Citation: *R. S. v. Canada Employment Insurance Commission*, 2015 SSTAD 613

Appeal No. AD-14-316

BETWEEN:

R. S.

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 21, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated April 7, 2014. The General Division determined that the Applicant was not eligible for disability benefits under the *Canada Pension Plan*, as it found that his disability was not "severe" at his minimum qualifying period (MQP) of December 31, 2010. To succeed on this application, the Applicant must show that the appeal has a reasonable chance of success.

SUBMISSIONS

[2] The Applicant seeks leave on the grounds that the General Division:

1. Failed to observe a principle of natural justice by not considering all of the evidence and submissions before it;

2. Erred in law by "fail[ing] to make the decision without considering the severe and prolonged disability issues in terms of paragraph 42(2)(a) of the [*Canada Pension*] *Plan*";

3. Based its decision on erroneous findings of fact "and it failed to consider the facts in correct meaning"; and

4. Failed to take the totality of the evidence and the cumulative effect of the Applicant's problems into consideration in assessing the severity of the disability.

[3] The Respondent has not filed any submissions.

THE LAW

[4] 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.

[5] 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.

[6] The Applicant needs to satisfy me that the reasons for appealing 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) <u>Did the General Division fail to observe a principle of natural justice?</u>

[7] Counsel for the Applicant submits that the General Division failed to observe a principle of natural justice in failing to consider all of the evidence and submissions before it. Counsel has not identified the evidence which he submits the General Division failed to consider and what impact it might have had on the outcome. That said, I note the words of the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, that:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion *(Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.,* [1975] 1 S.C.R. 382, at p. 391).

[8] The Federal Court of Appeal has also held that there is no obligation for a decision-maker to exhaustively list all of the evidence before 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 lead me to question whether the presumption ought to be rebutted or displaced.

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

(b) Did the General Division fail to consider the legal test set out in paragraph 42(2)(a) of the *Canada Pension Plan*?

[10] Counsel submits that the General Division failed to consider the severe and prolonged disability issues. At the outset of its analysis, the General Division identified the legal test which the Applicant was required to meet under paragraph 42(2)(a) of the *Canada Pension Plan,* in determining whether he was eligible for a disability benefit. The General Division then undertook an analysis of the severe criterion. While it is true that the General Division did not consider the prolonged criterion, the test for disability is two-part and if an applicant does not meet one aspect of this two-part test, then he will not meet the disability requirements under the legislation. As the General Division correctly indicated, it was unnecessary under those circumstances to undertake an analysis on the prolonged criterion. In *Klabouch v. Canada (Minister of Social Development),* 2008 FCA 33, the Federal Court of Appeal stated that:

> [10] The fact that the Board primarily concentrated on the "severe" part of the test and that it did not make any finding regarding the "prolonged" part of the test does not constitute an error. The two requirements of paragraph 42(2)(a) of the CPP are cumulative, so that if an applicant does not meet one or the other condition, his application for a disability pension under the CPP fails.

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

(c) Did the General Division base its decision on erroneous findings of fact and did it fail to "consider the facts in correct meaning"?

[12] Counsel submits that the General Division based its decision on erroneous findings of fact and failed to consider the "facts in correct meaning". Counsel has not identified the alleged erroneous finding of fact upon which the General Division based its decision, or what facts it failed to consider in its "correct meaning". Without setting out some particulars of the erroneous finding of fact or incorrectly interpreted facts, there is no basis upon which I can properly assess this ground. While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, he ought to, at the very least, particularize the bases for the leave application beyond making a general statement that the General Division based its decision on an erroneous finding of fact or failed to consider the facts "in correct meaning", without having the Appeal Division speculate as to what those errors might be. The Application is deficient in this regard and the Applicant has not satisfied me that the appeal has a reasonable chance of success on this ground.

(d) Did the General Division fail to consider the totality of the evidence and the cumulative effect of the disability in assessing severity?

[13] Counsel for the Applicant submits that the General Division erred in failing to consider the totality of the evidence. In particular, counsel writes as follows:

> The appellant was diagnosed with chronic condition called Crohn's ileitis in 2009 which affected more than 50% of his ileum with superficial mucous membrane ulcers and seeing his gastroenterologist on regular basis and receiving many strong medications. In addition he is taking medication for depression and anxiety. He also has chronic sleep problems and taking medications for his sleep which are not helping him to have proper sleep and he is awake many times in night. He has also been diagnosed with Osteoporosis in the year 2010 and is on weekly medication to stop the bone fragility. Lately he has also developed degenerative disc disease. He is also a patient of hypertension for many years and is constantly on medication. Due to all these problems he is not able to have sufficient sleep and has to go to washroom 10-15 times a day. There are various medical reports available on file which refer to the medical problems of the appellant. All the problems started well before his MQP of December 2010 and are still continuing. The family physician of the appellant has summarized all the medical problems of the appellant in his letter dated November 2, 2012 and opined that he cannot get a gainful employment.

> . . . The appellant is also on Remicade which makes the immune system to almost zero and the patient becomes prone to catch any infection easily. Due to this reason the appellant avoids to go out of the house except for doctors' appointments.

[14] Counsel submits that the General Division failed to consider the cumulative effects of all the problems on the ability of the Applicant to return to any kind of gainful employment. He further submits that the General Division erred in considering the various problems in isolation and in concluding that the Applicant's disability is not severe and prolonged.

[15] If the General Division failed to consider the Applicant's disabilities cumulatively and the totality of the evidence, in the context of whether he was incapable regularly of pursuing any substantially gainful occupation at the minimum qualifying period and continuously since then, that could raise an arguable ground. I will consider the decision of the General Division from this perspective.

[16] Counsel has identified the Applicant's various medical conditions, including Crohn's ileitis, depression and anxiety, chronic sleep issues, osteoporosis, hypertension, susceptibility to infection (due to consumption of Remicade) and more recently, degenerative disc disease. Counsel submits that the General Division erred to conclude that, in spite of all these problems, the Applicant can return to any kind of gainful employment.

[17] The General Division wrote that there was a lack of medical evidence before it, particularly for the period between April 1, 2010 and November 2, 2012. It considered the gap in the medical evidence to be significant, as the minimum qualifying period fell within this period. The General Division wrote about the Applicant's sleep disorder and Crohn's disease. It referred to the absence of reports from Dr. Nguyen, a gastroenterologist and to the results of two lab reports (though there were reports dated September 8, 2009 and April 1, 2010 from another gastroenterologist).

[18] The General Division did not analyze in particular the depression and anxiety, osteoporosis, hypertension, susceptibility to infection, though the Applicant testified that he has osteoporosis and depression. The report dated November 2, 2012 of the family

physician indicated that the Applicant had recently developed depression and was being treated. I note that the report also indicates that the Applicant has had hypertension for a few years but that it was well-controlled with treatment. The report also indicates that the Applicant has had osteoporosis since 2010 and was on weekly medications. The family physician did not indicate what impact these might have had on the Applicant at or around the minimum qualifying period. The family physician also indicated that the degenerative disc disease arose in 2011, which falls after the MQP.

[19] The Applicant also testified that he fears infection, though it is unclear from the decision of the General Division as to when this fear may have arisen. There was also a bone density report dated December 22, 2009 before the General Division.

[20] Although the General Division did not undertake any analysis regarding the depression and anxiety, osteoporosis, hypertension, susceptibility to infection or hypertension, the General Division wrote that:

> the disability must be one that is actively in existence at the time of the MQP (December 31, 2010). The [Applicant's] evidence of thyroid problems, depression and osteoporosis are not supported by medical documentation at the time of the MQP. There are no specialists' reports, lab tests, or other corroborative evidence of the existence of these conditions in the relevant time period. The report of the family physician is authored in 2012, with no supportive evidence relating the conditions back to the MQP. The medical reports generated on or before the MQP do not show an [Applicant] with a severe disability as defined in the CPP. (my emphasis)

[21] Returning to the test set out above, while the General Division may have failed to consider all of the Applicant's disabilities cumulatively, it also indicated that there was a dearth of medical evidence before it, in respect of some of the Applicant's medical conditions, including the thyroid problems, depression and osteoporosis. The General Division found that there was no corroborative evidence of the existence of these conditions for the relevant time period. If there was no evidence before it of these conditions at the MQP, then it cannot be said that the General Division failed to consider the cumulative effect of these very same conditions, or the totality of the evidence, at that time.

[22] It seems that these submissions call into question the reasonableness of the decision of the General Division. A reassessment and redetermination are well outside the scope of a leave application.

CONCLUSION

[23] The Application is refused.

Janet Lew
Member, Appeal Division