Citation: ***N. B. v. Minister of Employment and Social Development,*** **2015 SSTAD 1163**

Date: September 30, 2015

File number: AD-15-456

APPEAL DIVISION

Between:

N. B.

Applicant

and

Minister of Employment and Social Development
(Formerly known as the Minister of Human Resources and Skills Development)

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

Decided on the Record on September 30, 2015

DECISION

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

INTRODUCTION

[2] In a decision issued May 11, 2015, the General Division of the Social Security Tribunal of Canada (the Tribunal), found that the Applicant did not meet the criteria for payment of a *Canada Pension Plan* (CPP) disability pension. The Applicant seeks leave to appeal the decision, (the Application).

GROUNDS OF THE APPLICATION

[3] On her behalf, Counsel for the Applicant submitted that the General Division breached the three grounds contained in subsection 58(1) of the *Department of Employment and Social Development* (DESD) *Act*, in that the General Division committed a number of errors in regard to how it assessed and weighed the medical documentation. Counsel also submitted that the General Division did not take the cumulative effect of the Applicant's conditions on her.

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

[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."

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 (Attorney General)*, 2010 FCA 63, the Federal Court of Appeal equated a reasonable chance of success to an arguable case.

[6] There are only three grounds on which an appellant may bring an appeal. These grounds are set out in section 58 of the DESD Act. They are,

(1) a breach of natural justice;
(2) 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]

ANALYSIS

[7] In order to grant leave to appeal the Tribunal must 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.

[8] Counsel for the Applicant contended, generally, that the General Division "failed to give adequate consideration to the medical documentation with respect to the nature

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[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."

[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.

and extent of Ms. N. B.'s multiple injuries and disabilities; and failed to weigh the impact all these injuries had."

[9] Counsel's specific submissions included that the General Division Member, who he terms "delegate" improperly interpreted the report of Dr. Clifford, the physiatrist, when the Member stated that the report concluded that in regard to the Applicant's ability to obtain and maintain substantially gainful employment "there was no substantial inability to perform the essential tasks of her pre-MVA employment."

[10] Counsel argues that this was an "appealable error of fact" because Dr. Clifford's "physiatry report only compares Ms. N. B.'s pre-accident condition with her post-accident condition. Dr. Clifford declined to provide an opinion regarding whether Ms. N. B. could or should have been able to maintain her pre-MVA activities. Likewise, Dr. Clifford declined to comment on whether her pre-MVA injuries would or could have progressed to limit her function and activities."

[11] Dr. Clifford in fact did comment on the Applicant's ability to perform the essential tasks of her employment. The report asked the question, "as a result of the accident, does the insured person suffer a substantial inability to perform the essential tasks of his/her employment?" In response, Dr. Clifford stated "there would be no medical contraindication to a resumption of all activities (including workplace activities) that had been appropriate for her prior to the index-MVA. Therefore, the answer to this question is no." (GT1-117) In the context of this response, the Tribunal finds that the Applicant's position is not supported and Counsel's submission does not give rise to a ground of appeal that would have a reasonable chance of success.

[12] Counsel for the Applicant also submitted that as the General Division Member did not comment on the Applicant's credibility, it failed to weigh all of the material before it, thereby committing an error of law. The Tribunal rejects this argument. In the Tribunal's view the mere fact that the General Division did not expressly comment on an applicant's credibility cannot lead to the inevitable conclusion that the General Division failed to weigh all of that applicant's evidence. In the Tribunal's view the Applicant has not established an arguable case on this point.

Errors of Mixed Fact and Law

[13] Counsel submitted that the General Division committed the following errors of mixed fact and law namely that the General Division,

1. did not properly consider or address how the Applicant's functional limitations would prohibit even a sedentary job.
2. Failed to apply the real world test prescribed by *Bungay*[4] and *Villani*[5]. Counsel for the Applicant submitted that the General Division ought to have assessed whether the Applicant's psychological, neurological, physical and substance-related conditions cumulatively render her incapable of work.

[14] Counsel for the Applicant submitted that the General Division did not properly consider or address how the Applicant's functional limitations would prohibit her from being engaged in even a sedentary job.

Errors of Law

[15] Counsel for the Applicant alleged that the General Division made the following errors of law:

a) The General Division did not consider reasonable explanations for the Applicant's inability to look for work, nor did the Member indicate that there were exceptions for the requirement to seek out new work. Counsel submitted that contrary to *Klabouch*, in determining the severity of the Applicant's medical conditions, the General Division focused on the diagnosis of the Applicant's medical conditions rather than her capacity to work, *Klabouch v. Canada (Social Development),* 2008 FCA 33 at para 14.

b) Counsel for the Applicant also submitted that the General Division failed to apply the new test for "substantially gainful." The Tribunal finds that this submission does

[4] *Bungay v. Canada (Attorney General),* 2011 FCA47
[5] 2001 FCA 248.

not disclose a ground of appeal that would have a reasonable chance of success on appeal. The Tribunal finds that in making this submission Counsel for the Applicant seeks to give retrospective application to a legislative provision that contains no such proviso. The new *Regulations*[6] apply to CPP disability pension applications made after May 29, 2014. The Applicant's application for CPP disability benefit predates the coming into force of the *Regulations* and clearly do not apply to the Applicant.

[16] Counsel for the Applicant also submitted that the General Division breached natural justice. The basis of Counsel's submission is the aforementioned absence of a finding on the credibility of the Applicant. In Counsel's submission, this failure, *ipso facto* points to the General Division depriving the applicant of a fair hearing. He argued that if the General Division did asses the Applicant's credibility it was obliged to include its credibility assessment in the written decision. While it is true that all appellants must be afforded a fair hearing, the Tribunal is at a loss to comprehend Counsel's position. In the Tribunal's view, failing to comment on an appellant's credibility cannot inexorably lead to the conclusion that the General Division did not hear the appellant.

[17] Even a cursory glance at the General Division decision would reveal that the Applicant was provided with a fair hearing. That what constitutes a fair hearing varies with the circumstances of the case was made crystal clear in *Baker*[7] where the Supreme Court of Canada stated that "the existence of a duty of fairness, however, does not determine what

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[6] SOR/2014-135, May 29, 2014. - **68.1** (1) For the purpose of subparagraph 42(2)(*a*)(i) of the Act, "substantially gainful", in respect of an occupation, describes an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension. The amount is determined by the formula

(A × B) + C where

- A is .25 × the Maximum Pensionable Earnings Average;
- B is .75; and
- C is the flat rate benefit, calculated as provided in subsection 56(2) of the Act, × 12.

(2) If the amount calculated under subsection (1) contains a fraction of a cent, the amount is to be rounded to the nearest whole cent or, if the amount is equidistant from two whole cents, to the higher of them.

COMING INTO FORCE

2. These regulations come into force on the day on which they are registered.

[7] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

requirements will be applicable in a given set of circumstances… the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case."

[18] In the instant case, the Applicant was given notice of the time, date and place of the hearing. She, and her legal representative, attended the hearing. The Applicant gave evidence on her own behalf, which evidence the General Division noted at paragraphs 9-18 of the decision. In no way can it be said that the Applicant did not have the opportunity to be heard or to present evidence and arguments to the General Division; all of which are elements of a fair hearing. Accordingly, the Tribunal is satisfied that this is a submission that does not give rise to a ground of appeal that would have a reasonable chance of success.

CONCLUSION

[19] In deciding this Application, the Tribunal was required to determine whether any of the Applicant's reasons for leave to appeal fall within any of the grounds of appeal and then to assess the possibility of success on appeal. While the Tribunal finds that the Applicant has alleged breaches of all of the grounds of appeal set out in the DESD Act, for the reasons set out above the Tribunal is not satisfied that, if leave is granted, the appeal would have a reasonable chance of success.

[20] The Application is refused.

Hazelyn Ross
Member, Appeal Division