Citation: *D. M. v. Minister of Employment and Social Development*, 2014 SSTAD 212

Appeal No. AD-14-290

BETWEEN:

D. M.

Applicant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: August 25, 2014

DECISION

[1] The Member of the Appeal Division of the Social Security Tribunal refuses the application for leave to appeal.

BACKGROUND

[2] The Applicant seeks leave to appeal the decision of the General Division issued on April 23, 2014. The Member of the General Division determined that a Canada Pension Plan disability pension was not payable to the Applicant, as it found that his disability was not "severe" at the time of his minimum qualifying period of December 31, 2001 ("MQP"). The Applicant filed an application requesting leave to appeal (the "Application") with the Social Security Tribunal on June 16, 2014, within the time permitted under the *Department of Employment and Social Development* (DESD) *Act.*

ISSUE

[3] Does this appeal have a reasonable chance of success such that leave to appeal should be granted?

THE LAW

[4] According to subsections 56(1) and 58(3) of the 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".

[5] Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success".

APPLICANT'S SUBMISSIONS

[6] The Applicant submits that the General Division erred as it did not have and therefore failed to consider all of the pertinent documentation, including medical forms,

despite the fact that he had filed these with the Social Security Tribunal. The Applicant filed various forms and medical records with his leave application. They include the following:

i. Correspondence with and from the Office of the Commissioner of Review Tribunals, Human Resources and Skills Development Canada ("HRSDC") and the Social Security Tribunal;

ii. Letter dated August 15, 1995, Discharge Summary dated August 18, 1995, and medical file from the Nova Scotia Rehabilitation Centre;

iii. Letters dated November 28, 1995 and October 27, 1999, as well as consultation reports dated May 31, 1996, November 18, 1996, November 12, 1997, April 14, 1998 and October 27, 1999 from Dr. Robert Mahar, physiatrist;

iv. Physiotherapy Spinal Cord Injury Clinic Assessment of Queen Elizabeth II Health Sciences Centre, dated April 8, 1998;

v. Emergency Care Record of Cape Breton District Health Authority, dated January 7, 2005;

vi. Printout of active medications, dated April 22, 2009;

vii. Consultation reports dated June 9, 2008 and December 10, 2010 of Dr. Yassar Chakfe, neurologist;

viii. Application for CPP Disability Benefits, CPP Child Rearing Dropout Provision, and Questionnaires (stamped and unstamped copies. The stamped copies of the Application are dated received October 13, 2005 and November 30, 2011);

ix. CPP Disability Self-Employment Questionnaire, date stamped received February 16, 2006;

x. CPP Medical Report dated August 10, 1995 of Dr. Mahar;

xi. CPP Medical Reports dated June 7, 2004, September 20, 2005, and December 21, 2011 of Dr. Sheira Haq;

xii. Medical file of Dr. Haq, including various referrals, consultation reports, pain clinic reports, and diagnostic reports, such as the reports from the Cape Breton Healthcare Complex;

xiii. Letter of support from Rodger Cuzner, M.P., dated May 17, 2012;

xiv. Employer Questionnaire (Magic Cuts), date stamped received January 31, 2013; and

xv. Miscellaneous handwritten notes.

[7] The Applicant further submits that he should not be penalized for attempting to support his family and attempting a return to work, which ultimately proved unsuccessful.

RESPONDENT'S SUBMISSIONS

[8] The Respondent has not filed any written submissions.

ANALYSIS

[9] Although a leave to appeal application is a first, and lower, hurdle to meet than the one that must be met on the hearing of the appeal on the merits, some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC).

[10] In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 4, the Federal Court of Appeal found that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success.

[11] Subsection 58(1) of the DESD Act sets out the grounds of appeal as being limited to the following:

> (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.

[12] The Applicant is required to satisfy me that the reasons for appeal fall within any of the grounds of appeal and that at least one of them has a reasonable chance of success, before I can grant leave.

[13] On the face of it, it appears that pertinent missing documentation from the file before the General Division could qualify as a breach of the principles of natural justice, but a review of the file suggests that the General Division had the materials which are listed above in paragraph 6. The Courts have consistently held that it is unnecessary for the trier of fact to identify or list all of the documentation. In *Oliveira v. Canada (Minister of Human Resources Development)*, 2003 FCA 213, the Federal Court of Appeal held that "the Board need not make express reference in its reasons to all the oral and documentary evidence presented". The Federal Court of Appeal went further in *Simpson v. Canada (Attorney General)*, 2012 FCA 82, in that not only was the tribunal not required to refer in its reasons to each and every piece of evidence before it, but also, "it is presumed to have considered all the evidence".

[14] In this instance, the General Division wrote that there were no medical reports from the date that the Applicant returned to work in 1997 following a motor vehicle accident to the date of his MQP on December 31, 2001. A review of the file contents provided by the Applicant suggests that the hearing file before the Member of the General Division does in fact contain some medical records and reports between 1997 and 2001. I cannot account for why the Member seemingly failed to overlook the existence of these reports. Nonetheless, none of these reports was prepared around the Applicant's MQP and none of these reports addresses his medical disability at around that time, with the closest reports preceding the MQP being dated 1998 and 1999.

[15] A letter dated April 14, 1998 from the Nova Scotia Rehabilitation Site indicates that the Applicant had returned to work on an approximately half-time basis and was anxious to return to full-time employment.

[16] The letter dated October 27, 1999 from Dr. Mahar indicates that he had last seen the Applicant in April 1998. Dr. Mahar's notes indicate that the Applicant had returned to work on a part-time basis in early 1997 and continued to work on an approximate half- time basis at the time of the last assessment.

[17] I note that in the letter dated February 4, 2013 from HRSDC, the writer advised the Applicant that there were no medical records from one of the family physicians from 2000 and another physician from 2001 to April 2003.

[18] I am of the view that the fact that there may be missing documentation from the General Division file alone is not a basis upon which to grant leave, as an Applicant ought to make submissions as to how that documentation might or could have supported a finding of a severe disability. In this case, the "missing documentation", primarily the 1998 and 1999 letters, could hardly be seen as accomplishing that.

[19] Furthermore, while the Member concluded that there was no medical evidence to support a finding that the Applicant had a severe disability at the time of his MQP, the Member also found that the Applicant was capable regularly of pursuing any substantially gainful occupation, in that he was able to work successfully for many years following his MQP. The Member also found that the Applicant consistently realized his greatest earnings of his working career after his MQP, in the years 2007 to 2009 (albeit these earnings were modest).

[20] Lastly, the Applicant submits that he should not be penalized for attempting to support his family and attempting a return to work, which ultimately proved unsuccessful.

[21] It is questionable as to whether there was a failed attempt to return to work. In *Monk v. Canada (Attorney General)*, 2010 FC 48, the Federal Court addressed the issue of a failed attempt to work. The applicant in that case worked in 2003 and 2004 and had earnings of $21,000 and $15,000 in those years. In the leave application, the Pension Appeals Board held that the income in 2003 and 2004 compared favourably to the income earned by her when she worked full-time from 1992 to 1999 and that fact, considered with the length of time worked by her in 2003 and 2004, left her "with no arguable case that the employment in 2003 and 2004 [could] be considered merely as a failed attempt to return to work". In dismissing the application for judicial review, the Federal Court felt it was inappropriate to attempt to draw a firm demarcation line as to what constitutes a failed attempt to work, as it would have to be dependent on the facts of particular cases. However,

the Federal Court held that “two years of earnings consistent with what had been earned before cannot be a failed attempt”.

[22] While it is admirable that the Applicant attempted to support his family, it is not a factor that can be taken into account in determining disability, nor can the impact of the decision of the General Division on the Applicant and his family, as there are highly technical requirements to be met to qualify for disability benefits. The General Division found that the Applicant had not met those requirements. The *Canada Pension Plan* does not permit the General Division to consider the impact its decisions may have on any of the parties, nor does it confer any discretion upon the General Division to consider other factors outside of the *Canada Pension Plan* in deciding whether an applicant is disabled as defined by that Act.

CONCLUSION

[23] The Applicant has not satisfied me that he has raised an arguable ground or that there is a reasonable chance of success on any of the grounds of appeal, and as such, the Application is refused.

Janet Lew
Member, Appeal Division