Citation: *S. A. v. Minister of Employment and Social Development*, 2015 SSTAD 557

Appeal No. AD-14-299

BETWEEN:

S. A.

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 : May 5, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated March 31, 2014. The General Division determined that she was not eligible for disability benefits under the *Canada Pension Plan,* as it found that her disability was not "severe" at her minimum qualifying period (MQP) of December 31, 2009.

[2] Counsel for the Applicant seeks leave on the grounds that the General Division committed various errors of law and also based its decision on erroneous findings of fact 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

[3] The Applicant seeks leave on the following grounds, that the General Division:

1. Erred in law by effectively requiring her to prove that her disability was severe beyond reasonable doubt, rather than on a balance of probabilities;

2. Based its decision that she has the capacity to work on an erroneous finding of fact, without regard for the material before it. Specifically,

    a) the General Division accepted that the medical evidence supported consistent and ongoing disability with severe functional limitations from June 2009;

    b) there was no medical evidence presented to the effect that the Applicant had any residual work capacity; and

    c) the General Division accepted the Applicant's evidence of severely limited functional capacities and did not indicate that it did not accept any portion of her evidence.

3. Erred in failing to consider the medical evidence with respect to her pre- and post-MQP work capacity;

4. Erred in failing to consider the post-MQP medical evidence and opinion after it found the complaints following her motor vehicle accident in 2009 to be consistent, which she submits reasonably leads to the inference that her post-MQP work capacity and functional abilities are representative of her pre-MQP capacity and abilities.

5. Erred in law in requiring the Applicant show that she had undertaken efforts to obtain and maintain employment, as its finding that she had residual work capacity was in error.

[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

(a) Did the General Division Err in Law in Applying the Wrong Standard of Proof?

[8] Counsel for the Applicant submits that the applicable standard of proof is the civil standard on a balance of probabilities, rather than the stricter standard of proof beyond a reasonable doubt.

[9] Did the General Division apply the stricter standard? At paragraph 22 in its Analysis, the General Division indicated that the Applicant was required to prove that she had a severe and prolonged disability on a balance of probabilities.

[10] Counsel for the Applicant submits however that at paragraph 28 of its decision, the General Division "misdirected itself in addressing whether [the Applicant] has removed all doubt with respect to the severity of her symptoms" (my emphasis). The General Division wrote the following at paragraph 28:

> While the Tribunal noted the significant health concerns currently facing the appellant, it was also noted that the medical evidence on file leaves some doubt as to the severity of her symptoms as to the MQP.

[11] Notwithstanding the fact that the General Division stated that the standard of proof was one on a balance of probabilities, there is an arguable case that ultimately the General Division may have applied a stricter standard of proof when it suggested that there could be no doubt as to the severity of her symptoms. The Applicant has satisfied me that the General Division may have erred in law in effectively requiring the Applicant to prove the severity of her disability beyond doubt, when it indicated that it was left with "some doubt" as to the severity of her symptoms.

(b) **Did the General Division Base its Decision on an Erroneous Finding of Fact without Regard for the Material Before it?**

[12] I will address the submissions in subparagraphs [3] (b) i. to iii. together, given the overlapping issues. Counsel for the Applicant submits that the General Division accepted that the medical evidence supported consistent and ongoing disability with severe functional limitations from June 2009. Counsel submits that the General Division accepted the Applicant's evidence of severely limited functional capacities and did not indicate that it did not accept any portion of her evidence. Counsel further submits that there was no medical evidence presented to the effect that the Applicant had any residual work capacity. Given these considerations, counsel submits that the General Division erred in concluding that the Applicant exhibited any work capacity.

[13] In reviewing the decision of the General Division, at most, it stated that it agreed with the Applicant that the medical reports on file suggest a consistency in her complaints from the time of the motor vehicle accident (at paragraph 25). The General Division however did not go so far as to state that it accepted that the medical evidence supports a consistent and ongoing disability with severe functional limitations from June 2009. That would represent a mischaracterization of the decision.

[14] Counsel notes that the General Division did not indicate that it did not accept any portion of the Applicant's evidence. However, one cannot infer that by not specifically ruling out which portions it may not have accepted, that it thereby accepted that evidence. This is particularly so when the General Division discussed and analyzed some of the evidence.

[15] To suggest that there was no medical evidence that the Applicant had any residual work capacity would require a reassessment of the evidence, which is beyond the scope of a leave application. That said, without analyzing the evidence itself, the General Division did refer to some of the medical evidence from which it concluded that there was evidence of work capacity. At the same time, the General Division also indicated that there were no medical reports on file prior to the minimum qualifying period from either a psychiatrist or psychologist, nor any evidence of hospitalization. In other words, the absence of certain evidence can also be of some

persuasive value, if that evidence might have been of some probative value in addressing the issues before the General Division.

[16] Finally, it seems that submitting that there was no medical evidence of residual work capacity suggests that the onus to prove severity somehow shifts away from the Applicant. The onus of proof lies with an applicant throughout. It is the applicant who must prove on a balance of probabilities that he or she is incapable regularly of pursuing any substantially gainful occupation and that his or her disability is prolonged.

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

(c) **Did the General Division Err in Failing to Consider the Medical Evidence with respect to the Applicant's pre - and post-MQP work capacity?**

[18] I do not require that there be an actual error of law or erroneous finding on the part of the General Division, but in assessing this ground of appeal, the Applicant needs to satisfy me that, in this particular case, the General Division in fact failed to consider the medical evidence with respect to the Applicant's post-MQP work capacity, before I even determine whether the alleged error falls into any of the enumerated grounds of appeal under subsection 58(1) of the DESDA.

[19] Counsel for the Applicant submits that the General Division erred in "failing to consider medical evidence with respect to the Applicant's work capacity that was after the MQP, but so close in time that it would have fairly represented the Applicant's condition at her MQP and in failing to consider medical evidence prior to the MQP that supported this inference".

[20] In particular, counsel for the Applicant points to paragraph 25 of the decision of the General Division, as clearly showing that the Applicant experienced an onset of symptoms in June 2009 that continued unabated up to December 2009. The General Division wrote at paragraph 25, that:

> The Tribunal agrees with the Appellant that the medical reports on file suggest a consistency in her complaints from the time of the motor vehicle accident.

[21] Counsel for the Applicant then notes that the Applicant subsequently saw Dr. Lori J. Albert, rheumatologist, on February 11, 2010, approximately six weeks after the MQP. Counsel notes that Dr. Albert described the same symptoms and associated functional limitations, as her physiatrist and neurophysiologist, Dr. Sharma, had on October 19, 2010. Counsel submits that the General Division failed to consider Dr. Albert's medical report in this regard. I do not draw that same conclusion from the decision of the General Division. After all, the General Division wrote that it agreed with the Applicant that the medical reports suggest a "consistency in her complaints from the time of the motor vehicle accident" and then specifically referred to Dr. Albert's report dated February 12, 2010. While the General Division clearly did not list all of the Applicant's reported symptoms or functional limitations described in the medical report, the General Division was certainly alive to the overall medical history set out by Dr. Albert.

[22] Was the General Division required to list all of the reported symptoms and functional limitations in Dr. Albert's medical report of February 12, 2010, to demonstrate that it had indeed fully considered her medical report? The Federal Court of Appeal has held that there is no obligation for a decision-maker to exhaustively list all of the evidence considered by it, as there is a general presumption that it considered all the evidence. In *Simpson v. Canada (Attorney General),* 2012 FCA 82, the Federal Court of Appeal held that, "… 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". Counsel has not pointed me to anything within the decision of the General Division that would cause me to question whether the presumption ought to be rebutted or displaced. Thus, the General Division was not required to make any specific references to any particular symptoms or functional limitations which the Applicant may have reported during the consultation with a physician, even if that visit occurred merely weeks after the MQP. The Applicant has not satisfied me that there is a reasonable chance of success under this ground.

(d) <u>Did the General Division Err in Failing to Consider the Post-MQP Medical Evidence and Opinion?</u>

[23] Counsel for the Applicant submits that the General Division erred in "failing to consider medical evidence and opinion after the MQP after it found that there was a consistency in the [Applicant's] complaints from the time of the motor vehicle accident in June 2009, which would

reasonably lead to the inference that the [Applicant's] post MQP work capacity and functional abilities are representative of her pre MQP capacity and abilities".

[24] The General Division in this case referred to the medical opinion dated February 12, 2010 of Dr. Albert and to the report dated June 8, 2011 of the Applicant's family physician Dr. P. Hose, at paragraph 25 of its decision. However, a review of the hearing file indicates that the following post-MQP medical reports and records were before the General Division:

1. Clinical records from Om Sai Physiotherapy Clinic Inc. for the period from July 14, 2009 to November 2011 (the cover page suggests that the physiotherapy clinic provided records commencing from March 24, 2011, but the records predate this) (pages GT1-56 to GT1-122 of the hearing file);

2. Patient History Report for the dates from June 30, 2009 to November 16, 2011, from Keele & Rogers Pharmacy (page GT1-129);

3. Consultation report dated February 4, 2010 of Dr. Robert D. Wagman, ophthalmologist (page GT1-134);

4. CT scan of the head performed on October 5, 2010 (page GT1-148);

5. Consultation report dated August 4, 2011 of Dr. Jan Carstoniu, anaesthesiologist (pages GT1-123 to GT1-128);

6. Medical opinion dated April 22, 2012 of Dr. Carstoniu (pages GT1-175 and GT1-176);

[25] The General Division acknowledged that there were additional medical reports on file related to the Applicant's medical condition <u>after</u> the MQP. The General Division did not undertake any analysis of these post-MQP reports. While I have already stated above that the General Division was not obligated to list all of the evidence which it considered in arriving at its decision, on the other hand, it appears that the General Division dismissed any consideration of these records and reports altogether, as they were prepared after the minimum qualifying period.

[26] Had the General Division found the Applicant to be severely disabled, the post- MQP records would have been material to any analysis as to whether her disability could be considered prolonged. As it is, the General Division did not find the post-MQP records germane, likely as it did not consider them to have addressed the issue as to whether the Applicant's disability could be considered severe at her minimum qualifying period.

[27] A consideration of the post-MQP records may not have necessarily altered the outcome of the decision of the General Division, but there may be issues which might have arisen and been addressed by some of the treating physicians, which were not in the pre-MQP or early 2010 records, and which could have had some impact on the decision. While the post-MQP records may not have satisfied the General Division of the severity of the Applicant's disability, that is entirely speculative.

[28] Counsel for the Applicant submits that had the General Division considered the post-MQP reports, it would have reasonably inferred that the Applicant's post-MQP work capacity and functional abilities represented her pre-MQP capacity and abilities.

[29] Counsel has not identified the specific post-MQP records which she says could have led to this inference. Presumably counsel is relying particularly on the medical reports of Dr. Carstoniu, as the Patient History Report, consultation report of the ophthalmologist, CT scan of the head and physiotherapy records do not speak to the issue of work capacity or functional limitations or, for that matter, the severity of the Applicant's disability. Most of the physiotherapy records are handwritten and largely illegible, and notable for their brevity. The physiotherapist has not offered any opinion regarding the Applicant's capacity and functional abilities.

[30] In the case of Dr. Carstoniu, it would have been one thing had he seen the Applicant in the period leading up to or shortly after the MQP, as he might have been in a position then to provide an opinion on the Applicant's work capacity and functionality for the MQP. Dr. Carstoniu however apparently did not begin to see the Applicant until August 2011, approximately two years after the minimum qualifying period. If Dr. Carstoniu set out the Applicant's complaints regarding her capacity and limitations pre- and post-MQP, I do not see why the General Division necessarily would be expected to rely on the history provided to

Dr. Carstoniu, as the Applicant could have (and presumably) provided that same history directly to the General Division, and the General Division then could have formed its own conclusions from that evidence.

[31] The other difficulty that I have with this submission involving the post-MQP records is that if counsel suggests that the complaints have been consistent over time, and that one should infer a severe disability from the post-MQP symptoms and functionality, logically one should have been able to make the same inference from the same symptoms and functionality pre-MQP, without having to consider the post-MQP circumstances. The General Division considered the pre-MQP evidence and was not persuaded that the evidence showed the Applicant to be severely disabled. If I were to now suggest that one could consider the post-MQP evidence to reflect the Applicant's pre-MQP disability, despite a finding that the pre-MQP evidence was insufficient, this potentially could amount to allowing one to get in through the back door what one was unable to get in through the front door, particularly if those submissions had not been advanced at the hearing before the General Division.

[32] Despite some of my misgivings about these submissions, if the General Division had indeed accepted that the Applicant's symptomology remained largely unchanged from the time of her accident to the date of hearing, I am of the view that there is an arguable case to be made that the General Division should have considered the post-MQP records and the expert opinions in its overall analysis as to whether the Applicant's disability could be considered severe for the purposes of the *Canada Pension Plan.*

(e) Did the General Division Err in Law in Requiring the Applicant to Show that She Undertook Efforts to Obtain and Maintain Employment?

[33] In *Inclima v. Canada (Attorney General),* 2003 FCA 117, the Federal Court of Appeal stated:

> Consequently, an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.

[34] While the General Division referred to *Inclima* in its decision, the Applicant submits that the General Division erred in law in requiring that she undertake efforts to obtain and maintain employment, as it had erred in finding that the Applicant had residual work capacity.

[35] Had the General Division found that the Applicant did not have any residual work capacity, it would have committed an error in law in requiring that she undertake efforts to obtain and maintain employment, but here, the General Division found that the Applicant had some work capacity. Had this ground been the sole basis upon which leave was sought, I would have dismissed the leave Application.

[36] As I have found there to be a reasonable chance of success on the leave Application, in part on the grounds that the General Division based its decision on an erroneous finding of fact regarding the Applicant's work capacity, without regard for the material before it, ultimately, if it should be found that the Applicant does not have any work capacity, then it would be an error of law to require that the Applicant show that she undertook efforts to obtain and maintain employment.

APPEAL

[37] Issues which the parties may wish to address on appeal include the following:

a) What is the level of deference which is owed by the Appeal Division to the General Division?

b) Did the General Division commit errors of law?

c) If the General Division committed any errors of law, what is the applicable standard of review? If a correctness standard applies, what outcome should the General Division have reached? If a reasonableness standard applies, can the overall decision of the General Division be justified, is it transparent and intelligible and does it fall within a range of possible, acceptable outcomes which are defensible in respect of the law and the facts before it?

d) Is the appeal moot, in light of the fact that there were other bases upon which the General Division concluded that the Applicant's disability could not be found severe?

e) What is the appropriate remedy, if any?

[38] I invite the parties to make submissions also in respect of the mode of hearing (i.e. whether it should be done by teleconference, videoconference, other means of telecommunication, in-person or by written questions and answers) and any applicable time estimates for hearing.

CONCLUSION

[39] The Application is granted.

[40] This decision granting leave in no way presumes the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division