Citation: *D. L. v. Minister of Employment and Social Development*, 2015 SSTAD 50

Appeal No. AD-14-308

BETWEEN:

D. L.

Applicant

and

Minister of Employment and Social Development
(formerly known as 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: January 13, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated April 30, 2014. The General Division determined that a Canada Pension Plan disability pension was not payable to the Applicant, as it found that her disability was not "severe" by her minimum qualifying period of December 31, 2003, or had arisen within a possible prorated period between January 1, 2004 and July 31, 2004.

[2] The Applicant made extensive submissions. She submits that the General Division erred in assessing whether her disability is severe, primarily on the grounds that it misinterpreted and did not appreciate the evidence and hence, made erroneous findings of fact in a perverse or capricious manner or without regard for the material before it. To succeed on this application, the Applicant must show that the appeal has a reasonable chance of success.

ISSUES

[3] The issues before me are as follows:

1. What are the alleged errors made by the General Division?

2. Do these errors fall within any of the grounds of appeal under subsection 58(1) of the *Department of Employment and Social Development Act?*

3. If so, does the Applicant have a reasonable chance of success on any of the grounds of appeal?

APPLICANT'S SUBMISSIONS

[4] In the leave application filed on June 26, 2014, the Applicant submits that the General Division made an erroneous finding of fact, misconstrued the medical evidence and "gravely undervalued" the evidence regarding her illness and its persistence. The Applicant prepared a letter dated June 20, 2014, in which she made additional submissions and elaborated on those made in the leave application. The letter attached numerous annexes.

[5] The Applicant alleges that, despite being aware of her financial constraints and mental illness, the latter which impedes her memory and impairs her ability to effectively communicate, the General Division nonetheless rendered a decision based, "in part, on unreliable testimony from the teleconference hearing", without regard to some of the medical documentation. She did not point to any specific parts of the testimony which she claims were unreliable and upon which the General Division might have based its decision.

[6] The Applicant identified the following paragraphs in which she alleges the General Division made erroneous findings. She also identified the following facts which she alleges the General Division failed to appropriately consider, in assessing whether she could be found disabled. (The paragraph numbers refer to the paragraph numbers of the decision of the General Division.)

A. Paragraph 16 – she had been diagnosed with asthma in 1998, severe asthma in 2006 and COPD in 2006. Dr. Atkinson had severely underdiagnosed her respiratory issues.

B. Paragraph 21 – Axis I and Axis II with cluster B traits are known to be serious and incapacitating. A diagnosis of post-traumatic stress disorder had been confirmed in 2003. The Applicant also submits that the General Division's remarks in regards to Dr. Mark Johnston's opinions are "grossly understated".

C. Paragraph 22 – the psychologist Elaine Campbell supported Dr. Johnston's diagnosis. The Applicant submits that the General Division ought to have given greater consideration to the psychologist's comments that the Applicant has "very significant problems", had a "very difficult childhood", "has psychomotor agitation", "would not be able to gain employment", and that she "continues to meet criteria for a Major Depressive Disorder" as well as "for Generalized Anxiety Disorder".

D. Paragraph 25b - her psychological state and physical health have rendered her unemployable since 1998, as evidenced by her work history which shows that

any work from 1998 onwards was brief. She had quit either due to medical reasons or was dismissed by her employers.

E. Paragraph 28 – she has not physically attended any courses or schooling since 1983, and any courses she took were by correspondence, so she could work at her own pace. Her progress was slow as she found it extremely difficult to retain information.

F. Paragraph 31 – she saw Dr. Sapp in 2001, 2003 and 2005 for severe pain, which he ultimately diagnosed as thoracic outlet syndrome. She continues to undergo tests to determine the cause of her pain and to receive proper treatment. Significant weight loss and an improved diet have failed to provide any pain relief to date.

[7] The Applicant provided additional facts regarding her various medical issues and treatment history. She noted that by 1995, she was experiencing persistent respiratory problems, including numerous bouts of pneumonia which required hospitalization. By 1998, breathing became so difficult that she was unable to blow a candle five inches from her face, even with the use of medication.

[8] The Applicant also prepared "closing remarks" in which she addressed the issue as to whether she qualifies for a disability benefit under the *Canada Pension Plan.* She submits that the Appeal Division review the appeal and "deem that it meets all the necessary requirements for CPP disability benefits".

RESPONDENT'S SUBMISSIONS

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

ANALYSIS

[10] 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 required for leave to be granted: *Kerth*

v. Canada (Minister of Human Resources Development), [1999] FCJ No. 1252 (FC). 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 DESDA 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 the reasons has a reasonable chance of success, before leave can be granted.

[13] For the purposes of this leave application, I do not require that there be an actual demonstrated error on the part of the General Division, but in assessing any of the alleged erroneous findings of fact, the Applicant needs to satisfy me that the General Division indeed made such a finding of fact.

Applicant's "Fact A" – Paragraph 16

[14] Paragraph 16 of the decision of the General Division reads:

> [16] In March 2006, the Appellant saw Dr. Anthony Atkinson (page GT1-79), where he diagnosed her with factitious asthma and hyperventilation and stated that her problems were primarily "psychiatric/psychological rather than organic". Dr. Atkinson performed a Pulmonary Function test (page GTl-81), which indicated a very severe airflow obstruction, with marked improvement in flow rates following post bronchodilator. When compared to results taken in 1998, the test indicates

> there has been a significant reduction in flow rates. He then diagnosed the Appellant with moderately severe asthma (page GT1-82) and prescribed two puffs of Symbicort per day. In June 2006, Dr. Atkinson suspected that the Appellant was abusing Symbicort, by using at least eight puffs per day (page GT1-84).

[15] The Applicant does not specify the error the General Division is alleged to have made in relation to paragraph 16 of the decision. Properly, the Applicant ought to identify the alleged errors, rather than to leave me speculating as to what they might be.

[16] Did the General Division misstate the evidence at paragraph 16 and come to an erroneous finding of fact? In comparing the summary of evidence set out in paragraph 16 to the records or reports (for which the General Division provided page references), it appears that the General Division accurately summarized the evidence. Apart from that, the evidence set out in paragraph 16 does not form part of the analysis and does not appear to have been the basis upon which the General Division made its decision. Hence, it cannot be said therefore that there might be any erroneous findings of fact arising out of paragraph 16. That said, I will analyze the Applicant's factual references.

[17] The Applicant relies on a telephone record to establish when her asthma was diagnosed. The telephone record is based on the Applicant's own self-reporting, years after the alleged onset of asthma. There needs to be a more contemporaneous foundation to establish the severity of the disability. For instance, it likely would have been more helpful had the Applicant produced medical reports prepared in 1998 or thereabouts to establish the severity of her condition then. Apart from the issue as to whether I can place much weight on a telephone record to establish when a diagnosis was made, a diagnosis alone does not concurrently establish severity at the time of diagnosis, even if there are subsequent medical records or reports that show her asthma or respiratory issues to be more severe at a later date.

[18] The Applicant alleges that Dr. Atkinson severely underdiagnosed her diagnosis in 1998 and 2006. There is no independent corroborating evidence of this, but even if Dr. Atkinson had severely underdiagnosed the Applicant in 1998 and again in 2006, this does not qualify as an erroneous finding of fact under the DESDA, as the erroneous finding of fact has to have been one made by the General Division. The Applicant has not satisfied me

that there is a reasonable chance of success on the grounds that the General Division made any erroneous findings of fact in paragraph 16 of its decision.

Applicant's "Fact B" – Paragraph 21

[19] The Applicant submits that the General Division "grossly understated" Dr. Johnston's report of September 24, 2012, as it failed to include any reference to his opinion that "Axis I and Axis II with cluster B traits are known to be serious and incapacitating". She notes also that the General Division failed to consider that she had been diagnosed with post-traumatic stress disorder in 2003.

[20] In my review of Dr. Johnston's report, I do not see that he provided any opinion as to the impact of cluster B traits. It seems to me that the Applicant is now endeavouring to introduce opinion evidence that Axis I and Axis II with cluster B traits are known to be serious and incapacitating. This opinion about the effect of these traits was not squarely placed before the General Division and therefore generally would not be relevant for the purposes of a leave application, unless it addressed any of the grounds of appeal set out in subsection 58(1) of the DESDA.

[21] In any event, there is no indication in Dr. Johnston's consultation report that a diagnosis under Axis I and Axis II with cluster B traits would necessarily have such a significant impact on an individual. Indeed, Dr. Johnston indicated that he mentioned cluster B traits because the Applicant employed a lot of black-and-white thinking, though he was uncertain how pervasive these thoughts were.

[22] The Applicant also relies upon a telephone note which records that she had been diagnosed with post-traumatic stress disorder by her family physician in 2003, to establish that she had PTSD by 2003. She also referred to the notes of therapists whom she saw in 2006 and 2009. The therapists' notes did not form part of the evidence before the General Division. I will address the inclusion of the therapists' notes under the heading "Applicant's Additional Facts" below.

[23] I understand that the Applicant references these notes to support her claim that she was diagnosed with mental illness as early as 2003. As I indicated above, I am unprepared to

place much weight on a telephone record or on these therapists' records to establish when a diagnosis was made, as they does not represent the "best evidence" available. The telephone record and therapists' notes are based on the Applicant's own self-reporting, years after the alleged onset of PTSD. The telephone records also fall short in establishing whether the disability was severe. It likely would have been more helpful had the Applicant produced medical reports prepared in 2003 or 2004 to establish the severity of her condition then or to establish the onset of disability in 2004. While there are handwritten clinical records (presumably of Dr. Mark Pennell) in the General Division hearing file at pages GT1-87 to GT1-91, there are no accompanying opinions which might have established the severity of disability for the relevant timeframe.

[24] The fact that the General Division did not refer to the cluster B traits, may have "grossly understated" some of the medical evidence, and may not have referred to or relied upon other evidence does not mean that the General Division committed an erroneous finding of fact. The evidence set out under paragraph 21 of the decision and within "Fact B" of the Applicant's submissions does not form part of the analysis and does not appear to have been the basis upon which the General Division made its decision. The Applicant has not satisfied me that there is a reasonable chance of success on the grounds that the General Division made any erroneous findings of fact in paragraph 21 of its decision.

Applicant's "Fact C" – Paragraph 22

[25] The Applicant submits that the General Division failed to give greater consideration to the opinion dated May 1, 2013 of the psychologist Elaine Campbell and in particular, failed to include or refer to portions of her report including where she wrote that the Applicant has "very significant problems", had a "very difficult childhood", "has psychomotor agitation" and that she "would not be able to gain employment", and that she "continues to meet criteria for a Major Depressive Disorder ... as well as for Generalized Anxiety Disorder".

[26] The General Division in fact did note that Ms. Campbell had written that the Applicant "would not be able to gain employment", though it did not cite the other references. I do not see this as a failing however. While the General Division may not have

included all these references, it was not required to refer to all of the evidence before it in its decision: *Simpson v. Canada (Attorney General)*, 2012 FCA 82. The Applicant's counsel in the *Simpson* case had identified a number of medical reports which she said that the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the Applicant's application for judicial review, the Court of Appeal held that,

> First, a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence. Second, assigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact. . .

[27] The fact that the General Division may not have referred to all of the evidence before it in its decision does not qualify as an erroneous finding of fact. The Applicant has not satisfied me that there is a reasonable chance of success on the grounds that the General Division made any erroneous findings of fact in paragraph 22 of its decision.

Applicant's "Fact D" – Paragraph 25b

[28] The Applicant submits that the General Division wrongfully likened her employment from 1998 onwards with capacity to work. The Applicant states that any employment she held from 1998 onwards was only very brief and therefore ought not to have been conclusive of any capacity to work. She prepared a history from 1998 to 2009, showing that she was largely dismissed from her places of employment. Paragraph 25b in fact represents the submissions of the Respondent, rather than any findings of the General Division, and I therefore cannot consider paragraph 25b to be an erroneous finding on the part of the General Division. I will however consider these submissions in the context of paragraph 28 of the decision of the General Division, where it dealt with the Applicant's capacity.

Applicant's "Fact E" – Paragraph 28

[29] The Applicant submits that the General Division erred in finding that she had the capacity to attend school and work beyond her minimum qualifying period ("MQP") and therefore exhibited the capacity to work prior to her MQP. She explains that she has not physically attended school since 1983 and any schooling she has had since then has been by correspondence, which allowed her to work at her own pace. She advises that her progress even by correspondence was very slow because it was extremely difficult for her to retain information. She relies on three technical articles from medical journals regarding the impact of major depressive and social anxiety disorders on cognitive functioning. I will address the inclusion of the three articles under the heading "Applicant's Additional Facts" below. The Applicant also submits that any employment she held from 1998 onwards was only very brief, so should not be viewed as capacity to work.

[30] Paragraph 28 of the decision of the General Division reads:

> [28] The Appellant graduated from high school, and has diplomas in Digital Arts and Accounting, which she earned in 2004 and 2006. She has held administrative, retail, customer service, and management positions. She has demonstrated the capacity to attend school and work post MQP. Of (*sic)* her post MQP positions involved moving her entire family to Northern Manitoba for 4 months. The [General Division] accepts these factors as indications that the Appellant had the capacity to work prior to her MQP.

[31] The CPP Questionnaire (page GT1-116) asked whether the Applicant had attended college or university. She responded that she obtained diplomas, but did not provide further details of schooling. In her letter dated February 10, 2012 (page GT1-10), she confirmed that while she attended school, it was through distance learning. In submissions dated October 24, 2013 to the General Division (page GT2-3), the Applicant explained that she was not attending school, but rather, had taken a number of correspondence courses from home, as she had to occupy her mind with something after her father's murder/suicide.

[32] I assume that the General Division was aware from the Applicant's submissions that she did not physically attend school and instead, took correspondence courses. The General Division was aware of the Applicant's short-term work history. The General

Division alluded to this at paragraph 32, and also wrote, that "there is nothing to indicate that these short terms are as a result of the [Applicant's] medical condition".

[33] In my view, the General Division may well have considered the Applicant's schooling by correspondence to have reflected some work capacity, but it is somewhat ambiguous from the decision as to whether the General Division assumed that she physically attended school or otherwise. Ultimately, the question is whether the General Division considered her schooling and post-MQP work as determinative factors in its decision as to whether the Applicant could be found severely disabled for the purposes of the *Canada Pension Plan.*

[34] It is unclear to me whether the General Division made a typographical error at paragraph 28 of its decision, when it wrote that it accepted various factors (i.e. that she demonstrated the capacity to attend work post MQP) as indications that the Applicant had the capacity to work "prior to her MQP". It would seem that after reviewing the Applicant's post-MQP employment, it would be logical to assess her capacity post-MQP.

[35] While the General Division nevertheless considered the Applicant's schooling and work post-MQP to be factors indicating that she had the capacity to work prior to her MQP, the General Division clearly based its decision that the Applicant does not meet the test for a severe disability under the *Canada Pension Plan* on what it perceived to be the lack of medical evidence prior to the Applicant's MQP and the fact that she had not undergone any treatment to indicate whether her symptoms would improve. At paragraph 33 of its decision, the General Division concluded,

> In light of the lack of medical evidence prior to the Appellant's MQP, and that the Appellant has not undergone any treatment to indicate whether or not her symptoms would improve, the Tribunal determined that the Appellant's disability was not severe in that it made her incapable regularly of pursuing any substantially gainful occupation at the time of her MQP and continuously thereafter.

[36] In essence, the analysis undertaken by the General Division regarding her schooling and work post-MQP were not only unnecessary, as it determined that there was inadequate medical evidence around the time of her MQP to establish whether the Applicant's disability was severe, but was not determinative of its conclusions. Overall, the Applicant has not

satisfied me that there is a reasonable chance of success on the grounds that the General Division based its decision on an erroneous finding of fact in paragraph 28 of its decision.

Applicant's "Fact F" – Paragraph 31

[37] Paragraph 31 of the decision of the General Division reads:

> [31] The only medical evidence on file around the time of the MQP is Dr. Sapp's report from September 2003 which indicated the Appellant was suffering from thoracic outlet syndrome. Physiotherapy was recommended, but the Appellant did not follow through with this recommendation. While this pain may prevent the Appellant from doing any type of heavy physical work, it does not preclude her from all types of employment.

[38] It appears that the General Division accurately summarized Dr. Sapp's report. Dr. Sapp diagnosed the Applicant with thoracic outlet syndrome and also recommended one or two sessions of physiotherapy. The General Division was entitled to draw its own conclusions regarding the Applicant's pain levels and her resulting capacity from Dr. Sapp's report. In other words, there was a basis for its findings. Hence, it cannot be said that the General Division based its decision on an erroneous finding of fact without regard for the material before it.

[39] The Applicant notes that lifestyle changes have failed to provide any pain relief and that she continues to receive ongoing treatment and investigation in relation to her chronic pain. While that may be so, this however does not point to any errors on the part of the General Division. For the purposes of a leave application, I am restricted to considering only those grounds of appeal which fall within subsection 58(1) of the DESDA. The subsection does not permit me to undertake a reassessment of the evidence. As the Applicant has not identified any errors which the General Division may have made in paragraph 31, she has not satisfied me that there is a reasonable ground of appeal on this point.

Applicant's Additional Facts and Records

[40] The Applicant set out some additional facts which do not appear to have been before the General Division. Her leave application also attaches therapist notes and various articles from medical journals.

[41] The proposed additional facts, records and articles should relate to the grounds of appeal. The Applicant has not indicated how the proposed additional facts or records might fall into or address any of the enumerated grounds of appeal. If the Applicant is requesting that we consider these additional facts and records, re-weigh the evidence and re-assess the claim in her favour, I am unable to do so at this juncture, given the constraints of subsection 58(1) of the DESDA. Neither the leave application nor the appeal provides any opportunities to re-assess or re-hear the claim to determine whether the Applicant is disabled as defined by the *Canada Pension Plan.*

[42] If the Applicant has set out these additional facts in an effort to rescind or amend the decision of the General Division, she must now comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations*, and must also file an application for rescission or amendment with the same Division that made the decision. There are strict deadlines and requirements under section 66 of the DESDA that must be met to succeed in an application for rescinding or amending a decision. Subsection 66(2) of the DESDA requires an application to rescind or amend a decision to have been made within one year after the day on which a decision is communicated to a party, while paragraph 66(1)(b) of the DESDA requires an applicant to demonstrate that the new facts are material and could not have been discovered at the time of the hearing with the exercise of reasonable diligence. Under subsection 66(4) of the DESDA, the Appeal Division in this case has no jurisdiction to rescind or amend a decision based on new facts, as it is only the Division which made the decision which is empowered to do so.

[43] This is not a re-hearing of the merits of the claim. In short, there have been no grounds established upon which I can consider any additional facts or new records for the purposes of a leave application or appeal.

CONCLUSION

[44] The Applicant has not satisfied me that she 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