Citation: *K. M. v. Minister of Employment and Social Development*, 2015 SSTAD 437

Appeal No. AD-15-97

BETWEEN:

K. 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: Hazelyn Ross

DATE OF DECISION: March 27, 2015

DECISION

[1] The Social Security Tribunal (the "Tribunal"), grants leave to appeal.

BACKGROUND

[2] On December 1, 2014, the General Division of the Tribunal issued a decision in the Applicant's appeal of a decision to refuse him a *Canada Pension Plan* ("CPP"), disability pension. The General Division Member found that the Applicant did not have a severe and prolonged disability prior to his minimum qualifying period date ("MQP"), of December 31, 2014. Therefore, he did not qualify for a CPP disability pension. The Applicant seeks leave to appeal that decision ("the Application").

GROUNDS OF THE APPLICATION

[3] Counsel for the Applicant makes the Application on the basis of the following two grounds, namely, that the General Division,

a. Made an error of law (ss. 58(2));

b. Based its decision on an erroneous finding of fact that it made in a perverse or capricious manner (ss. 58(3));

[4] Counsel for the Applicant also submits that the appeal has a reasonable chance of success.

ISSUE

[5] The Tribunal must decide whether the Applicant has raised an arguable case.

THE LAW

[6] The statutory provisions that apply to the grant of leave are found at s. 55, s. 56, s. 57 and s. 58 of the *Department of Employment and Social Development* ("DESD") *Act.* S. 55 gives a right of appeal to the Appeal Division from decisions of the General Division of the Tribunal; while s. 56 governs the grant of leave to appeal. Time limits for bringing an

application for leave to appeal are addressed in s. 57; and s. 58 sets out the grounds on which an appeal may be made.

[7] With respects to the grounds of appeal, ss. 58(1) of the DESD Act states that the only grounds of appeal are:

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.

ANALYSIS

[8] In order for leave to appeal to be granted, the Applicant must demonstrate that there are grounds for appeal on at least one of the three enumerated grounds set out above. Also, pursuant to the DESD Act s. 58(2), the Applicant must satisfy the Tribunal that his appeal has a reasonable chance of success.[1]

Did the Tribunal commit an error of law?

[9] Counsel for the Applicant submits that the General Division Member misstated the test with respect to treatment efforts, thereby committing an error of law. Counsel submits that at paragraph 39 of the decision, the General Division Member took the position that the Applicant had not exhausted all treatment options and, therefore, was not eligible for disability payments. In Counsel's submission the appropriate test requires only that an applicant for disability payments seek out treatment and make efforts to cope with pain. The General Division Member was requiring a test that was different to that actually required when she stated that the Applicant had not exhausted all treatment options.

[1] *Department of Employment and Social Development Act; Alves v. Canada (Attorney General),* 2014 FC 110.

[10] The case law is clear that claimants for a disability pension have a personal responsibility to cooperate in their health care.[2] Counsel's arguments raise the question of the degree of participation required of claimants. In the Tribunal's view this raises an arguable case, sufficient to allow the application for leave.

Did the Tribunal base its decision on an erroneous finding of fact that it made in a perverse or capricious manner?

[11] Counsel for the Applicant also submits that, in the decision, the General Division Member made three erroneous findings of fact. The first mistake alleged is that the General Division Member erred when she stated that the Applicant remained seated throughout the 60 minute hearing, thereby belying the statements of the nurse practitioner that he could sit or stand for only 15-20 minutes at a time. The General Division Member used this observation to arrive, in part, at the conclusion that the evidence did not show that the Applicant's back pain would limit him from all types of work and that he had retained work capacity.

[12] Counsel for the Applicant submits that this was an erroneous finding of fact because of the circumstances that applied during the hearing. She states that due to a malfunction in the videoconference equipment the General Division Member was prevented from having a clear view of the Applicant at all times. The Tribunal finds that, if true, this raises questions as to whether the General Division Member placed undue reliance on the Applicant's demeanour during the hearing. In the Tribunal's view such undue reliance would be sufficient to ground the appeal.

[13] Counsel for the Applicant also contends that when considering the Applicant's conditions, cumulatively, the General Division Member failed to consider the Applicant's complex cardiac condition. Counsel for the Applicant contends that while the Applicant's COPD, back pain and anxiety were considered, the Applicant also suffers from a complex cardiac condition that the General Division Member failed to consider. On reading the decision, it is clear that while the General Division Member did include his heart conditions under the medical evidence part of the decision, that condition was not specifically addressed in

[2] *Kambo v. MHRD*, 2005 FCA 353.

the Analysis. Notwithstanding any omission relating to the Applicant's heart condition, the Tribunal is not persuaded that in the overall context of the decision that the omission is fatal.

[14] The third error of fact the General Division Member is alleged to have committed is to misstate the nature of the treatment the Applicant was receiving for his chronic back pain. Counsel for the Applicant contends that the General Division Member failed to mention a letter from a Dr. Bowman. In this letter Dr. Bowman refers the Applicant for a cortisone shot to treat the pain in his lumbar region. Further, she contends the reports of several specialists were not referenced in the decision. While acknowledging that the General Division Member did not have to reference each and every medical document in the decision, Counsel for the Applicant submits that these particular omissions led the General Division Member to misapprehend the facts regarding the treatment that the Applicant had undertaken.

[15] The Tribunal is satisfied that an arguable case is raised with respect to the omission of Dr. Bowman's letter and the other medical documents that Counsel for the Applicant references.

[16] Taking the errors of fact together with the alleged error of law, the Tribunal finds that it is appropriate to grant the Application.

CONCLUSION

[17] The Application for Leave to Appeal is granted.

Hazelyn Ross
Member, Appeal Division