Citation: *H. D. v. Minister of Employment and Social Development*, 2015 SSTAD 558

Appeal No: AD-14-314

BETWEEN:

H. D.

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 April 24, 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, 2013. To succeed on this leave application, the Applicant must show that the appeal has a reasonable chance of success.

SUBMISSIONS

[2] Counsel for the Applicant seeks leave on behalf of the Applicant, on the following grounds, that the General Division based its decision on various erroneous findings of fact, made without regard for the material before it, and that it also made various errors of law. In particular, counsel submits that the General Division made the following:

Erroneous Findings of Fact

(a) Erred by ignoring important evidence, substituting its own opinions in the place of the experts, and in misapprehending the facts before it. Counsel cites the following:

i. At paragraph 71, the General Division referred to the Applicant's educational training and qualifications. Counsel notes that the Applicant largely did not work in her fields of training;

ii. At paragraph 71, the General Division found that the Applicant had not tried to find any suitable work, whether full- or part-time. Counsel notes that the Applicant's last employment is still available to her, but she is unable to return to it, owing to medical problems; and

iii. At paragraph 67, the General Division found that "when considering the totality of the evidence … [it did not uphold] a determination [that her medical conditions] were severe at the time of her MQP". Counsel

submits that the General Division failed to appreciate the Applicant's testimony and the totality of the experts' opinions;

(b) Erred by failing to consider the Applicant's evidence;

(c) Erred by failing to consider the expert evidence and in particular, the records of Guelph General Hospital; reports of Drs. Kevork and Giles; and cytology and sleep study reports. Counsel submits that the General Division also erred in failing to give the appropriate weight to the report of Dr. Giles.

<u>Errors of Law</u>

(d) Erred in law in failing to apply the "real world" analysis required by *Villani v. Canada (Attorney General),* 2001 FCA 248. In particular, counsel submits that the General Division failed to consider the Applicant's personal characteristics such as her age, limited work experience, and the impact of her medical problems;

(e) Erred in law in failing to have regard to the principles set out in *Taylor v. Minister of Human Resources Development* (July 4, 1997), CP4436, and *Canada (Minister of National Health and Welfare) v. McDonald,* (October 7, 1988) CP01527, in that it failed to consider all of the Applicant's medical issues in their entirety, including a combination of both mental and physical aspects, and how they impact on her employability or capacity;

(f) Erred in law in failing to assess the Applicant's disability as of the minimum qualifying period;

(g) Erred in law in failing to consider *Inclima v. Canada (Attorney General),* 2003 FCA 117, in that it required her to engage in any form of gainful occupation when there was no medical evidence confirming that she had any capacity to do so; and,

(h) Erred in law in equating a "philanthropic" employer with a "realistic" employer.

[3] Counsel submits that by failing to weigh all of the evidence, the General Division failed to accurately and fairly conduct a proper factual analysis and, in so doing, fell into error.

[4] Counsel also filed additional medical reports. Counsel further submits that the Appeal Division ought to consider the additional medical evidence which was obtained and produced after the hearing on April 10, 2014.

[5] The Respondent has not filed any submissions.

THE LAW

[6] 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.

[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

(a) Alleged Erroneous Findings of Fact

[9] The Applicant needs to satisfy me that the General Division made the erroneous findings of fact which she alleges it made. So too should the alleged erroneous findings of fact be set out with some specificity, rather than house mere generalizations.

[10] Counsel for the Applicant has identified paragraphs 67 and 71 which she submits contain erroneous findings of fact. In regards to paragraph 71, counsel submits that the General Division erred by failing to consider that the Applicant did not work in her field of training as a dental assistant or personal support worker, and that it failed to consider that her former employment remained available to her. There was a factual foundation upon which the General Division could arrive at its findings regarding the Applicant's education and training, and the Applicant's efforts at pursuing employment. Indeed, Counsel does not suggest that the findings made by the General Division, namely, that the Applicant is "a well-educated woman who has taken training in several different fields" or that she "has not tried to find any suitable work either full time or part-time" as being erroneous, or as being based on erroneous findings of fact without regard for the material before it. That being so, the Applicant has not satisfied me that there is a reasonable ground of success on this basis.

[11] As for paragraph 67, counsel submits that the General Division erred when it stated that it had considered the "totality of the evidence" and that it "[did] not find the evidence upholds a determination [of severity at the MQP]". Counsel submits that the General Division failed to appreciate the Applicant's testimony and the totality of the medical evidence. Counsel advises that the otolaryngologist stated in March/April 2014 that there is a 90 percent probability that the Applicant suffers from papillary cancer and that she would be undergoing another thyroidectomy in summer 2014. In my view, the General Division did not arrive at paragraph 67 in a vacuum. The General Division referred to the Applicant's testimony and to some of the medical evidence,

in the preceding paragraphs, so it cannot be said that the General Division made its decision without regard for the material before it. Again, counsel does not suggest that the statement made by the General Division is itself erroneous. More significantly, I do not find these statements to represent findings of fact *per se,* but rather, matters of final determination.

[12] Counsel submits also that the General Division failed to consider the Applicant's evidence and the expert medical opinions, including the records of Guelph General Hospital, reports of Drs. Kevork and Giles, cytology and sleep study report. Counsel submits that the General Division also erred in failing to give the appropriate weight to the report of Dr. Giles.

[13] The submissions of counsel imply that the General Division was under an obligation to list all the evidence which it considered in assessing the severity of the Applicant's disability. 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". The Federal Court of Appeal also refused to interfere with the decision-maker's assignment of weight to the evidence, holding that that properly was a matter for "the province of the trier of fact". 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.

[14] The Applicant has not satisfied me that there is an arguable case under this ground of appeal that the General Division based its decision on various erroneous findings of fact made without regard for the material before it.

(b) Alleged Errors of Law

[15] Counsel for the Applicant submits that the General Division made numerous errors of law.

i. ***Villani***

[16] Counsel for the Applicant submits that the General Division erred in law in failing to apply the “real world” analysis required by *Villani* when it failed to consider the Applicant’s personal characteristics such as her age, limited work experience and the impact of her medical problems.

[17] *Villani* did not set out a comprehensive list of personal characteristics. In regards to the “real world” context set out in *Villani*¸ the particular circumstances which seem to have been contemplated by the Federal Court of Appeal relate to an applicant’s own particular circumstances, such as his or her age, education level, language proficiency and past work and life experience. The “real world” context does not relate to a consideration of the physical environment or demands placed on an applicant in an employment environment, or the impact of one’s medical problems in an employment setting. (While I do not consider the impact of an applicant’s medical problems or disabilities on his or her capacity regularly of pursuing any substantially gainful occupation to be a *Villani* factor, at the same time I agree that one’s overall functionality is material to assessing the severity of one’s disability.)

[18] For the purposes of a leave application, it is sufficient to show that the General Division did not apply the principles set out in *Villani.* Here, the General Division considered the Applicant’s personal characteristics at paragraph 71 of its decision, where it wrote:

> The Appellant is a well-educated woman who has taken training in several different fields. She has computer skills as well as many other transferrable skills. She has not tried to find any suitable work either full time or part time.

[19] While the General Division does not appear to have discussed the Applicant’s age or her prior work experience in assessing whether the Applicant is incapable regularly of pursuing any substantially gainful occupation, this does not mean that the General Division failed to apply the “real world” analysis required by *Villani.* The General Division undertook the analysis required of it in this instance, but did not undergo the depth of analysis nor consider the particular characteristics of the Applicant which counsel submits are germane to any consideration of severity.

[20] The Federal Court of Appeal stated in *Villani* that:

> . . . as long as the decision-maker applies the correct legal test for severity – that is, applies the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) he or she will be in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantial gainful occupation. The Assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere. (My emphasis)

[21] If the General Division applied *Villani* and conducted an assessment of some, but not all, of the Applicant's circumstances, did it apply the correct legal test? While I am mindful that the "assessment of the applicant's circumstances is a question of judgment [which ought not to be interfered with], I find that there is an arguable case to be made as to whether, notwithstanding such an assessment having been undertaken, the General Division properly applied *Villani* when it did not consider some of the Applicant's personal characteristics.

ii. *Taylor* and *McDonald*

[22] Counsel submits that the General Division erred in law in failing to have regard to the principles set out in *Taylor* and *McDonald,* in that it failed to consider all of the medical issues and evidence in their totality. Counsel submits that the General Division failed to consider the fact that the Applicant suffered from multiple health problems, including thyroid cancer, asthma, chronic obstructive pulmonary disease, pain and numbness in her face and the right side of her neck, lower back pain radiating down to her lower extremities and resulting in physical restrictions, anxiety and depression, sleep apnea and daytime fatigue and exhaustion. Counsel submits that the General Division focused on the Applicant's medical conditions which somewhat improved with bariatric surgery, such as diabetes, high blood pressure and elevated cholesterol.

[23] While the General Division discussed most of these conditions in its analysis, it did not refer to the thyroid cancer, asthma, pain or numbness in the face and right side of neck, sleep apnea, daytime fatigue and exhaustion. While some of these conditions (i.e. the thyroid cancer) may not have been extant at the minimum qualifying period, or may have been stable, the Applicant has satisfied me that there is an arguable case that the General Division may not have fully considered all of the medical issues and evidence in their totality, in assessing whether the

Applicant's disability could be considered severe at her minimum qualifying period. This does not however involve a reassessment of the evidence before the General Division, but will necessarily require that the Applicant and her counsel demonstrate that there was not only evidence of these conditions before the General Division, but evidence too as to how these conditions might have impacted the Applicant.

iii. Disability at the MQP

[24] Counsel submits that the General Division erred in failing to assess the Applicant's disability at her minimum qualifying period of December 31, 2013. Counsel notes the various medical conditions from which the Applicant was suffering at her minimum qualifying period. These include thyroid cancer, asthma, chronic obstructive pulmonary disease (COPD), pain and numbness in her face and the right side of her neck, lower back pain, anxiety and depression, sleep apnea and daytime fatigue and exhaustion. Counsel submits that the General Division ought to have closely examined the Applicant's health status "as of the date of her MQP" and, by implication, ought to have considered these various medical conditions.

[25] A review of the hearing file before the General Division indicates that the Applicant had produced little in the way of medical documentation that was relevant to the minimum qualifying period of December 2013. For the most part, the medical documentation focused on the period from 2010 to 2012. There was a single note dated May 17, 2013 from the Bariatric Clinic, some medical records of Dr. Maheshwari current only to May 2013, various diagnostic reports and records of the University Health Network indicating that the Applicant had undergone a left thyroid nodule biopsy, following right thyroidectomy in October 2013. (Counsel conveniently provided an index to the medical records, at pages GT1-259 and GT1-260 of the hearing file, though page references would have been ideal.) Indeed, even the written submissions of counsel for the Applicant directed the General Division's focus to the 2011 and 2012 medical records.

[26] The medical records before the General Division relating to the Applicant's 2013 medical history consisted of the following:

- January 4 to May 2, 2013 records of Grandview Medical Centre where the Applicant was seen for mental health services and seen regarding bariatric surgery and thyroid nodules. (pages GT1-344 to GT1-346)

- On March 18, 2013, the Applicant underwent an ultrasound to investigate a growing nodule. She was found to have multiple thyroid nodules. (pages GT1-370 and GT1-371)

- March 20, 2013 – ultrasound guided left thyroid biopsy (page GT1-267)

- March 21, 2013 – cytology report for left thyroid (page GT1-268)

- April 2013 – Discharge Summary of Guelph General Hospital – the Applicant underwent a laparoscopic gastric bypass on April 10, 2013. (pages GT1-428 to GT1-433 / GT1-447 to GT1-452)

- May 2013 - the entry in the clinical records indicates that the Applicant had been notified of her referral to the Pain Clinic, but she had declined an appointment as it coincided with bariatric surgery. She did not wish to proceed with an appointment then, as she did not wish to undo the results of the bariatric surgery (page GT1-346).

- May 17, 2013 – Bariatric Clinic Note – Applicant was seen to be doing well and no further follow-up appointment was made. She would continue on Prevacid for a total of three months after surgery (page GT1-432 / 449).

- May 7, 2013 – glucose fasting results (page GT1-445)

- March 2014 – University Health Network records indicate that the Applicant had undergone a right thyroidectomy in October 2013. She underwent a biopsy of her left thyroid nodule on March 24, 2014, which was suspicious for papillary carcinoma. Lobectomy was recommended to better classify the lesion before definitive treatment (pages GT4-2 to GT4-6)

[27] On the face of it, there is a marked absence of any discussion or analysis of many of the medical conditions which counsel submits the General Division ought to have closely examined. However, neither the Applicant nor her counsel had obtained much in the way of 2013 records which addressed the Applicant's various medical conditions. Had the Applicant and her counsel intended the General Division to review the entire 2013 medical history, it was incumbent upon them to obtain and produce the full medical file. It remains the Applicant's case to prove.

[28] Counsel suggests that the General Division also neglected to consider the Applicant's testimony relevant to the minimum qualifying period, yet did not refer me to any specific portions of the recorded hearing, nor obtain a transcript of the evidence, to support these allegations. The General Division could only consider the evidence before it. Other than the Applicant's testimony which was summarized in paragraphs 42, 43, 45, 46 and 48 to 50 of the decision and the medical documentation which was summarized in paragraphs 35 to 40 and 44, it does not appear that there was much in the way of medical evidence relating to the minimum qualifying period for the General Division to consider. While counsel listed the Applicant's various medical conditions as being thyroid cancer, asthma, COPD, pain and numbness in her face and the right side of her neck, lower back pain, anxiety and depression, sleep apnea and daytime fatigue and exhaustion, the medical evidence relevant to the minimum qualifying period did not wholly address these conditions. What evidence there was relating to the minimum qualifying period appears to have been largely referred to by the General Division in its analysis of the evidence.

[29] That said, at paragraph 66 of the decision, the General Division stated that, "It would appear that the main issues that were cited by the medical report completed when applying for CPP benefits were resolved or are now being managed adequately". Following this at paragraph 67, the General Division then wrote that, "when considering the totality of the evidence, the Tribunal does not find the evidence upholds a determination the Appellant's medical conditions were severe at the time of her MQP". I do not know what value or purpose was underlying the General Division's reference to the "main issues cited by the medical report…" but if the General Division considered the totality of the evidence in relation to those main issues and thereby restricted itself to considering only those issues cited in the medical report, this raises an arguable case.

iv. ***<u>Inclima</u>***

[30] Counsel submits that the General Division erred in failing to consider *Inclima v. Canada (Attorney General),* 2003 FCA 117, in that it required the Applicant to engage in any form of gainful occupation when there was no medical evidence confirming that she had any capacity to do so.

[31] 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.

[32] 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 held the capacity to be engaged in any form of gainful occupation at her minimum qualifying period.

[33] Had the General Division found that the Applicant did not have any capacity regularly of pursuing any substantially gainful occupation, 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 the capacity regularly of pursuing any substantially gainful occupation. Had this ground been the sole basis upon which leave was sought, I would have dismissed the leave application.

[34] As I have found there to be a reasonable chance of success on the leave application, ultimately, if it should be found that the Applicant does not have any capacity regularly of pursuing any substantially gainful occupation capacity, then it would be an error of law to require that the Applicant show that she undertook efforts to obtain and maintain employment.

(v) Philanthropic Employer

[35] Counsel for the Applicant submits that the General Division erred in law in equating a "philanthropic" employer with a "realistic" employer. She submits that the fact that a philanthropic employer may maintain an employment relationship with an otherwise disabled individual ought not to be interpreted by the trier of fact as evidence of work capacity. Generally, I agree with that proposition of law, but in this particular case, the factual circumstances do not apply here as the Applicant has ceased working.

[36] Counsel goes on to say that the Pension Appeals Board had consistently held as a matter of law that an applicant cannot be expected to locate employment under the "forgiving shroud of a benevolent employer". She cites *Minister of Social Development v. Cannon,* (February 7, 2006) CP23201. I presume that counsel's submissions amount to suggesting that the General Division required the Applicant to have either approached her employer about returning to work with job modifications or accommodations, or that she pursue other work, with a philanthropic employer.

[37] Had the General Division found that the Applicant did not have capacity regularly of pursuing any substantially gainful occupation, it would have committed an error in law in requiring that she either approach her employer about seeking workplace accommodations or that she pursue other work with a philanthropic employer, but here, the General Division found that the Applicant held the capacity regularly of pursuing any substantially gainful occupation.

(c) New Facts – Medical Records

[38] Counsel for the Applicant has filed new medical evidence, including reports of an otolaryngologist and rheumatologist, dated April 3, 2014 and June 2, 2014, respectively. The report of the otolaryngologist indicates that the Applicant likely would have undergone surgery in June or July 2014, to determine if she has thyroid cancer. The report of the rheumatologist notes that the Applicant has had symptoms of fibromyalgia since at least 2010, and that treatment options would be deferred until after the thyroid surgery. There are also some lab reports.

[39] The additional medical reports 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 counsel is requesting that we consider these additional facts and records, re-weigh the evidence and re-assess the claim in the Applicant's 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.*

[40] If counsel has set out these additional facts on behalf of her client 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 for rescinding or amending decisions. 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.

[41] The new medical reports do not raise nor relate to any grounds of appeal and I am therefore unable to consider them for the purposes of a leave application.

APPEAL

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

(a) Is the appeal an appellate review or appeal in the nature of judicial review? 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) If the General Division erred and the decision is seen to be unreasonable, what is the appropriate remedy, if any?

[43] 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 to provide time estimates.

CONCLUSION

[44] For the reasons set out above, the Application is granted.

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

Janet Lew
Member, Appeal Division