submissions cannot be maintained for several reasons.

[25] First, Dr. MacCallum's report was squarely before the General Division. He made no secret of the fact that he had consulted medical reports that were prepared by other persons. He prefaced his report with the statement, "the recommendations made in this report are based upon the history obtained from Ms. S. M., her physical examination and review of the available medical and therapy assessments." (GT1-100) Dr. MacCallum included summaries of the medical and therapy assessments in his report. The summaries include Dr. Dancyger's psychological assessment as well as Dr. Sicoli's report. (GT1-105-107) From this, the Tribunal finds that it is reasonable to conclude that the General Division had knowledge of these statements when it made its decision. Furthermore, in her report, Lisa Minello indicates that she was unable to comment on the Applicant's ability to perform her pre-accident work demands and that she was deferring to Dr. MacCallum for final recommendations and answers to specific questions. (GT1-87) In the Tribunal's view this was explicit recognition of Dr. MacCallum's expertise. Thus the Tribunal finds that the General Division did not err in its treatment of Dr. MacCallum's report.

[26] Concerning the submission that the General Division gave more weight to the insurer's examiners and none to the Applicant's examiners, Drs. Wong and Gouws. This submission was partly addressed in the paragraphs dealing with how the General Division weighed the evidence. However, the Tribunal would add that the General Division was not required to make a distinction based on who commissioned a report. The Applicant supplied all of the medical information in question. Clearly, she intended to rely on all of it. The proper function of the General Division in relation to the medical information was merely to assess the evidence and to ascertain whether it supported a finding that the Applicant had a severe and prolonged medical condition as defined by the CPP. The Tribunal finds that it is unlikely that an informed

person, viewing the matter realistically and practically and having thought the matter through, would think it more likely than not that the General Division decided the issue unfairly. In the Tribunal's view the statement that "independent medical examinations were undertaken by Drs. Wong, Gouws and Dancyger" is no more than a statement of fact. Therefore this submission cannot ground the appeal.

Did the General Division substitute its own opinion for that of medical practitioners and experts?

[27] On reviewing the decision, the Tribunal is not persuaded that the General Division substituted its own opinion for that of medical practitioners. The General Division was required to analyse the medical evidence for the purpose of determining whether the Applicant's medical condition brought her within the CPP definition of "severe physical or mental disability". In so doing, the General Division documented the various medical reports and summarised their content. (GD1- paras. 29-53). Counsel for the Applicant has not shown where or how the General Division substituted its own opinion for that of the various medical practitioners who treated the Applicant. Nor has Counsel shown how the General Division breached natural justice or otherwise erred in this respect. Disagreeing with the conclusions that the General Division Member comes to about the medical reports is not sufficient to ground an appeal. As a result, the Tribunal finds that the submission does not give rise to a ground of appeal that would have a reasonable chance of success.

Did the General Division commit a breach of natural justice or other error by failing to consider the evidence of the Applicant and the Witness?

[28] Counsel for the Applicant submitted that the General Division ignored or otherwise failed to adequately consider the evidence of the Applicant and that of her spouse, the witness. If by this submission, Counsel for the Applicant means that the General Division ignored their testimony about the Applicant's medical condition and her functional limitations, this would not be a correct statement. It is true that the General Division did not set out a separate head in the Analysis section under which it analysed the testimony of the Applicant and the witness. However, it cannot be said that their testimony was ignored. Their testimony, and in particular the Applicant's testimony concerning her work experience, learning disability and attempts to

return to the workforce informed the General Division Member's conclusions concerning the Applicant's *Villani*[9] factors and the decision about whether the Applicant met the definition of severe and prolonged. (GT1-paras. 57-58)

[29] With regard to the requirement to give reasons for decisions, the General Division has a statutory mandate to provide reasons. The DESD Act subsection 54(2) states that the General Division must give reasons for its decision and send copies to the appellant and the Minister or the Commissioner as the case may be, and any other party. In *Whiteley v. Canada (Minister of Social Development)* 2006 FCA 72, in reviewing a decision of the Pension Appeals Board (the PAB), Decary, J.A. observed that,

> the Board has a statutory duty to provide the parties with reasons for its decision (see subsection 83(11) of the Canada Pension Plan). The analysis of the evidence must be such as to enable the parties and, on judicial review, the Court to understand how the Board reached its decision. Furthermore, the Court must be in a position to determine whether the Board understood the state of the law and whether it applied it to the facts of the case.

[30] Notwithstanding the statutory requirement and the *dicta* in *Whiteley*, the Tribunal is not persuaded that the General Division erred by failing to give a reason for its decision on each individual point. In *R v. Burns*, [1994] 1. S.C.R. The Supreme Court of Canada addressed this very issue, albeit in a criminal law context. The Court stated:

> Failure to indicate expressly that all relevant considerations have been taken into account in arriving at a verdict is not a basis for allowing an appeal under s. 686(1) (a) of the *Criminal Code.* This accords with the general rule that a trial judge does not err merely because he or she does not give reasons for deciding on problematic points. The judge is not required to demonstrate that he or she knows the law and has considered all aspects of the evidence… Failure to do any of these does not, in itself, permit a court of appeal to set aside the verdict.

[31] Here, the argument is that (a) the General Division gave little or no analysis or weight to the oral testimony, and that it did so capriciously, (which argument the Tribunal does not accept); and (b) failed to give a reason for so doing. However, based on the foregoing, the Tribunal finds that the submission can neither be maintained nor can it be supported by the case

[9] *Villani v. Canada (Attorney General)* 2001 F.C.A. 248.

law. Accordingly, the submission does not disclose a breach of natural justice or any other ground of appeal that would have a reasonable chance of success.

[32] The Tribunal infers that the true complaint of Counsel for the Applicant is that the General Division did not weigh the evidence in a manner that benefitted the Applicant. The Appeal Division cannot re-weigh the evidence and come to a conclusion different to that reached by the General Division. This is not the role of the Appeal Division. The role of the Appeal Division is to determine if the General Division made an error that is reviewable under subsection 58(1) of the DESD Act and if so to provide a remedy for that error. In the absence of such a reviewable error, the law does not permit the Appeal Division to intervene. It is not our role to re-hear the case *de novo*. Thus, the submission that the General Division gave little or no analysis or weight to the oral testimony, and that it did so capriciously is not a ground of appeal that has a reasonable chance of success.

[33] Based on the foregoing, the Tribunal finds that the Applicant has not met her onus to establish that the General Division was biased.

Did the General Division base its decision on an erroneous finding of fact that it made in a perverse or capricious manner?

[34] Counsel for the Applicant alleged that the General Division decision was based on erroneous findings of fact that had been made in a perverse or capricious manner. Once again, Counsel did not state what the precise errors were. It is not enough to make the bald statement that the General Division committed an error and in effect leave it to the Tribunal to divine the error. Nonetheless, the Tribunal has already addressed all of the submissions made by Counsel for the Applicant and can find no evidentiary basis upon which to find that this ground has a reasonable chance of success.

CONCLUSION

[35] Counsel for the Applicant submitted that the General Division failed to observe the principles of natural justice in that it was biased and did not base its decision on the evidence before it. After considering the submissions made by Counsel for the Applicant, the Tribunal finds that she has not met her onus to establish bias on the part of the General Division.

Counsel for the Applicant also submitted that the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner. The Tribunal found that this submission is not supported. Therefore, on the basis of the foregoing reasons, the Tribunal is not satisfied that any of Counsel's submissions disclose a ground of appeal that would have a reasonable chance of success. Accordingly, the Application is refused.

Hazelyn Ross
Member, Appeal Division