Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *A. W. v. Minister of Employment and Social Development*, 2017 SSTADIS 432

Tribunal File Number: AD-16-1323

BETWEEN:

A. W.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time and Leave to Appeal by: Meredith Porter

Date of Decision: August 23, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant is seeking leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated August 16, 2016, which determined that the Applicant was not entitled to receive payment of a disability pension under the *Canada Pension Plan* (CPP).

[2] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on November 28, 2016, which appears to have been submitted beyond the time limit set out in paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESD Act).

ISSUES

[3] The member must decide whether to grant an extension of time to request leave to appeal.

[4] If the extension of time is granted, the member must also decide, for the purposes of determining whether to grant leave to appeal, whether the appeal has a reasonable chance of success.

THE LAW

[5] Pursuant to paragraph 57(1)(*b*) of the DESD Act, an application must be made to the Appeal Division within 90 days after the day on which the decision was communicated to the Applicant.

[6] When determining whether to grant an extension of time, the member must consider and weigh the criteria as set out in the case law. In *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883, the Federal Court stated that the criteria are as follows:

a) A continuing intention to pursue the application or appeal;

b) The matter discloses an arguable case;

c) There is a reasonable explanation for the delay; and

d) There is no prejudice to the other party in allowing the extension.

[7] The weight to be given to each of the *Gattellaro* factors may differ in each case and, in some cases, different factors will be relevant. The overriding consideration is that the interests of justice be served—*Canada (Attorney General) v. Larkman*, 2012 FCA 204.

[8] The Federal Court of Appeal concluded that the question of whether a party has an arguable case at law is akin to determining whether that party, legally, 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.

[9] When determining whether to grant leave to appeal, according to subsection 58(1) of the DESD Act, the only grounds of appeal are the following:

> (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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 SUBMISSIONS

[10] In support of the Applicant's request for an extension of time to file the Application, the Applicant's representative submits: that the Applicant had a reasonable explanation for the delay; that he demonstrated a continuing intention to pursue the appeal; and that he has an arguable case. Furthermore, the Applicant's representative submits that there would be no prejudice to the Respondent should an extension be granted. All the Applicant's arguments supporting this submission are set out below, in paragraphs 20 to 27.

[11] The Applicant's representative has submitted that the General Division had failed to follow the *Code of Conduct for Members of the Social Security Tribunal* and the *Canada Pension Plan Adjudication Framework*, which resulted in a breach of natural justice pursuant to paragraph 58(1)(*a*) of the DESD Act.

[12] The Applicant's representative has further submitted that the General Division erred in law, pursuant to paragraph 58(1)(*b*) of the DESD Act, as it failed to complete a "credibility test," despite the obligation to complete one as stated by the British Columbia Supreme Court in *Scott v. British Columbia*, 2013 BCCA 554.

[13] The Applicant's representative has also submitted that the General Division breached a principle of natural justice, as the Applicant was prevented, throughout the hearing process before the General Division, from arguing his case fairly and fully before the General Division. Moreover, the representative has submitted that the General Division member deciding his case was biased. The Applicant's representative presented several instances where she believed that the General Division had either refused to consider evidence or had actually told the Applicant (and his representative) that the new evidence would not be heard during the General Division hearing.

[14] The Applicant's representative has also argued that the General Division erred in law, pursuant to paragraph 58(1)(*b*) of the DESD Act, in failing to properly apply *Villani* v. *Canada (Attorney General)*, 2001 FCA 248, and *D'Errico v. Canada (Attorney General)*, 2014 FCA 95.

[15] Finally, the Applicant's representative has submitted that the General Division failed to provide adequate reasons for its findings, which would be a breach of a principle of natural justice under paragraph 58(1)(*a*) of the DESD Act.

PRELIMINARY ISSUE—GROUNDS OF APPEAL

[16] The Applicant filed an Application requesting leave to appeal the General Division's decision. The Application includes 45 pages of arguments, reasoning and details regarding the General Division's findings intended to support the Applicant's request for leave to appeal. The Application also includes three pages of information intended to explain the delay in filing the Application and to address the other *Gattellaro* criteria.

[17] With respect to the 45 pages of arguments and reasoning, which specifically relate to the General Division's decision, the Applicant's representative argues against the General Division's findings on a paragraph-by-paragraph basis. I have reviewed the arguments entirely and thoroughly. While several of the Applicant's arguments have been included in the submissions set out above, I find that most of the Applicant's arguments essentially amount to a request for the Appeal Division to reconsider and reweigh the evidence that was before the General Division with the hope that the Appeal Division will decide the matter differently. The Appeal Division is not in a position to reweigh the evidence that the General Division has already considered. As set out above in paragraph 9, the grounds for which the Appeal Division may grant leave to appeal do not include a reconsideration of evidence that the General Division has already considered (*Tracey v. Canada (Attorney General)*, 2015 FC 1300). The General Division has discretion to consider evidence before it, to weigh it and to reach a decision. Where the General Division finds certain evidence more reliable than other evidence, it must give reasons for preferring that evidence (*Canada (Attorney General) v. Fink*, 2006 FCA 354). The General Division's decision, in this case, includes reasons for relying on medical evidence in the record.

[18] The Applicant may disagree with the General Division's findings, but the Applicant's disagreement is not a ground for appeal enumerated in subsection 58(1) of the DESD Act. The Appeal Division does not have broad discretion in deciding leave to appeal pursuant to the DESD Act, and it is not acceptable for the Appeal Division to explore the merits of the General Division's decision in deciding whether to grant leave to appeal (*Misek v. Canada (Attorney General)*, 2012 FC 890). It would be an improper exercise of the delegated authority conferred upon the Appeal Division to grant leave to appeal on grounds not included in subsection 58(1) of the DESD Act (*Canada (Attorney General) v. O'Keefe*, 2016 FC 503).

[19] As a result, I am not considering the arguments that the Applicant's representative has put forward and that essentially ask the Appeal Division to reweigh the evidence that the General Division has already considered. I have set out the Applicant's submissions, in paragraphs 15 to 19 above, which I intend to address in my decision on whether leave to appeal should be granted, as these are grounds of appeal that are included in subsection 58(1) of the DESD Act.

ANALYSIS

Extension of Time to File the Application

[20] In *Gattellaro*, the Federal Court set out four questions, set out above in paragraph 6, which should be considered and weighed in determining whether to grant an extension of time. I note that not all four questions need be resolved or answered in favour of the party seeking an extension. Rather, the overriding consideration is that the interests of justice be served. (*Larkman*) Turning to the four *Gattellaro* questions, based on the information that the Applicant's representative has provided, I am granting the extension of time to file the Application for the following reasons:

Did the Applicant demonstrate a continuing intention to pursue the appeal?

[21] The Applicant confirmed that the General Division's decision had been received on August 23, 2016. According to paragraph 57(1)(*b*) of the DESD Act, applicants are allowed 90 days to file an application requesting leave to appeal with the Appeal Division, which means that the Applicant in this case had until November 23, 2016, to file his Application. His Application was received on November 28, which is five days beyond the time limit allowed.

[22] This is a short delay, of only five days. I have listened to the recording of the General Division hearing, and I note that the Applicant stated his intention to appeal the General Division's decision, for several reasons, at the conclusion of the hearing before the General Division. His Application sets out those reasons at length. As a result, I find that the Applicant has demonstrated a continued intention to pursue an appeal.

Does the matter disclose an arguable case?

[23] On this question I must answer in the negative. I do not find that the Applicant has disclosed an arguable case. My reasons for this finding are set out in greater detail below as I address the second issue before me, which is whether the Applicant has raised a ground of appeal that has a reasonable chance of success. However, as I have already acknowledged above, not all the *Gattellaro* questions need to be resolved in the Applicant's favour in order for an extension of time to be granted.

Did the Applicant provide a reasonable explanation for the delay?

[24] The Applicant's representative provided a complicated explanation for the delay in filing the Application, the reasons for which, as she has described, are referred to as a "snowball effect" of circumstances. The explanation reads as follows:

> The Representative has been accepted by both of the Canada Pension Plan Disability and Workers' Compensation as having a disability, unable to "regularly pursue" substantial gainful employment since August 2008. The Representative's disability is due to chronic pain and this disability plays a part in why [the Applicant's] Leave to Appeal Notice is filed late. As noted above under the "*header Reason for Late Notice of Appeal*" the snowball effect, the snowball effect in [the Applicant's] case started earlier this year. At the time when the GD [General Division] contacted [the Applicant's] Representative to see if we were prepared to proceed, the Representative stated, "Not for at least 6-8 weeks". At the time, the Representative did not realize that this would be the only time the process could be adjourned. The reason for not being ready at that time was due to the Representative was involved in an appeal with WCB that was at the Tribunal level on [the Applicant's] behave [sic]. At first, the WCAT Tribunal hearing was by way of personal attendance but while in the hearing in January 2016, it was switched to written submissions. The written submissions were not filed until mid-March 2016. The Representative, due to disability, had a hard time meeting the deadline multiple times. After the written submissions were submitted to the Workers' Compensation Tribunal, the Representative carried on with the research for [the Applicant's] Canada Pension Disability appeal. It was assumed that the appeal for the CPP Disability Benefits was going by way of written submissions. Due to disability, the Representative "merely" met the deadline for submitting evidence to the GD. Due to disability, [the Applicant's] evidence submissions for the CPP appeal were

not submitted in any particular order, basically, a mess of evidence was submitted.

During the above, the doctor made a mistake with one of the prescriptions for pain control, the Representative had less pain control and it made it difficult to make these deadlines and appeals.

The dog that was noted as "sick" in the GD decision, by way of two biopsies, she [the dog] was diagnosed with multiple myeloma September 2015 and ultimately ended up with having to take cancer medications daily. Fast forward to May 2016, [the dog] ended up with pyrometra and had to have emergency spay surgery. Fast forward to the June 2016 CPP hearing date, [the dog] was soon to be scheduled to have her mammary glands removed.

The mammary glands were removed, which included 0.75 kgs of tumor on June 25, 2016. [The dog] ended up with an ecoli infection in her incision, the incision included just over 50 staples to keep the incision closed. The family doctor again, but this time included another 3rd party which is the Pharmacist, the Representative ended up with a lot less pain control and was not able to take care of "anything" except for [the dog]. The Representative due to pain was not able to focus attention on anything but [the dog], [the dog] had a nasty infection and because of, [the dog] needed to be attended to severely. Due to the circumstances, I do not want to relive this by talking about it if I don't have to. Due to infection [the dog] expired needlessly September 3, 2016.

September 5, 2016, the Representative received a WCB's adjudicator's decision that had to be appealed within 30 days. This the Representative had to take care of first before continuing with the appeal of the GD August 16, 2016 decision. Due to disability and taking care of [the dog], it took over two weeks for the pain to subside enough to be able to work on [the Applicant's] WCB appeal.

Final submissions for the appeal of the WCB decision was mid to late October 2016. [the Applicant's] father, due to COPD, was put on life support October 22, 2016, on October 23, 2016, [the Applicant], the Representative and other family members watched his father die after life support was removed. Final submissions for the WCB appeal were adjourned to the first week of November. In the mixt [sic] of this, [the Applicant's] and the Representative's first dog, [first dog] (12.5 years old), had been having breathing problems since February 2016, it was getting worse, near the end of October 2016, the Veterinarian prescribed [first dog] Prednisone in hopes to ease "laryngeal paralysis". [first dog] would have bad spells where he would need to be calmed and relaxed so he could catch a breath, this took a considerable amount of time each time. Sunday, November

> 20, 2016 R. W. expired midafternoon. [First dog's] death transpired over the past few days. The Appellant and Representative had to prepare burial which took a long time to do, increasing pain symptoms in the process. Again, unless I have to, I prefer not to have to relive this moment.
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> Also in the mixt [sic] of, the Representative tried to help their 81 year old mother for a few days and because of this the Representative's pain was drastically increased to the point the Representative was not able to do anything at home, not even able to eat or clean oneself.

[25] The Applicant's representative has identified several factors and circumstances that worked against the Applicant's efforts to file an Application within the time limit allowed. I have not requested additional documentation or evidence to substantiate the representative's health status, the deaths of either dog, the passing of the Applicant's father or whether the representative did in fact offer assistance to her aged mother. I am satisfied that the Applicant's representative has offered a reasonable explanation as to why the Application was filed late, and I remain mindful that it was delayed by only five days.

Would granting an extension cause prejudice to the other party?

[26] The Applicant's representative has submitted that no prejudice would result should an extension of time be granted, and I agree that no prejudice would result to the Respondent should I allow a relatively brief extension to file the Application.

[27] Given that three *Gattellaro* criteria were met and the overriding consideration that the interests of justice be served, I allow the extension of time to file the application for leave to appeal.

[28] I now move to consider whether leave to appeal should be granted.

Does the appeal have a reasonable chance of success?

Submission 1: The General Division had failed to follow the *Code of Conduct for Members of the Social Security Tribunal* and the *Canada Pension Plan Adjudication Framework*, which resulted in a breach of natural justice pursuant to paragraph 58(1)(*a*)of the DESD Act.

[29] The Applicant's representative has submitted that the General Division member failed to abide by the provisions contained in the *Code of Conduct for Members of the Social Security Tribunal* (Code), and the *Canada Pension Plan Adjudication Framework* (Framework). I recognize that the failure to abide by the Code or the Framework does not in and of itself constitute a ground of appeal under the DESD Act. However, embodied in the Code and the Framework are requirements that Tribunal members are expected to comply with to ensure that applicants are afforded a fair, transparent, credible and impartial appeal process, and that applicants are provided the opportunity to present their cases fully and fairly before the Tribunal.

[30] The Applicant's representative has asserted that, in appearing before the General Division, the "hearing was unfair from start to finish." She has argued that the General Division member's initial phone greeting was "disgruntled" and overly informal. The representative has claimed that the General Division refused to engage in a "debate" about the evidence and, when the Respondent stated something or asked the Applicant a question, "the [Applicant] wasn't able to give a reply because the decision maker felt the reply was a waste of time to her." The representative has made several very serious allegations. She has argued that:

> "The decision maker refused to allow the [Applicant's] Representative to represent the [Applicant]. The decision maker literally forced the [Applicant] to represent himself. The Appellant was not prepared to represent himself.
>
> The Representative asked the decision maker if we could reschedule the hearing so the Appellant could properly prepare because I was to be the Representative and obviously, the Appellant was not prepared to represent himself.
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> The Representative said that the Appellant has the right to be represented, that's why the Authorization to Represent/Disclose form was submitted for this Appeal. The decision maker stated, "The Appellant doesn't have

> to be represented and he's present anyways, he can represent himself and anything that the Representative does say I will not consider it".

[31] As I have already indicated, I have listened to the recording of the hearing before the General Division and do not find that the Applicant's representative has accurately detailed what was said during the hearing. I did not hear a disgruntled tone to the General Division member's voice, nor did I hear the member refuse to listen to evidence from the Applicant's representative or hear her state that she would not consider the evidence that the representative had given. I do, however, confirm that the General Division did explain that the Applicant was required to give his own evidence. The representative was told that she could ask him questions, but that she could not give evidence on the Applicant's behalf. The representative also wanted to act as a witness for the Applicant. The General Division explained that her role as a witness was different than her role as a representative for the Applicant. She would now be giving evidence regarding her personal observations of the Applicant, and the General Division reminded the representative that she was not allowed to give evidence on the Applicant's behalf. The General Division was attempting to ensure that the evidence that was being given was not hearsay evidence. Evidence of which the representative has no personal knowledge or evidence that the Applicant had told her must be considered hearsay evidence that lacks probative value. Although the representative may have construed this as placing limits on her with respect to her capacity to represent the Applicant, this is not an error on the part of the General Division member.

[32] The representative has argued that the Applicant had not been "prepared" to answer questions that the General Division member put to him during the hearing. However, the General Division notes at paragraph 18 of the decision that "[t]he [Applicant] did not object to giving his own testimony and responding to questions himself." Additionally, on listening to the recording of the General Division hearing, I note that the questions that were asked during the hearing did not require any degree of preparation. The Applicant was asked to recall the details of his health condition and his employment circumstances. There was no evidence in the record that reflected that the Applicant had suffered any issues with his memory or cognitive functioning that would require accommodation by the General Division or that would warrant particular preparation on the part of the Applicant. The Applicant bears the burden of proof with respect to his claim that he is entitled to a disability pension under the CPP. With this burden

comes the obligation to produce at least enough evidence for the trier of fact (in this case the General Division) to consider his disputed claim and decide whether there is just enough evidence to tip the balance in his favour. In this case, the Applicant's testimony, along with the documentary evidence, failed to do this.

[33] I am not prepared to grant leave to appeal on the ground that the General Division breached a principle of natural justice. I do not find that the Applicant was prevented from bringing his case forward fully and fairly in any way as a result of any failure on the part of the General Division to comply with the expected hearing protocols, rules of evidence or appropriate conduct expected of Tribunal members.

[34] Leave to appeal is not granted on this ground.

Submission 2: Did the General Division fail to complete a "credibility test," resulting in an error of law pursuant to paragraph 58(1)(*b*) of the DESD Act?

[35] The Applicant's representative has argued that the General Division erred in law in failing to complete a "credibility test" that it was required to complete, pursuant to the court's reasoning in *Scott*. In that case, the court found that the adjudicator had reached her conclusion in an unreasonable manner by using a flawed approach to the assessment of credibility. The Applicant's representative appears to be inferring that there is an actual "credibility test" that must be administered by decision-makers when hearing matters and rendering decisions. No such test exists.

[36] In evaluating credibility, the General Division must consider the entire evidentiary record and give specific reasons for the weight it assigns to the evidence provided therein. The General Division must also provide reasons for the weight it assigns to the oral testimony that Applicants and witnesses have provided. The assessment of credibility cannot be based on an intangible standard, on personal perspective or an intuitive "notion." It must be grounded in evidence and articulated in the decision. I find that the General Division has done this.

[37] At paragraph 20 of the decision, the General Division explains why the evidence in the record was afforded greater weight than the oral testimony provided during the hearing, and the reasons read as follows:

> [20] From the oral testimony it was challenging to obtain a clear and consistent description of the events leading up to the Appellant's claim for CPP disability benefits. The Appellant's evidence was sparse and the Spouse was combative and inconsistent in her discussion of the Appellant's injuries, treatment and ongoing health condition. I relied heavily on the written documentation to identify the most likely chronology of events related to the Appellant's appeal.

[38] I have already stated that the General Division has discretion to consider evidence before it, to weigh it and to reach a decision. Where the General Division finds certain evidence more reliable than other evidence, it must give reasons for preferring that evidence (*Fink*). I do not find that the General Division failed to consider and assess the credibility of the evidence before it, and I do not find that the General Division erred in law.

[39] Leave to appeal is not granted on this ground.

Submission 3: The General Division breached a principle of natural justice, as the Applicant was prevented, throughout the hearing process before the General Division, from arguing his case fairly and fully before the General Division.

[40] I have already addressed this issue above, under the subheading of Submission 1. I did not find that, in listening to the recording of the hearing before the General Division, the Applicant had been denied the opportunity to put his case forward fully and fairly.

[41] I will add to those comments that matters before the Tribunal are intended to proceed "as informally and quickly as the circumstances and the considerations of fairness and natural justice permit," pursuant to paragraph 3(1)(*a*) of the *Social Security Tribunal Regulations*. The hearing before the General Division went well beyond the time frame normally allowed for hearings, as it took over two hours to complete. It is the Tribunal members' responsibility to ensure that hearings are held in an orderly and efficient manner. While it may be the representative's opinion that, because she and the Applicant had been unable to be fully prepared for the hearing process, they should have been afforded unlimited time to search for documents and respond to questions, the General Division's unwillingness to conduct an open-ended hearing with respect to time does not amount to an error on the part of the General Division.

Submission 4: Did the General Division err in law in failing to properly apply *Villani* and *D'Errico*, which would be a ground of appeal under paragraph 58(1)(*b*) of the DESD Act?

[42] The Federal Court of Appeal in *Villani* stated, at paragraph 38, that "[i]n my view, it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience." This is the "real world" context that must be considered when assessing disability under the CPP. *Villani* sets out the test for determining disability under the CPP. According to *Villani*, the test for determining the severity of a disability is not that a disability must be found to be "total," but that the disability should be assessed in a "real world" context with respect to certain factors that may impact an individual's capacity to obtain and/or maintain employment. Factors such as the applicant's age, education level, language proficiency, and past work and life experience should be considered in determining whether an applicant is disabled under the CPP. Applicants for disability pension under the CPP are required to produce objective medical evidence of their disability. (*Warren v. Canada (Attorney General)*, 2008 FCA 377)

[43] An applicant's medical condition is not a personal characteristic that the Federal Court of Appeal considered in *Villani*. In order for an applicant to be found disabled under the CPP, they must first demonstrate that they suffer a serious and possibly debilitating medical condition. Then, a decision-maker assesses the severity of the claimed disability in the context of the *Villani* factors, which include personal characteristics. The General Division has done this. At paragraph 45 and 46 of the decision, the General Division states:

> [45] The severe criterion must be assessed in a real world context (*Villani v. Canada (A.G.)*, 2001 FCA 248). This means that when deciding whether the Appellant has a severe disability, I must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.
>
> [46] The Appellant did not identify, and I did not find, any factors such as those considered in *Villani* that I must consider as I decide whether the Appellant has a severe disability.

[44] The Applicant was 29 years old at the time of his minimum qualifying period date and had worked as a labourer for several years. In 2009, after he had stopped working, he planned to

return to school but, without adequate funding, he was unable to proceed with his planned retraining. He has no issues with language proficiency, and he is married. None of these factors impacts the Applicant's capacity to obtain and/or maintain "any substantially gainful" employment.

[45] The Federal Court of Appeal, in *Villani*, stated at paragraph 49 that, "[t]he assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere." I am also reluctant to interfere with the determination of the General Division's assessment of the *Villani* factors unless the Applicant's counsel identifies a specific error of law. I do not find that an error appears on the face of the record.

[46] The representative has also argued that the General Division erred in law in failing to follow the Federal Court of Appeal's reasoning in *D'Errico*. That case deals with a decision of the former Pension Appeals Board (PAB), which preceded the Tribunal's Appeal Division. In that case, judicial review was being sought for a PAB decision, and the Federal Court of Appeal found that the PAB had not fully considered the reasoning and evidentiary basis on which the former Review Tribunal (now the Tribunal's Appeal Division) had based its finding that the applicant in that case had not proven that he a "severe and prolonged" disability under the CPP. The court found that the PAB had not demonstrated that it had "grappled with the medical evidence to see if the legal test was met."

[47] In the matter at hand, however, I do not find that the General Division failed to grapple with the medical evidence in the record before it. I do find that the General Division has demonstrated that the medical evidence in the record had been thoroughly reviewed and considered. At the hearing, the General Division questioned the Applicant regarding particular details found in the medical evidence. The Applicant was not able to provide any evidence to dispute the opinion found in the medical evidence that he had retained capacity to work.

[48] As a result, I do not find that this ground of appeal has a reasonable chance of success.

Submission 5: Did the General Division fail to provide adequate reasons for its findings?

[49] The Applicant's representative has submitted that the General Division failed to provide adequate reasons for its findings, which would be a breach of a principle of natural justice pursuant to paragraph 58(1)(*a*) of the DESD Act.

[50] The broad issue before the General Division was whether the Applicant's health condition, on or before December 31, 2009, had made him incapable regularly of pursuing any substantially gainful occupation. In deciding this issue, the General Division considered whether there were any medical opinions (supported by testing or other evidence) or functional assessments that demonstrated that the Applicant lacked any capacity to work. There were not. Having found that the Applicant had retained some capacity to work, the General Division further considered whether the Applicant had made efforts to obtain employment within his limits or whether he had attempted to retrain but had been unsuccessful as a result of his health condition (*Inclima* v. *Canada (Attorney General)*, 2003 FCA 117). He had not.

[51] Unless there is a reasonable explanation for not doing so, applicants seeking a disability pension under the CPP are expected to follow the advice of their attending medical professionals regarding prescribed medications and other types of treatment intended to mitigate troublesome health conditions (*Kambo v. Canada (Human Resources Development)*, 2005 FCA 353). The General Division must also consider what impact any unreasonable refusal would have on his disability (*Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211).

[52] The General Division finds, at paragraphs 54 and 55, that:

> [54] The Appellant submitted that he is not required to follow all medical advice. He suggested this is a personal preference and it is up to him to decide whether to participate in treatment. […]
>
> [55] If, as the Appellant testified, he refused recommended treatment because he was unable to pay for it that could be a reasonable refusal. In this case however, there is evidence that he failed to attend physiotherapy treatments that were funded by the WCB and recommended by Dr. Wong. Dr. Wong reported that the delay in his physiotherapy delayed the Appellant's recovery.

[53] Having assessed the Applicant's health condition and finding that he had retained some capacity to work, the General Division then turned its mind to whether the Applicant had attempted to obtain employment within his limits or to retrain for a more sedentary occupation. The General Division also considered whether the Applicant had made efforts to mitigate his health condition. All the General Division's findings on these issues are contained in the decision. I do not find that the General Division's determinations lack adequate reasons.

[54] This is not a ground of appeal for which I am granting leave to appeal.

CONCLUSION

[55] An extension of time to apply for leave to appeal is granted, as I have found that the Applicant has established a continuing intention to pursue the appeal, that he has provided a reasonable explanation for the delay and that there is no prejudice to result if an extension is allowed. I did not find that the Applicant established that this matter discloses an arguable case. However, in the interests of justice, I have allowed an extension to file the application requesting leave to appeal.

[56] I have not found that the Applicant had raised a ground of appeal that has a reasonable chance of success. As a result, although I have allowed an extension to file the appeal, the application requesting leave to appeal is refused.

Meredith Porter
Member, Appeal Division