Citation: ***K. M. v. Minister of Employment and Social Development,*** **2015 SSTAD 1041**

Date: September 1, 2015

File number: AD-15-358

APPEAL DIVISION

Between:

K. 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 1, 2015

DECISION

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

INTRODUCTION

[2] On March 9, 2015, the General Division of the Social Security Tribunal of Canada (the Tribunal), determined that the Applicant was not entitled to a disability pension as she did not have a mental or physical disability that was "severe and prolonged" as defined by the *Canada Pension Plan* (CPP). The Applicant has filed an application for leave to appeal (the Application), with the Appeal Division of the Tribunal.

GROUNDS OF THE APPLICATION

[3] On her 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 errors of law and errors of fact. Counsel for the Applicant set out in detail the errors of law as well as the erroneous findings of fact that he alleged 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 equated a reasonable chance of success to an arguable case: *Canada (Minister of Human*

[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."

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.

ANALYSIS

[7] The crux of the General Division decision is that while the Applicant may suffer from a progressive disease, she failed to satisfy her onus to establish that, on or before her minimum qualifying period date, (the MQP), she suffered from a severe and prolonged disability. In order to grant leave to appeal the Appeal Division must be satisfied that the appeal has a reasonable chance of success. For the following reasons the Tribunal is not satisfied that the appeal has a reasonable chance of success.

[8] Counsel for the Applicant submitted that the General Division misapplied the real world context to its consideration of the Applicant's ability to regularly pursue substantially gainful employment. Counsel argued that the General Division failed to consider the Applicant's physical limitation and diminished ability to attend at the workplace and maintain employment on a regular and reliable basis. The Tribunal finds little support for this submission in the decision.

[9] The General Division engaged in a fulsome discussion of the Applicant's symptoms; the medical evidence; and the effects of her medical conditions on her ability to regularly pursue substantially gainful employment. The Applicant's physical limitations and ability to attend at the workplace is addressed in paragraphs 68-69 and in paragraphs 75-87. The General Division may have come to conclusions different from that which the Applicant would have liked, however, this is not a case where the General Division failed to address the whole of the

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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.

Applicant's ability to pursue and maintain employment or ignored her physical limitations in its analysis. Thus, an appeal is not supported on this ground.

[10] In addition to these alleged errors of law, Counsel for the Applicant submitted that the General Division ignored the evidence of Dr. Baker "as to the interrelationship between the CMT and peripheral vestibulopathy and the impact upon the Appellant's ability to seek and maintain and regularly pursue substantially gainful employment." The Tribunal finds that the General Division specifically addressed the position of Dr. Baker at paragraph 80. However, the General Division found that Dr. Baker did not endorse the Applicant's inability to work because of her CMT. Rather, the General Division found that Dr. Baker had made a generalised comment about the possible effect of CMT on some patients that did little to support the Applicant.

> [80] In November 2010, Dr. Baker does not say that the Appellant is disabled from working as a result of her CMT. The most he says is that some patients with CMT report fatigue and that this may affect the Appellant's ability to perform her duties as an educational assistant. In the Tribunal's opinion this is a very generic comment that does little to support the Appellant's claim that in December of 2011 she was unable to participate in substantially gainful employment.

[11] Counsel went on to submit that the General Division ignored Dr. Baker's subsequent clarifications of the above comments as well as his subsequent reports of November 14, 2014 and an email dated February 18, 2015. The difficulty with this submission is that Dr. Baker's report coming three years after the MQP as it did, does not speak to the Applicant's medical condition as of the MQP. Therefore, the General Division failing to address either that report or the subsequent email is not an error that would give rise to a ground of appeal.

[12] With respect to Counsel for the Applicant's submission that the General Division incorrectly drew a negative inference from the Applicant's failure to file the 2010 report from the Occupational Therapist, Ms. Mazurkiewicz, the Tribunal finds that for the reasons set out in the decision (para. 76), the General Division reasonably drew a negative inference, particularly as the later letter referenced the earlier and, it was reasonable to expect that the Applicant could have also disclosed the earlier document. As noted in *Pereira v. MHRD*, (July 26, 199) CP 425, where medical reports are missing, clinical and physical findings will be given less weight.

Thus, despite what its contents may have been, the Applicant's failure to file the 2010 Occupational Therapy report meant that the General Division was deprived of the complete picture regarding the Applicant's ability to participate in vestibular physiotherapy or comment on any benefits she may have derived from treatment.

[13] Other errors that the General Division was alleged to have made included,

(i) incorrectly characterising the Applicant's evidence concerning her reasons for stopping work in 2009, namely her vertigo and safety fears;
(ii) drawing a negative inference from her failure to attempt to return to work after January 9, 2009 even though this was supported by a doctor;
(iii) failing to iterate the "numerous transferable skills" that the Applicant has;
(iv) drawing an incorrect inference from Dr. Stephenson's use of the words "we" need to "craft" as indicating that the Applicant had a hand in drafting the letter. Dr. Stephenson being the Applicant's family physician.
(v) focusing solely on the Applicant's condition of "vertigo" and not on her progressive CMT symptoms; and
(vi) ignoring that the Applicant's attempt to return to work had failed.

[14] With respect to Counsel's submissions, the Tribunal is not persuaded that the General Division in any way mischaracterised the Applicant's reasons for stopping work or ignored her attempts to return to work. The General Division spent considerable time discussing the Applicant's stated reasons for stopping work at paragraphs 85 & 86 of the decision. The General Division Member had the opportunity to see and hear the Applicant first hand, and thus, to assess the Applicant's oral testimony, which she found to be vague. That the General Division Member found that the Applicant's testimony was not supported by the medical evidence is, in the Tribunal's view, a finding that was, on the testimony and evidence before the Tribunal Member, one that was open to her to make.

[15] Thus, despite the Applicant's testimony about why she left work, which the Tribunal finds was related mostly to the vertigo she suffers from, the Tribunal is not persuaded that the General Division committed any material error with respect to the Applicant's reasons for

stopping work or that the General Division ignored that the Applicant had tried to return to work.

[16] Counsel for the Applicant has also submitted that the decision did not consider the totality of the Applicant's medical conditions, which is an error of law. Counsel asserts that the General Division failed to consider the progressive nature of the Applicant's pre-existing CMT or the impact that her peripheral vestibulopathy has on the CMT. In fact, not only did the General Division address the Applicant's two main conditions and the interplay between them in the decision at paragraph 87, the General Division went on to address the Applicant's other medical conditions including carpal tunnel syndrome; bursitis; shoulder and knee pain. The Tribunal finds that the General Division did not err in this regard. Therefore, the Tribunal finds that this submission cannot ground the appeal.

[17] Counsel made the submission that the General Division erred by failing to set out what transferable skills the Applicant possessed. In response to the Tribunal's request that he provide support for this position, Counsel pointed to the decision in *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, where at paragraph 43, Mme. L'Heureux- Dubé J. stated that, "*it would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached."* With respect, the Tribunal is not persuaded that the dicta of Mme. Justice L'Heureux-Dubé assists the Applicant since the General Division clearly provided reasons for its decision. If, however, Counsel's argument is, as the Tribunal originally understood it to be, that the General Division had a duty to itemise the transferrable skills that the Applicant was assessed as having, the Tribunal has been unable to find any authority that supports this position, nor has Counsel for the Applicant provided any.

[18] In the Tribunal's view, the General Divisions' statements must be put in the context of the Applicant's former employment as a teacher's assistant for children with special needs and her testimony that she assisted the children with their physical needs and that prior to this she had worked as a cashier. In this context, the Tribunal is not satisfied that the General Division erred. Even if it did, the Tribunal is not persuaded that, in the context of the General Division

finding that, after 2009, the Applicant made no attempt to find and maintain any substantially gainful occupation, that this error is material.

[19] Furthermore, it has consistently been held that there is no onus on the former PAB (and consequently, its successor) that "it is not the function of the PAB to answer the question: What type of wok can the applicant do? Nor is it incumbent on the Minister to define or describe specifically what types of employment lie within the capabilities of the applicant or whether such employment is actually or immediately available." *Montilla v. MHRD* (November 28, 2000) CP 06657; *Kostoglou v. MHRD* (September 3, 1998) CP 5623. Thus, Counsel's response that "from his review of the Applicant's evidence at the Tribunal, he can find no evidence of transferrable skills which indicate that the Applicant has work capacity" is not only a mere statement of his opinion; but following *Montilla* and *Kostoglou* it lacks a basis in law. For these reasons, the Tribunal is not satisfied that the above submissions relate to a ground of appeal that would have a reasonable chance of success.

[20] With respect to the submission that the General Division incorrectly inferred that Dr. Stephenson had become an advocate for the Applicant, the Tribunal finds that, it is more likely than not that a reasonable person reading the words "we'll need to craft a letter" would conclude from the use of the word "craft", as the General Division Member did, that the Applicant's family physician had adopted the role of her advocate. For this reason, the Tribunal is not persuaded that this is a ground that would have a reasonable chance of success on appeal.

CONCLUSION

[21] The Applicant, through her Counsel, has submitted that the General Division committed a number of errors that included mischaracterising and/or ignoring evidence; drawing undue negative inferences; failing to focus on the totality of the Applicant's medical conditions; and failing to identify the Applicant's transferrable skills. Having examined the General Division decision and Tribunal record, the Tribunal is not satisfied that Counsel's submissions give rise to a ground of appeal that would have a reasonable chance of success.

[22] The Application is refused.

Hazelyn Ross
Member, Appeal Division