Citation: ***Minister of Employment and Social Development v. M. J.*, 2015 SSTAD 1311**

Date: November 10, 2015

File number: AD-15-102

APPEAL DIVISION

Between:

Minister of Employment and Social Development

Applicant

and

M. J.

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

DECISION

[1] Leave to appeal is granted

INTRODUCTION

[2] On May 29, 2015 the General Division of the Social Security Tribunal of Canada, (the Tribunal), issued its decision in which it held that the Respondent was disabled within the meaning of s. 42 of the *Canada Pension Plan,* (CPP). Accordingly, she was entitled to a CPP disability pension. The Applicant seeks leave to appeal the decision, (the Application).

GROUNDS OF THE APPLICATION

[3] The Grounds of the Application are,

(a) the General Division erred in law in making its decision. The specific errors of law that were alleged are,

  i. that the General Division failed to require objective medical evidence of the severity and prolonged nature of the Respondent's main disabling condition, which was found to be asthma.
  ii. The General Division failed to engage in a meaningful analysis of the medical evidence before it and failed to address the absence of medical evidence to support a finding of disability.

(b) 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. The Applicant submitted that,

  i. there had been no objective medical evidence before the General Division that described the nature, severity, prognosis and treatment of the Respondent's asthma on or near the end date of her minimum qualifying period, (MQP), namely December 31, 2013.
  ii. The existing medical reports did not support the General Division’s conclusion that the Respondent’s disability was severe and prolonged; neither was there
  iii. Any medical evidence in the Record that was before the General Division to support its finding that efforts to obtain and maintain employment failed by reason of the Respondent's medical conditions.

ISSUE

[4] In this Application the issue is:

Does the appeal have 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] Leave to appeal is granted where an applicant satisfies the Appeal Division 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. This means that the Appeal Division must first find that at least one of the grounds of the Application relate to a ground of appeal. The Appeal Division must then access whether there is a reasonable chance that the appeal would succeed on this ground.

[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 that,

(1) there has been 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]

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[1] Sections 56 to 59 of the *Department of Employment and Social Development, (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."

[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; The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or 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

[7] Counsel for the Applicant argued that because of errors of law and fact that the General Division made, the appeal has a reasonable chance of success. The Appeal Division agrees. The Appeal Division's reasons are set out below.

[8] The General Division found that, on a balance of probabilities, the Respondent had established that prior to the MQP she had a severe and prolonged disability. The Applicant submitted that the General Division had failed to establish a sufficient evidentiary basis for its finding, arguing that the General Division conclusion was based entirely on the oral testimony of the Respondent. In the submission of the Applicant this ignored the requirement for objective medical evidence to establish the disability, of which the Applicant argued there was none

[9] The rationale for the General Division decision is set out in paragraphs 28 through 32. These paragraphs state, in part,

> [28] In this case, the Appellant's primary disabling condition is her asthma and breathing problem, she testified at the hearing that her asthma is very bad and that she is on puffer every day, she sometime has to stay downstairs in the living room because going up a few stairs would make her feel like losing her breath. The Tribunal finds that it is difficult to determine a person with this kind of condition "employable".
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> [29] An Appellant is not expected to find a philanthropic, supportive, and flexible employer who is prepared to accommodate his disabilities; the phrase in the legislation "regularly of pursuing any substantially gainful occupation" is predicated upon the Appellant's capacity of being able to come to the place of employment whenever and as often as is necessary for him to be at the place of employment; predictability is the essence of regularity: *MHRD v Bennett* (July 10, 1997) CP 4757 (PAB). The Appellant had been working as an accountant for about 20 years. The job is a sedentary job. She did try to see whether there was any alternative part time work for her but she failed because she cannot commit to work on a regular basis due to her health condition.
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> [30] … It is the effect of the disease or condition on the person that must be considered in light of all factors that must be considered in determining whether a person's condition is severe and prolonged within the meaning of the CPP: *Petrozza v MSD* (October, 2004), CP 12106 (PAB). In this case, it is the effect of the Appellant's condition especially her frequent breathing problem caused by asthma precludes her from doing any type of remunerative employment as she is

> not able to commit the working time on a regular basis due to her health condition.
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> [31] The Tribunal has an obligation to consider both the oral and the documentary evidence: *Pettit v. MHRD* (April 22, 1998), CP 4855 (PAB). Dr. A. Karjee's December 23, 2010 report noted that the Appellant has diagnoses of asthma with recurrent exacerbation, poor controlled diabetes, hypertension and osteoarthritis of both knees. He particularly pointed out that the Appellant has frequent asthma exacerbation with severe cough and shortness of breath and cannot work during an episode due to shortness of breath. The Appellant also testified at the hearing that she quit her job on December 16, 2010 because her health drastically declined and she could no longer commit to work regularly due to asthma. The Tribunal also noted that the Appellant's oral evidence and Record of Earnings demonstrate a strong work ethic. The Appellant is the type of person who would be working, if she was able to do so.
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> [32] Although the Respondent pointed that the Appellant did not see any specialist for her osteoarthritis, the Appellant stated clearly that the only condition that prevents her from working is her asthma and that situation is getting worse, as she finds herself using the asthma puffers and taking the prêt ozone more often, it is very hard to expect the Appellant to be "regularly of pursuing any substantially gainful occupation".

[10] These passages of the decision clearly indicate that, in coming to its decision, the General Division placed great reliance on the Respondent's oral testimony. The General Division relied on *Pettit v. MHRD* (April 22, 1998), CP 4855 (PAB) for its position that it had an obligation to consider both the oral and the documentary evidence. However, in the view of the Appeal Division, *Pettit* indicates that a credibility finding in relation to an applicant's testimony is required. Per PAB Member, C.R. McQuaid, commenting on the weight to be given to Sydney Pettit's oral testimony,

> The grounds for appeal are, in general terms that the Review Tribunal misinterpreted and/or misconstrued the medical evidence before it, and apparently disregarded the *viva voce* evidence of the Appellant himself. Such *viva voce* evidence can be, and very often is, material to the resolution of the matter, and, if deemed credible, entitled to due weight and serious consideration.

[11] The General Division did not make an express credibility finding regarding the Respondent. The Appeal Division acknowledges that it can be argued that implicit in the General Division's statements concerning the Respondent's work ethic and her medical condition, that the General Division found her to be a credible witness. Nonetheless, the Appeal Division finds that there is an arguable case that the General Division decision is deficient in respect of its treatment of the Respondent's oral testimony as well as the medical evidence.

[12] Not only did the General Division not make any clear statement as to the Respondent's credibility, the Appeal Division finds that its statements about her capacity to pursue regularly any substantially gainful employment raise questions about the test(s) the General Division applied to arrive at its conclusions.

[13] The Applicant also submitted that the General Division failed to require objective medical evidence as demanded by the case law. The Applicant pointed out that the most recent medical report was the 2010 CPP medical report that was authored by her family physician, Dr. Karjee. The Applicant referred to several deficiencies in the report, notably the age of the report and the fact that it did not appear to indicate that the Respondent's condition was severe.

> The latest report is the 2010 CPP medical report authored by the family physician almost three years prior to MQP. Second, the 2010 CPP medical report, which does not note any referral to a respirologist and is not supported by a chest x-ray or pulmonary function test, does not support the GD's conclusion that the Respondent's disability was severe and prolonged at MQP. Moreover, there was no medical evidence in the record before the GD to support its finding that efforts to obtain and maintain employment failed by reason of the Respondent's disability.

[14] At paragraph 20 of the decision the General Division refers to a medical report of January 19, 2011. The Appeal Division is satisfied that this is the same Medical Report of December 2010.[4] Two other medical reports are mentioned in paragraphs 17 and 18. However, the General Division appeared to have relied mainly on the December 2010 report.

[4] There is a Service Canada stamp on the first page of the Medical Report of Jan. 10, 2011 (GT1-45) and another stamp on the last page of same document bearing the date Jan. 19, 2011 (GT1-47)

[15] *Villani* [5] makes it clear that not only would objective medical evidence be required, there should also be evidence of employment efforts and possibilities. The only evidence of employment efforts came from the Respondent's testimony. (Decision at para. 15) There appears to have been no other objective evidence of attempts to obtain and maintain substantially gainful employment. In light of the fact that the General Division did not make a credibility finding regarding the Respondent, the Appeal Division finds that it is arguable that the General Division erred by failing to apply the case law.

[16] In light of the above, the Appeal Division is satisfied that the Applicant has raised an arguable case.

[17] Leave to appeal is granted.

Hazelyn Ross
Member, Appeal Division

[5] *Villani v. Canada (Attorney General)*, 2001 FCA 248.