Citation: *G. H. v. Minister of Employment and Social Development*, 2015 SSTAD 239

Appeal No. AD-14-302

BETWEEN:

G. H.

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: February 23, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated March 17, 2014. The General Division determined that she was not eligible for disability benefits under the *Canada Pension Plan*, as it found that she did not have a severe disability at the time of her minimum qualifying period of December 31, 2012. The Applicant seeks leave on the grounds that 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. To succeed on this application, the Applicant must show that the appeal has a reasonable chance of success.

SUBMISSIONS

[2] In her leave application, the Applicant submits that the General Division misinterpreted and misapplied the evidence, which resulted in erroneous findings of fact upon which the decision was based. In particular, she submits that the General Division erred as follows:

a) In finding that it was unreasonable for her to follow homeopathic treatment rather than traditional modalities. The Applicant submits that the General Division failed to recognize that she continues to rely on traditional modalities of treatment, and that it wrongly placed undue weight on her testimony relating to homeopathic treatment. The Applicant referred to numerous medical records, documenting her reliance on traditional forms of treatment. For instance, she notes that she participated in a Fibromyalgia Day Program at the local hospital's Rheumatology Clinic; she has undergone various surgeries; and she takes a number of different prescriptive and over-the-counter medications. She submits that the General Division instead should have found that traditional modalities of treatment have not worked for her, and hence, she has had to turn to non- traditional forms of treatment to supplement existing treatment; and

b) In finding that she has the requisite capacity to regularly pursue any substantially gainful occupation, in light of the fact that she does volunteer work. The Applicant submits that there was no evidentiary basis for the General Division to come to this finding, given that there is flexibility and accommodation in her volunteer pursuits. For instance, she is able to pace herself, does not face time constraints and is not subjected to any stress or deadlines.

[3] The Applicant filed a number of medical records in support of her leave application, some of which were incomplete. The records consist of the following:

(a) Consultation note dated December 18, 2000 to Dr. Moser;

(b) Consultation report dated March 7, 2007 from Dr. Harth to Dr. Wojcik;

(c) Summary of chronic pain/psychosocial assessment of Fibromyalgia Day Program, dated June 5, 2008, prepare d by Dr. Marilyn Hill, psychologist;

(d) Request for fibromyalgia consultation dated November 17, 2010, by Dr. Nancy Moser, GP;

(e) Consultation report dated December 20, 2010 from Dr. Wojcik, endocrinologist, to Dr. Moser; and

(f) Discharge summary dated July 31, 2011 from University Hospital.

[4] On October 23, 2014, the Applicant filed an article on fibromyalgia with the Social Security Tribunal.

[5] The Respondent has not filed any submissions.

THE LAW

[6] 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.

[7] 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.

[8] 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

Alleged Erroneous Findings of Fact

a) Treatment Modalities

[9] The Applicant submits that the General Division erred in finding that it was unreasonable for her to follow homeopathic treatment rather than traditional modalities, and in failing to recognize that she continues to rely on traditional modalities of treatment. The Applicant referred to numerous medical records, documenting her reliance on traditional forms of treatment. She submits that the General Division should have concluded that she has not found any relief of her symptomology from more traditional

forms of treatment, and hence, has had to turn to non-traditional forms of treatment to augment existing treatment.

[10] The Applicant's testimony before the General Division is set out at paragraph 19 of its decision. The Applicant testified that she believes in herbal remedies and consults with a homeopath practitioner. In her submissions before the General Division, she noted that while she saw a psychiatrist, she preferred natural herbs over prescription medication.

[11] The General Division was guided by *Kerr v. MHRD* (January 3, 2002), CP 16349 (PAB). In that decision, the Pension Appeals Board held that an applicant must show by a preponderance of evidence that he or she has made reasonable efforts to follow medical advice and do those things that could reasonably result in a degree of rehabilitation to permit a return to regular work. The Pension Appeals Board wrote that it was clear from the evidence that Ms. Kerr had allowed herself to become seriously deconditioned by ignoring or lacking the motivation to follow the treatment suggested by medical specialists who deal with fibromyalgia patients and consequently, it was not persuaded that she had a reasonable excuse. It concluded that:

> The weight of the evidence leads the Board to conclude Ms. Kerr has not made reasonable efforts to undertake and commit to programs and treatments recommended by rheumatologists when such programs offer her the only reasonable prospect of regaining the capacity to rejoin the workforce.

[12] The Applicant submits that the General Division erred in finding that she had abandoned traditional forms of medical treatment. She relies on various medical records to confirm that she relies on traditional modalities. There is little merit to these submissions, as the General Division was aware of and accepted that she had pursued these more traditional forms of treatment, for some of the Applicant's medical conditions. For instance, the General Division accepted that the Applicant participated in the Fibromyalgia Day Program and that she has had bilateral hip replacement surgery.

[13] It appears that the General Division found that the Applicant relatively recently turned to homeopathic medicine and rejected the treatment suggested by medical specialists, in the context of her depression, anxiety and fibromyalgia. While the

Applicant suggests that the General Division misinterpreted her testimony, the General Division did not rely upon it solely. It also referred to the documentary evidence before it, in concluding that the Applicant had turned to homeopathic medicine. For instance, the General Division cited a report dated November 9, 2012 from the London Health Sciences Center, where the Applicant was seen in regards to her right hip. The report indicated that the Applicant would be following up with her Homeopath for her depression, and while she had attended classes at St. Joseph's for her fibromyalgia, she was not being followed by any specialists at that time.

[14] While it did not form part of the reasons of the General Division, I note also that the letter dated June 8, 2012 from her representative indicates that the Applicant saw a psychiatrist for her depression and anxiety, but chose natural herbs rather than prescription medicine. The Final Report, dated July 18, 2011, of Dr. Bhandari of the Pre- Admission Clinic, indicates that the Applicant was taking herbal medications for pain control and that she was not on any narcotics or non-steroidal anti-inflammatory agents. Dr. Bhandari also noted that the Applicant has had fibromyalgia since 1996, and again, was treating herself with herbal medications. Certainly, there was a documentary basis for the General Division to have found that the Applicant was relying on homeopathic options to treat her depression and anxiety and fibromyalgia, so it cannot be said that its decision was based on an erroneous finding of fact without regard for the evidence before it.

[15] It seems that the Applicant is, to some extent, disputing the correctness of the law applied by the General Division, that it was unreasonable for her to have turned to homeopathic options instead of relying on more traditional forms of treatment. The Applicant has not referred me to any legal authorities to support such a proposition, whereas the General Division pointed to a decision of the Pension Appeals Board, which it found to be of some persuasive value. I note also *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211, in which the Federal Court of Appeal stated that:

> The "real world" context also means that the Board must consider whether Ms. Lalonde's refusal to undergo physiotherapy treatment is unreasonable and what

impact that refusal might have on Ms. Lalonde's disability status should the refusal be considered unreasonable.

[16] I am unable to readily identify any errors in law.

[17] The Applicant has not satisfied me that there is a reasonable chance of success on the ground that the General Division based its decision on an erroneous finding of fact that she had unreasonably abandoned traditional medical treatment for non-traditional options.

b) <u>Volunteer Work</u>

[18] The evidence before the General Division was that the Applicant volunteers an average of three mornings a week. She participates in "witnessing", which consists of going door-to-door to teach the Bible and prophecies. She testified that she would rest in the afternoon after her morning of volunteering. The General Division noted the Applicant's submissions regarding her volunteer work. The Applicant submitted to the General Division that the "flexibility in her volunteer work does not transfer to a workplace".

[19] From this, the Applicant submits that the General Division found that she has the requisite capacity to regularly pursue any substantially gainful occupation. She submits that there is no evidentiary foundation to come to this conclusion.

[20] At paragraph 36 of its decision, the General Division wrote:

> [36] The Appellant has not attempted to retrain or upgrade her skills in order to obtain substantially gainful work. The Appellant has the energy and the motivation to perform volunteer work on a regular weekly basis. The participation of the Appellant in volunteer work should not necessarily be held against her. The problem for the Appellant is the lack of evidence that she considered using this energy and motivation to attempt employment or retraining.

[21] The General Division did not find a direct correlation between the Applicant's volunteer pursuits and the capacity to regularly pursue any substantially gainful occupation. Rather, it found that as she had some work capacity, as evidenced by her

energy and motivation, it required her to show some effort at obtaining and maintaining employment, and to show that these efforts had been unsuccessful because of her health condition. The General Division referred to *Inclima v. Canada (Attorney General)*, 2003 FCA 117 and found that the Applicant had not made any efforts at obtaining and maintaining employment, when it wrote that the "problem for the [Applicant] is the lack of evidence that she considered using this energy and motivation to attempt employment or retraining".

[22] The Applicant has not satisfied me that there is a reasonable chance of success on this ground.

Medical Records

[23] The Applicant has referred me to various medical records and more recently, an article on fibromyalgia. Some of the medical records – the discharge summary dated July 31, 2011 and Dr. Harth's consultation report dated March 7, 2007 -- were before the General Division and I am therefore unable 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 of appeal relating to either the discharge summary or the consultation report of Dr. Harth.

[24] 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 the discharge summary and Dr. Harth's consultation report of March 7, 2007, she has not satisfied me that there is a reasonable ground of appeal on this point.

[25] As for any medical records which were filed subsequent to the hearing before the General Division, if the Applicant is requesting that we consider these additional notes, 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-hear the merits of the matter. In the event that the Applicant intends to file any "new" facts or records, she 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.

[26] If the Applicant intends to file any additional medical records in an effort to rescind or amend the decision of the General Division, she 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 applicant 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.

Weight of Evidence

[27] Finally, the Applicant raises another issue, that the General Division placed undue weight on her evidence. 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 Federal 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…"

[28] 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.

CONCLUSION

[29] The Application is refused.

Janet Lew
Member, Appeal Division