Citation: *I. A. v. Minister of Employment and Social Development*, 2015 SSTAD 60

Appeal No. AD-14-254

BETWEEN:

**I. A.**

Applicant

and

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

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division – Leave to Appeal Decision

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SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: January 14, 2015

## INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated March 18, 2014. The General Division determined that he was not eligible for disability benefits under the *Canada Pension Plan*, as it found that his disability was not "severe" at the time of his minimum qualifying period of December 31, 2011.

[2] The Applicant is of the position that the General Division erred in assessing whether his disability is severe, as he has been diagnosed with chronic low back pain and arthralgia in both knees and diabetes since 1995. To succeed on this application, the Applicant must show that the appeal has a reasonable chance of success.

## SUBMISSIONS

[3] In his leave application, the Applicant submits that he continues to suffer from a severe and prolonged disability rendering him regularly incapable of pursuing any substantially gainful occupation. He worked primarily in the construction industry and stopped working as of 2008, due to chronic low back pain and arthralgia in both knees and diabetes. The Applicant referred to his family physician's initial medical report dated June 7, 2012, which confirms that his condition is severe and prolonged and that he is totally disabled. The Applicant included consultation notes regarding the Applicant's diabetes.

[4] The Respondent has not filed any submissions.

## THE LAW

[5] 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, for leave to be granted, some arguable ground upon which the proposed appeal might succeed is required: *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.

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) states that 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;
>
> (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.

[7] The Applicant needs 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.

**ANALYSIS**

[8] There is no suggestion by the Applicant that the General Division failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction in coming to its decision. The Applicant has not identified any errors in law nor identified any erroneous findings of fact which the General Division may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision. The Applicant has not cited any of the enumerated grounds of appeal.

[9] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some reasons which fall into the enumerated grounds of appeal. The Application is deficient in this regard and the Applicant has not satisfied me that the appeal has a reasonable chance of success.

**Dr. Kerametlian's Report of June 7, 2012**

[10] The Applicant has referred me to the medical report of his family physician, which he submits confirms that his disability is severe and prolonged and that he is totally disabled. I note that Dr. Kerametlian's report was before the General Division.

[11] 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 which was before the General Division. As the Applicant has not identified any errors which the General Division may have made in relation to Dr. Kerametlian's report, he has not satisfied me that there is a reasonable ground of appeal on this point.

[12] In *Simpson v. Canada (Attorney General),* 2012 FCA 82, the Applicant's counsel in that case 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. . ."

[13] The General Division was acting within its jurisdiction as the trier of fact in sifting through the relevant facts, assessing the quality of the evidence, determining what evidence, if any, it chose to accept or disregard, and in deciding on its weight, before ultimately coming to a decision based on its interpretation and analysis of the evidence before it. Hence, I can find no arguable case which might have a reasonable chance of success, arising out of the fact that the General Division chose to place more or less weight on some of the evidence than the Applicant submits was appropriate.

**New Facts**

[14] The Applicant has provided various consultation notes regarding his diabetes. It appears that these notes were also before the General Division, in which case I would not be able to consider them, unless they relate to any of the grounds of appeal set out under subsection 58(1) of the DESDA. The Applicant has not identified any grounds relating to these consultation notes. If the Applicant is requesting that we consider these additional notes, re-weigh the evidence and re-assess the claim in his 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-hear the merits of the matter.

[15] In the event that the Applicant intends to file any "new" facts or records, he should note they ought to fall into or relate to one of the enumerated grounds of appeal set out under subsection 58(1) of the DESDA.

[16] If the Applicant intends to file any additional medical records in an effort to rescind or amend the decision of the General Division, he must 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 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 fact is material and that it 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.

## CONCLUSION

[17] The Application is refused.

*Janet Lew*
Member, Appeal Division