Citation: *J. B. v. Minister of Employment and Social Development*, 2015 SSTAD 646

Appeal No. AD-14-500

BETWEEN:

J. B.

Applicant

and

Minster 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 26, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated August 12, 2014. The General Division conducted a teleconference hearing on July 24, 2014, after which it determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that he did not have a severe and prolonged disability on or before December 31, 2010.

[2] The Representative for the Applicant (the "Representative") filed an Application Requesting Leave to Appeal to the Appeal Division on September 11, 2014 and provided additional submissions on March 18, 2015. Leave is sought on the grounds that the General Division erred in law in making its decision, whether or not the error appears on the face of the record; and based its decision on various erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it; and in doing so, "totally misinterpreted the information in the decision". To succeed on this application, the Applicant must establish that the appeal has a reasonable chance of success.

SUBMISSIONS

[3] The Representative submits that the General Division erred as follows, in:

(a) Finding that the Applicant had the capacity to educate and retrain in another occupation, based on the fact that he had attended schooling in 1995 - 15 years prior to his minimum qualifying period and before his back pain increased and prevented him from working. The Representative submits that the Applicant is unable to retrain "due to the mental component and inability to sit";

(b) Failing to consider that Advil is similar to Naproxen. When asked at the hearing before the General Division, the Applicant testified that he stopped taking Naproxen because he experienced various side-effects and instead, was now taking Advil;

(c) Requiring the Applicant to be on medication, without considering the Applicant's "reasonable concerns" against taking them, particularly when there was evidence that he was using alternative treatment options and attended all types of therapy, chronic pain support groups and mental health counselling. The Representative further submits that the General Division erred in equating use of medication with capacity;

(d) Finding that the Applicant had failed to mitigate when he did not try other medications, despite the fact that they had not been prescribed;

(e) Failing to properly consider the findings of the Functional Capacity Evaluation; and

(f) Relying on "singular facts" and thereby failing to take the totality of the evidence into consideration and, given the evidence, failing to undertake any analysis as to how it concluded that the Applicant has the capacity for regularly attending a place of employment.

ANALYSIS

[4] Some arguable ground upon which the proposed appeal might succeed is needed 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* sets out the grounds of appeal as being limited to 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 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.

(a) Did the General Division err in finding that the Applicant had the capacity to retrain?

[7] The Representative submits that the General Division erred in finding that the Applicant has the capacity to retrain in another occupation. The Representative submits that the Applicant is unable to retrain, given his functional limitations and mental state, and submits that it was an error for the General Division to have relied on the fact that the Applicant attended schooling in 1995 – 15 years prior to his minimum qualifying period and before his back pain increased and prevented him from working in 2010.

[8] To make out the ground of appeal based on an erroneous finding of fact under subsection 58(1) of the DESDA, the General Division must have based its decision on the erroneous finding of fact, and it must have been made without regard for the material before it. The Representative does not submit that the material or the evidence – the fact that the Applicant had been involved in schooling in 1995 – is inaccurate. From that perspective, one might have readily concluded that this ground has no merit. On the other hand, if what the Representative submits is true, there would appear to be an arguable case as to whether the Applicant's capacity for retraining should be based on his capacity at the time of his minimum qualifying period, and since then.

[9] I note however that the General Division largely considered the Applicant's past training as part of the "real world" context, in assessing his capacity to be retrained. The General Division found that apart from a lack of experience in non-labour type jobs, the

Applicant's personal characteristics "did not apply to restrict the [Applicant's] capacity to work" and that "it is strictly the [Applicant's] medical conditions that affect his ability to work". Clearly, the General Division concluded that the Applicant had in the past demonstrated that he has the intellect and the general aptitude for retraining, though noted his lack of experience in non-labour type jobs. The General Division acknowledged that while the Applicant has the intellect and general aptitude for retraining, it still needed to take his physical and mental disabilities into consideration. Viewed from this perspective, there was an evidentiary basis upon which the General Division could make the finding that the Applicant had some capacity for retraining, subject to medical considerations. It is not for me at the leave stage to assess the reasonableness of these findings. The Applicant has not satisfied me that there is a reasonable chance of success under this ground.

[10] Notwithstanding my conclusions on this particular submission, paragraph 58(1)(b) of the DESDA provides a ground of appeal on the basis of an error of law, whether or not the error appears on the face of the record. The General Division proceeded to undertake an analysis of the Applicant's personal characteristics under *Villani v. Canada (Attorney General),* 2001 FCA 284, and concluded that the "Applicant's personal factors do not apply in this case to restrict the [Applicant's] capacity to work and it is strictly the [Applicant's] medical conditions that affect his ability to work". In *Villani,* the Federal Court of Appeal wrote:

> [38] This analysis of subparagraph 42(2)(a)(i) strongly suggests a legislative intention to apply the severity requirement in a "real world" context. Requiring that an applicant be incapable *regularly* of pursuing any *substantially gainful* occupation is quite different from requiring that an applicant be incapable *at all times* of pursuing *any conceivable* occupation. Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.

[11] The General Division's approach to *Villani* raises an arguable case, as to whether the General Division considered the "real world" context in assessing the severity of the Applicant's disability.

(b) Did the General Division err in failing to consider that Advil is similar to Naproxen?

[12] The General Division wrote that the family physician had prescribed Seroquel or Naproxen, but that the Applicant took neither and instead, "only used Advil if his pain could not be relieved by laying down for a sleep". The General Division noted the numerous reasons the Applicant avoided medication. The Representative submits that the General Division erred in failing to consider that Advil has properties similar to Naproxen.

[13] The Representative is requesting that I take "judicial notice" of Advil's properties. This is not a subject matter that allows for the extent of "judicial notice" which the Representative seeks. While there may be similarities to some degree, it does not appear that there was any evidence or submissions before the General Division that Advil is similar to Naproxen. Without that evidence and those submissions having been made, I do not see how the General Division could have concluded that there were similarities, or how I can conclude that there might be an erroneous finding of fact on this point.

[14] Even if I should accept that Advil is similar to Naproxen, there are differences between the two, otherwise why would Naproxen require a prescription? The General Division drew this distinction as a means of underlying its finding that the Applicant's disability could not have been that severe if he refused treatment with any prescription medication.

[15] 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 Applicant's "reasonable concerns" against taking medication?

[16] The Representative submits that the General Division erred in requiring the Applicant to be on medication, without giving any consideration to the Applicant's "reasonable concerns" against taking them, particularly when there was evidence that he was using alternative treatment options and attended all types of therapy, chronic pain support groups and mental health counselling. The Representative further submits that the General Division erred in equating use of medication with capacity. In other words, the Representative submits that the General Division should have considered the reasonableness of the Applicant's non-compliance in the context of his particular circumstances.

[17] While the Representative submits that the General Division ought to have considered the reasonableness of the Applicant's non-compliance, this is distinct from assessing the reasonableness of the decision of the General Division, which is not contemplated under subsection 58(1) of the DESDA, for the purposes of assessing a leave application. Here, I see that the General Division considered some of the Representative's submissions regarding the Applicant's avoidance of medications, and that it undertook some analysis as to whether the Applicant's non-compliance was reasonable. It is not for me to assess the reasonableness of that analysis. If, on the other hand, the General Division had failed to consider the Applicant's circumstances underlying his non-compliance, this would have been a separate matter altogether and would have resulted in a reasonable chance of success.

[18] The Representative further submits that the General Division erred in equating use of medication with capacity. In other words, the Representative submits that the General Division found that if the Applicant were taking medication, he would have the requisite capacity regularly of pursuing any substantially gainful occupation.

[19] Did the General Division in fact find that the Applicant would acquire the requisite capacity if he were taking medications? A review of the decision of the General Division indicates that it wrote at paragraph 29 that "the [Applicant] **could** have the potential for further capacity had he followed the recommendations [of his physicians]" (my emphasis).

[20] I do not find that the General Division made the finding of fact which the Applicant alleges it did, so there is no issue as to whether it was erroneous, a matter upon which the General Division based its decision or was made without regard for the material before it. As such, the Applicant has not satisfied me that there is a reasonable chance of success under this ground.

(d) Did the General Division err in finding that the Applicant had failed to mitigate in trying other medications?

[21] The Representative submits that the General Division erred in finding that the Applicant had failed to mitigate when he did not try other medications, despite the fact that they had not been prescribed.

[22] The General Division wrote that it was unreasonable for the Applicant to refuse treatment with any prescription medication. It went on and wrote,

> It is generally known that there are many different antidepressants available for treatment of both PTSD and chronic pain each with varying degrees of side effects. It is also generally known that not all pain medication is addictive and there are many available specifically for chronic pain and neuropathic pain.

[23] There is an issue here as to whether an applicant can be said to have properly mitigated, if it is said that he failed to follow certain recommendations, when those specific recommendations allegedly had not been made. This raises an arguable ground. The Applicant has satisfied me that there is a reasonable chance of success under this ground.

(e) Did the General Division err in failing to properly consider the functional capacity evaluation?

[24] The Representative for the Applicant submits that the General Division erred in failing to properly consider the functional capacity evaluation. She submits that had the General Division properly considered the report, it would have concluded that the Applicant does not have the requisite capacity regularly of pursuing any substantially

gainful occupation. She referred to various passages in the evaluation. She pointed to page 12, where the occupational therapist wrote that,

> although [the Applicant] may still have the STRENGTH to perform work in to (*sic)* the Medium strength category, his poor quality of movement, difficulties with attaining an upright position after ANY activity in stooping, sitting, or work at low levels, and rests taken, particularly during material handling testing, he is likely to perform poorly.

[25] She queries how the General Division could conclude from this opinion that the Applicant is capable regularly of pursuing any substantially gainful occupation.

[26] The submissions suggest that the General Division failed to consider portions of the functional capacity evaluation 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 refer to 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". The Federal Court of Appeal also refused to interfere with the decision-maker's assignment of weight to the evidence, holding that it was properly a matter for "the province of the trier of fact".

[27] These particular submissions call into question the reasonableness of the decision of the General Division. What this amounts to essentially is a request for a reassessment and redetermination on this issue. That is well outside the scope of a leave application.

(f) Did the General Division err in failing to consider the totality of the evidence?

[28] The Representative submits that the General Division erred by relying on "singular facts", by failing to consider the totality of the evidence, and given the evidence, failing to undertake any analysis as to how it concluded that the Applicant has the capacity for regularly attending a place of employment.

[29] Setting aside the fact that the test for severity of disability is not based on regularity of attendance at a place of employment, a review of the decision of the General Division indicates that it relied on the functional capacity evaluation as well as the Applicant's perceived ability to perform activities of daily living. While the Applicant and his representative might have considered other factors and conducted a different analysis as to the Applicant's capacity, it cannot be said that the General Division failed to conduct any analysis or that it arrived at its decision in a vacuum.

[30] The Representative submits that the General Division failed to consider the totality of the information; the General Division referred to the Applicant's testimony that he was unable to cope and manage treatment appointments, was often incapable of doing household activities and unable to manage his property, but gave no consideration to this testimony in its analysis.

[31] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Supreme Court of Canada remarked that the analysis of a decision-maker does not have to address all of the arguments in front of it:

> 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).

[32] These submissions too call into question the reasonableness of the decision of the General Division. As I have indicated, a reassessment and redetermination are well outside the scope of a leave application.

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

APPEAL

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

(a) What level of deference does the Appeal Division owe to the General Division?

(b) Based on the grounds upon which leave has granted, did the General Division commit the alleged errors of law or base its decision on any erroneous findings of fact without regard for the material before it?

(c) Based on the grounds upon which leave has been granted, what is the applicable standard of review and what are the appropriate remedies, if any?

[35] I invite the parties to make submissions also in respect of the form 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 preliminary time estimates for their respective submissions.

CONCLUSION

[36] The Application is granted.

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

Janet Lew
Member, Appeal Division