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

Citation: *N. D. v. Minister of Employment and Social Development*, 2017 SSTADIS 517

Tribunal File Number: AD-16-1009

BETWEEN:

N. D.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Meredith Porter

Date of Decision: October 5, 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 May 16, 2016, which determined that he was not entitled to disability pension benefits pursuant to the *Canada Pension Plan* (CPP). The General Division found that the Applicant had failed to establish that he suffered a "severe" disability on or before his minimum qualifying period (MQP) date, which was December 31, 2012.

[2] Pursuant to section 55 of the *Department of Employment and Social Development Act* (DESD Act), "Any decision of the General Division may be appealed to the Appeal Division." The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on August 12, 2016.

ISSUE

[3] Does the appeal have a reasonable chance of success?

THE LAW

[4] According to subsections 56(1) and 58(3) of the DESD Act, "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." Determining leave to appeal is a preliminary step to a decision on the merits and is an initial hurdle for an applicant to meet, however, the hurdle is lower than the one that must be met when the appeal is decided on the merits.

[5] Subsection 58(2) of the DESD Act provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." The Applicant must establish that there is some arguable ground upon which the proposed appeal might succeed in order for leave to appeal to be granted (*Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630). An arguable case at law is akin to determining whether, legally, an appeal 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).

[6] 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.

SUBMISSIONS

[7] The Applicant submits that the General Division failed to observe the principles of natural justice, pursuant to paragraph 58(1)(*a*) of the DESD Act, in that it was biased and did not base its decision on objective evidence before it.

[8] The Applicant submits that the General Division breached a principle of natural justice in failing to provide adequate reasons for how the issues in this case were decided.

[9] Finally, the Applicant submits that the General Division breached a principle of natural justice in failing to ensure that the Applicant knew his case to meet, and that he could properly prepare his case in reply.

[10] The Applicant further submits that the General Division erred in law, pursuant to paragraph 58(1)(*b*) of the DESD Act, in hearing evidence *ex parte*.

[11] Finally, the Applicant submits that the General Division based its decision on an erroneous finding of fact, pursuant to paragraph 58(1)(*c*), and specifically:

i. erred in finding that the Applicant failed to follow recommended treatment by continuing to smoke;

ii. failed to properly consider the evidence in the record, including the Applicant's full medical and physical condition in light of the health professional's diagnosis and recommended treatment; and,

iii. failed to consider the hypothetical occupations that the Applicant was capable of undertaking.

ANALYSIS

Did the General Division exhibit bias, or is there a reasonable apprehension of bias?

[12] The Applicant argues that the General Division determined the Applicant's case with personal bias. The Applicant argues that the member's personal bias is evident in her selective discussion of evidence in the record, and in her speculation on a number of issues including the Applicant's health condition and his efforts to mitigate the effects of his health condition on his capacity to work.

[13] Existing jurisprudence has defined bias in the following way:

> Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case. (see Cory J. in *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484, at para. 106)

[14] 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)*, 1976 CanLII 2 (SCC), 1978 1 S.C.R. 369, at page 386. In that case, the Court stated that:

> […] 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?

[15] Subsequent decisions have clarified the test further. In *R v. S. (R.D.)*, the Court noted that the test for bias is two-fold. The first part directs 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."

[16] The second part of the test directs an examination of whether the apprehension of bias is itself, in all circumstances of the case, reasonable. Further, the SCC held that the threshold for a finding of bias is high and the onus of demonstrating the existence of bias lies with the person who is alleging its existence. The reason for the high threshold is, as held by the SCC in *Roberts v. R.*, 2003 SCC 45, that "the standard refers to an apprehension of bias that rests on serious grounds in light of a strong presumption of judicial impartiality."

[17] The standard is no different where an administrative tribunal is the subject of an allegation of bias. In *Arrachch v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 999, the Federal Court, quoting the Federal Court of Appeal in *Arthur v. Canada (Attorney General)*, 2001 FCA 223, observed that:

> [20] An allegation of bias, 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. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture or mere impressions of an applicant or counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard.

[18] The Applicant has alleged that the General Division was biased. The foregoing sets out the standard that the Applicant must meet if his allegation of bias is to be proven.

[19] The Applicant submits that the General Division was biased as there was only selective reference to evidence in the record. However, it is an established principle of administrative law that a Tribunal need not refer to each and every item of evidence before it but is deemed to have considered all of it (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). The Applicant also argues that the General Division was biased with respect to the weight the General Division placed on certain medical evidence, and in substituting its own medical opinion for that of medical practitioners and experts.

[20] The Applicant submitted that the General Division member’s “clear personal bias” was shown by the “selective interpretation and presentation of both medical and other documented

evidence, and the [Applicant's] oral testimony for use as evidence in making the decision process." The Applicant supports this claim by arguing that the General Division member failed to review the documentary record in its entirety, and that the General Division member "accused" the Applicant of "wilfully inhibiting his treatment plan by not filing his income tax promptly and continued smoking […]" The Applicant further asserts that the General Division had preconceived bias against the Applicant because of his "educational status, his being a smoker, and his personal history of unpaid taxes."

[21] At paragraph 20 of the decision, the General Division acknowledged that the Applicant's oral evidence was that "he did complete his taxes and he is up to date […]" Further, at paragraph 27 of the decision, the General Division cites a report from Dr. B. McLeod, a rheumatologist whom the Applicant had consulted, which states that he had advised the Applicant that that tobacco is a very important causative agent in the development of rheumatoid arthritis (GD2- 107). Dr. McLeod also opined that the Applicant should be made aware that smoking appears to decrease the biological response to both methotrexate and biologics, which had been recommended as combination therapy progressing toward biologic therapy. Dr. McLeod advised that smoking would interfere with his response to therapy (GD2-108 to 109).

[22] 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, unless there is a reasonable explanation for not doing so (*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).

[23] At paragraphs 47 to 49 of the decision, the General Division relies on Dr. McLeod's recommendations as set out above. As the Applicant's evidence was that he had not stopped smoking, and continued to smoke 10 to 12 cigarettes per day, I do not see how the General Division's finding that the Applicant had failed to mitigate his health condition and failed to provide a reasonable explanation for his failure to do so was fueled by personal bias. Taking the

Applicant's argument to its logical conclusion, it was a breach of natural justice for the General Division to rely on statements in Dr. McLeod's report and the Applicant's testimony.

[24] With respect to the Applicant's incomplete taxes, the Applicant acknowledged that he had fallen behind in filing his income taxes and that, in order to qualify for Pharmacare to cover the cost of certain medications, the Applicant was required to get his taxes in order. He did so. At paragraph 50 of the decision, the General Division relies on this evidence in finding that the Applicant had treatment options open to him. He was "not on full treatment," but this was a result of Dr. McLeod's opinion that the Applicant's health conditions were "waxing and waning." I do not find that the General Division incorrectly relied on the Applicant's falling behind in paying his taxes in any way. I do not find that the General Division inappropriately characterized the Applicant's evidence, or reflected any prejudice with respect to his educational attainment either.

[25] I am 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. Furthermore, weighing evidence is within the purview of the General Division. The decision shows that the General Division member considered and addressed both the Applicant's oral testimony and the medical evidence in reaching its conclusions. While the General Division placed significant reliance on the report of Dr. McLeod, it is equally true that the General Division relied significantly on the Applicant's oral evidence as well.

[26] Considering the foregoing, and applying the test for a "reasonable apprehension of bias," I do not find that the General Division member either consciously or unconsciously decided the issues in this case in an unfair manner. I also do not find that the General Division contradicted itself in any way by substituting its opinions for those of the attending medical professionals. I do not find that the General Division acted with bias when it weighed the evidence before it. This is not a ground of appeal that would have a reasonable chance of success. Leave to appeal is not granted on this ground.

Did the General Division fail to provide adequate reasons for how the decision was made?

[27] 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. The Applicant asserts that the General Division's findings, on several issues, reflect speculation and suspicion rather than well-founded, logical reasons.

[28] The Applicant supports his claim by referencing the number of times that the General Division uses the terms "could," "possible," and "may" in the decision. It is the Applicant's position that these are terms of conjecture that reflect considerable speculation and suspicion instead of reasons grounded in factual evidence. What results is, according to the Applicant, a decision that fails to reflect how the issues before the General Division were decided.

[29] The General Division has discretion to consider evidence before it, weigh it and reach a decision. Where the General Division relies on certain evidence, finds certain evidence more reliable than other evidence, or where evidence is dismissed as unreliable, the General Division must give clear reasons for how that evidence is being considered and why (*Canada (Attorney General) v. Fink*, 2006 FCA 354). I find that the General Division decision, in this case, has provided reasons for relying on medical evidence in the record.

[30] The broad issue before the General Division was whether the Applicant's health condition, on or before December 31, 2012, 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, that demonstrated that the Applicant lacked any capacity to work. There were not. Having retained some capacity to work, the General Division further considered whether the Applicant had made efforts to obtain employment within his limits or 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.

[31] The General Division found, at paragraph 55, that:

> [55] […] [t]he medical evidence presented demonstrated the Appellant had certain limitations however the Tribunal finds that the Appellant had a capacity to work on or before the MQP.

[32] Further, at paragraphs 60 to 63:

> [60] However the Tribunal finds that the Appellant has not attempted alternate sedentary work even on a part-time at his MQP of December 31, 2012. Without attempting alternate sedentary work the Appellant does not know if he would be capable of sedentary lighter work or not. The Tribunal acknowledges that the Appellant submitted he has mobility issues and this would not allow him to work. However, the Tribunal finds that the Appellant may not be able to work at his physically demanding previous employment and the Tribunal took into consideration and acknowledges that there were no more light duties at Canfor Forest Products because they had been eliminated; however the Appellant has not attempted alternate sedentary work even on a part-time basis. The Tribunal finds that without attempting alternate sedentary employment that is not so physically demanding, the Appellant does not know whether he would be successful or not at maintaining alternate employment even on a part time basis. Sedentary jobs allow the opportunity for frequent breaks to stand and stretch while avoiding prolonged sitting. The Tribunal acknowledges that the Appellant stated he tried retraining at the computer and because of swelling in his hands he could not continue, however the Tribunal finds that not all sedentary positions require the use of a computer.
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> [61] The Tribunal acknowledges that the Appellant submitted that he has short term memory issues however the Tribunal finds that this issue on its own is not a severe disabling condition and Dr. Markham did not report a diagnosis of short term memory issues or cognitive impairment. The Tribunal acknowledges the Appellant may have some limitations but the medical evidence does not demonstrate incapacity from all work.
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> [62] Other public and private insurance disability plans and pensions besides the CPP do exist and their requirements vary. Although the CPP rules are strict and inflexible and the threshold is a high and stringent one, it is not an insurmountable threshold (*R.S. v. Minister of Human Resources and Skills Development*, December 17, 2013, CP 29025).
>
> [63] The Tribunal finds that the evidence on file and from the hearing does not indicate the Appellant was incapable regularly of pursuing any substantially gainful occupation.

[33] Having relied on the evidence in assessing the Applicant's health condition and finding that he 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 engaged in retraining for a more sedentary occupation. The General Division had already considered whether the Applicant had made efforts to mitigate his health condition. All the General Division's findings on these issues are found in the decision, and the reasons for the findings are explained in the paragraphs cited above with reference to the evidence relied on in support of the reasons. I do not find that the General Division's findings lack adequate reasons.

[34] This is not a ground of appeal on which I am granting leave to appeal, as it does not have a reasonable chance of success.

Did the General Division fail to allow the Applicant to know his case to meet?

[35] The Applicant also argues that the General Division, in relying on speculation and suspicion, denied the Applicant the opportunity to know his case to meet. The Applicant's argument is based on his assertion that he did not know that the General Division was alleging that he "self-inflicted" his diagnosed rheumatoid arthritis. He argues that the Respondent had initially denied his CPP application on the basis that he had not met the CPP contributory requirements. Once it was established that he had, in fact, made sufficient contributions to establish his MQP date, the issue turned to how severe his disability was. He argues that he was not provided with all of the evidence, and was not informed of all of the statements made against him, so he was not able to know his case to meet and was not able to prepare his case in response to that of the Respondent.

[36] I find that this argument holds little weight. Firstly, with respect to his assertion that the General Division relied on speculation and suspicion, I have already addressed this allegation in paragraphs 27 to 34 above. I will add only that the Applicant's oral testimony, summarized in paragraphs 13 to 22 of the decision, reflects that the Applicant was questioned on all of the submissions made by the Respondent including his medical condition at the time of his MQP; his attempts to obtain sedentary work or retrain; and, his health condition post-MQP. Secondly, the Applicant supplied all of the medical information in question to the Respondent initially, and a complete evidence package including all of that medical information and any additional documents received since the reconsideration decision was rendered was sent to the parties from the Tribunal on July 6, 2015. The Notice of Hearing was sent to the parties on January 5,

2016, and, following an adjournment, another Notice of Hearing was sent on March 31, 2016. The hearing took place on April 18, 2016. There were more than nine months from the time that the parties received the evidence package until the hearing was held. The Applicant was provided adequate time to review the materials in the evidence package and to prepare his case and his reply, prior to the hearing.

[37] Paragraph 42(2)(*a*) of the CPP defines disability for determining entitlement to a pension under the CPP. In order to be found disabled, the disability must be "severe" and "prolonged." An individual is considered to suffer a "severe" disability if they are incapable regularly of pursuing any substantially gainful occupation, and the disability is "prolonged" if it is likely to be long continued and of indefinite duration or is likely to result in death. The test for determining disability under the CPP has been further articulated by the Federal Court of Appeal in *Villani v. Canada (Attorney General)*, 2001 FCA 248:

> [50] This restatement of the approach to the definition of disability does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation". Medical evidence will still be needed as will evidence of employment efforts and possibilities.

[38] The Applicant argues that the General Division breached a principle of natural justice in making the severity of the Applicant's health condition, and its debilitating effects, the central issue in its decision. I do not find that this constitutes an error; in fact, the severity of an applicant's health condition is always the first central issue for determining disability under the CPP. The severity of a disability is determined in reference to the impact that the health condition has on the individual's capacity to work, and not on the seriousness of the diagnosis.

[39] The Applicant states that natural justice provides that parties must be given the opportunity to challenge the decision-maker if an error or contradiction exists. The appeal process to the Appeal Division provides that opportunity. However, there are enumerated grounds under subsection 58(1) of the DESD Act on which leave to appeal may be granted. I am not able to grant leave to appeal based on theoretical grounds (*Canada (Attorney General) v. Hines*, 2016 FC 112).

[40] I do not find that the General Division failed to allow the Applicant to argue his case fully and fairly. He was provided with all of the evidence on which the General Division member could base a decision, and there is no indication that the Applicant was prevented from giving testimony during the hearing before the General Division with respect to answering the Respondent's case against him.

[41] I do not find that the Applicant's argument has a reasonable chance of success, and leave to appeal is not granted on this ground.

Did the General Division hear the matter *ex parte*?

[42] The Applicant argues that the General Division possibly erred in law in failing to follow direction from the SCC, quoting Lord Denning, with respect to hearing evidence of one party in the absence of another party:

> Whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of the other [...] (*per* Lord Denning in *Kanda v. Government of the Federation of Malaya*, [1962] AC 322, 337).

[43] Although stated to be an error of law, as prescribed by paragraph 58(1)(*b*) of the DESD Act, hearing evidence *ex parte* is a breach of natural justice pursuant to paragraph 58(1)(*c*) as it results in unfairness. The absent party is not provided full disclosure of evidence or facts central to their full and fair participation in proceedings, nor is the party afforded the opportunity to be heard.

[44] Whereas the former Pension Appeals Board had the authority to compel witnesses to appear, the Tribunal does not hold the same authority. Parties are notified of hearings once they are scheduled, and they may appear or may choose not to. In this case, the Respondent did not appear. However, in the Tribunal's opinion, the Applicant was aware of the important facts of the case. In fact, he had been provided the entire record of evidence prior to the hearing. The Applicant was provided with the Respondent's written submissions and was provided the opportunity to address the Respondent's arguments during the hearing. The Applicant therefore had knowledge of the Respondent's evidence in support of the finding that he did not qualify for a disability pension.

[45] I note that the principles of natural justice are concerned with procedural fairness, which includes the Applicant being notified of his hearing date and the case to meet, being provided adequate time to prepare his case and to defend the case being brought in response, and being provided with a decision and reasons for how his case was decided. The Applicant was represented, and he was accompanied by his representative at the General Division hearing. I have already found that the Applicant was aware of the Respondent's evidence prior to appearing before the General Division, and had ample time to prepare his case. The General Division allowed him to present his arguments in respect of the entire case before it, and the Applicant had an opportunity to dispute the Respondent's position.

[46] Section 21 of the *Social Security Tribunal Regulations* (SSTR) provides that hearings may take one of four forms—in writing, by teleconference, by videoconference, or in person—and the discretion to decide how to hold a hearing lies with the General Division (*Parchment v. Canada (Attorney General)*, 2017 FC 354). Section 3 of the SSTR instructs the Tribunal to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit. The Applicant has not argued, nor demonstrated, that the General Division exercised its discretion incorrectly.

[47] I do not find that the Applicant's argument that the General Division committed a reviewable error of law, or breached a principle of natural justice in proceeding to hear the Applicant's case without the presence of the Respondent. Leave to appeal is not granted on this ground.

Did the General Division base its decision on an erroneous finding of fact?

[48] The Applicant argues that the General Division based its decision on several erroneous findings of fact, including that it erred in finding that the Applicant failed to follow recommended treatment by continuing to smoke; it failed to properly consider the evidence in the record, including the Applicant's full medical and physical condition in light of the health professional's diagnosis and recommended treatment; and, it failed to consider the hypothetical occupations that the Applicant was capable of undertaking.

[49] I have already addressed the General Division's finding with respect to the Applicant's failure to mitigate his health condition by continuing to smoke. I did not find that the General Division committed a reviewable error in relying on this evidence as this was an opinion of one of the Applicant's attending physicians and it was open to the General Division to consider the evidence an assign due weight.

[50] The Applicant has argued that the General Division failed to consider:

> Rheumatoid Arthritis is diagnosed through blood tests there is no speculative "impression" as the Investigator stated. For the Dr. to put the Appellant through physically and mentally debilitating chemotherapy to try and suppress his immune system for many years to prevent absolute physical immobility caused by Rheumatoid Arthritis clearly indicates severe and prolonged disabilities are occurring and will continue to occur. The Appellants 2009 medical reports by Dr. Macleod, which the Tribunal Investigator had access to, clearly indicates a Rheumatoid Arthritis diagnosis with a treatment plan to include chemotherapy to suppress the Appellants immune system. What that said suppression entails is a given for someone who is qualified to make a decision on what is a severe and prolonged disability. The 2009 specialist report also indicated that the disease had been occurring for at least 2 years prior to diagnosis.

[51] 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 already considered by the General Division. As set out above in paragraph 6, the grounds on which the Appeal Division may grant leave to appeal do not include a reconsideration of evidence already considered by the General Division (*Tracey v. Canada (Attorney General)*, 2015 FC 1300).

[52] The Applicant may not agree with the General Division's findings, but the Applicant's disagreement with the General Division's findings 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 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 granted to 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).

[53] Finally, the Applicant argues that the General Division failed to consider the hypothetical occupations in which the Applicant was capable of working.

[54] Pursuant to the Federal Court of Appeal in *Villani*, the General Division is required to assess the Applicant's capacity to work in a "real world" context. The real-world context means 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" (*Villani*). The Applicant argues that the General Division's assessment failed to demonstrate that the hypothetical occupations that it considered the Applicant was capable of were not divorced from the Applicant's particular circumstances (*Garrett v. Canada (Minister of Human Resources Development)*, 2005 FCA 84).

[55] The General Division cites the *Villani* factors in the decision, and states:

> [45] While taking the Villani characteristics into consideration the Tribunal finds that the Appellant was 50 at his MQP. He has a Grade 10 education and is proficient in the English language. He has worked in physically demanding employment all his life. He does not have transferrable skills.

[56] Further, at paragraph 49 of the decision, the General Division finds:

> An essential element of qualifying for a disability pension is evidence of serious efforts by the Appellant to help himself. This requirement extends to both the obligation to aggressively seek treatment and to the burden which accrues to all Appellants of establishing that reasonable and realistic efforts were made to find and maintain employment while taking into account the *Villani* personal characteristics and his or her employability: A.P. v MHRSD (December 15, 2009) CP 26308 (PAB).

[57] Finally, the General Division concludes at paragraph 52:

> On January 27, 2014, Dr. R. Markham, family physician, reported diagnosis of rheumatoid arthritis on the CPP Medical Report. The Appellant has joint pain and swelling especially in hands, joints, and ankles. The prognosis is stable. The Tribunal acknowledges that Dr.

> Markham on the previous CPP Medical Report noted the Appellant's condition was surprisingly in good control and in January 2014 he noted that the Appellant's prognosis is stable and has improved. These medical reports confirm that the Appellant suffers from Rheumatoid Arthritis; however **they do not establish a severe disability**. [my emphasis]

[58] Having found that the Applicant did not have a severe medical condition, it was not necessary for the General Division to apply the "real world" approach in this case. In paragraphs14-15 of its decision in *Giannaros v. Canada (Minister of Employment and Social Development)*, 2005 FCA 187, the Federal Court of Appeal held that whenever the decision-maker is not persuaded that there is a serious medical condition, it is not necessary to undergo the "real world approach" analysis. On my reading of the Court's decision, for *Giannaros* to apply, it presumes a finding separate from the severity analysis. On reading the General Division's decision, I do find that the General Division found, based on medical evidence and testimony provided by the Applicant, that the Applicant had failed to demonstrate that he suffered a severe condition on or before his MQP date.

[59] The Applicant also asserts that the General Division was obligated to identify what hypothetical occupations the Applicant was capable of pursuing. I disagree. In *Kiraly v. Canada (Attorney General*), 2015 FCA 66, the Tribunal found that the Applicant had capacity to work and had failed to meet her legal obligation to seek employment within her limitations. The Applicant sought judicial review of the Tribunal's decision, but the Court concluded that the Tribunal's decision was reasonable. The court in *Kiraly* found that *Villani* does not stand for the proposition that the Tribunal is required to identify what other employment may be within the applicant's limitations.

[60] Leave to appeal is not granted on the ground that the General Division failed to identify hypothetical occupations within the Applicant's limitations as I do not find that this argument has a reasonable chance of success.

CONCLUSION

[61] The Application is refused.

Meredith Porter
Member, Appeal Division