Citation: *M. M. v. Minister of Employment and Social Development*, 2015 SSTAD 661

Appeal No. AD-14-458

BETWEEN:

M. 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: Janet LEW

DATE OF DECISION : May 28, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated May 23, 2014. The General Division 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, 2008. Counsel for the Applicant filed an Application Requesting Leave to Appeal to the Appeal Division on August 14, 2014. Leave is sought on the grounds that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; made various errors of law; erroneously relied on various facts or failed to take various facts into consideration in arriving at its decision; and failed to give proper weight to the medical evidence. To succeed on this application, the Applicant must establish that the appeal has a reasonable chance of success.

FACTUAL BACKGROUND

[2] The Applicant grew up on a farm and assisted his father with breeding race horses. The Applicant is qualified as a horse trainer and harness race driver. He has always worked in the horse racing business and has no other work experience.

[3] The Applicant was involved in a motor vehicle accident on May 2, 2008, when an oncoming vehicle struck his vehicle head-on. The other driver suffered a fatality. Both vehicles were total losses. The Applicant sustained various injuries, including a wedge compression fracture of his L2 vertebrae with significant height loss and right calcaneal fracture. The Applicant also sustained injuries to his low back, left shoulder, neck, arm, pelvis, left-sided pain, and a laceration to his left knee, requiring stitches. He was taken by ambulance and hospitalized for several days. The Applicant also experienced headaches and sleep disruption.

[4] The Applicant has been seen by various medical experts and a vocational expert. The documentary evidence before the General Division -- much of it subsequent to the minimum qualifying period -- was extensive. The Applicant has undergone various types of treatment, including physiotherapy and massage therapy. Nonetheless, he has been left with a chronic pain disorder, depression, anxiety, and an adjustment and panic disorder.

[5] The Applicant has not worked since the motor vehicle accident and applied for Canada Pension Plan disability benefits in May 2011. His accompanying Questionnaire indicates that he has several functional limitations and restrictions, including difficulty with prolonged sitting, standing, walking and some limitations with reaching and bending. He indicated in the Questionnaire that he was exploring possible alternative vocational rehabilitation options.

[6] The Applicant participated in a Work Hardening Placement Program and was placed with a horse boarding farm over several weeks in summer 2011. The Applicant was assigned various duties, as set out in a letter dated August 2, 2011, by an occupational therapist (page GT1-572). The self-report records indicate that during this time, the Applicant worked four days a week for an average of three to four hour shifts. The Applicant reported that he was slow and took breaks, but nonetheless experienced increased pain associated with his work activities. He reported that he left early on one or more days each week, due to increased pain. The Work Hardening Placement Program Report dated September 8, 2011 concluded that the Applicant's current work function was compatible with part-time, light-level work, with up to frequent sitting, standing and walking. He would require workplace accommodations to enable him to "alternate his positioning among sitting, standing and walking … [and] for self-pacing (GT1-577 to GT1-588).

SUBMISSIONS

[7] I have grouped some of counsel's submissions together. Counsel submits that the General Division made numerous errors, as follows:

a) Exceeded its jurisdiction by refusing to consider and undertake any analysis of any Pension Appeals Board decisions upon which he relied, on the basis that the legal authorities had no bearing. At the same time, the General Division relied on a 1988 Pension Appeals Board decision;

b) Erred in law in failing to properly assess whether the Applicant had sustained a severe and prolonged disability on or before "the actual minimum qualifying period which was December 31st, 2008";

c) Erred in law in concluding that the Applicant was capable of substantially gainful employment without "actually completing the appropriate and required inquiry as to whether the [Applicant] was capable of regularly pursuing substantially gainful employment";

d) Erred in law in failing to properly assess whether the Applicant had a severe and prolonged disability at his minimum qualifying period and instead focused upon the fact that the Applicant had purchased a horse as the basis for concluding that he did not satisfy the applicable legal test for entitlement to a disability pension. Counsel submits that the General Division erred in equating the Applicant's purchase of a horse several years after the minimum qualifying period with capacity, without considering that the purchase was short-lived and had rehabilitative impact, and ultimately required his brother's assistance to complete the physical tasks related to this ownership;

e) Erred in law in relying upon *Mosher v. Canada (Minister of Human Resources Development),* 1998 CarswellNat 3409 as being analogous to the Applicant's circumstances, when the Pension Appeals Board did not consider the "air of reality" or examine the Applicant's disability at his minimum qualifying period; and consequently failed to apply the real world perspective, as set out in *Villani v. Canada (Attorney General),* 2001 FCA 248, and in *D'Errico v. Canada (Attorney General),* 2014 FCA 95;

f) Failed to give the appropriate weight or even acknowledge a number of different facts, including the fact that the Respondent had made a predetermined intentional decision not to attend the hearing before the General Division held on April 9, 2014; that the Respondent had acknowledged in its Explanation of Decision under Appeal to the Social Security Tribunal – General Division dated August 21, 2013, that the Applicant may be unable to work at this time; and that the Respondent had acknowledged that the Applicant suffered a serious motor vehicle accident and suffers from and will continue to have ongoing chronic pain in his low

back and heel. Counsel submits that this latter consideration confirms that the Applicant's disability is indeed prolonged. Counsel further submits that the General Division failed to give proper weight to the medical evidence which confirmed that the Applicant suffered from a severe and prolonged disability;

g) Erred in law by not following *Canada (Minister of Human Resources Development) v. Rice*, 2002 FCA 47, and instead, focused on the socio-economic factors relating to the Applicant's employment at the time of the motor vehicle accident of May 2, 2008. Counsel submits that the Federal Court of Appeal has held that socio-economic factors such as labour market conditions were not relevant factors in assessing disability under the *Canada Pension Plan;* and

h) Based its decision on erroneous findings of fact without regard for the material before it, in that it:

   i) Took "judicial notice" that the Applicant had not returned to any employment, on the basis that the horse industry had declined (although there was no evidence to support such an allegation), and despite the Applicant's testimony that employment was available with his family's horse racing farm, provided that he was able to withstand the physical demands; and

   ii) Found that the medical opinions of Drs. Doxey and Kumbhare established that the Applicant had the capacity to retrain for sedentary or other employment.

[8] The Respondent has not filed any submissions.

ANALYSIS

[9] 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.

[10] 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.

[11] 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 exceed its jurisdiction?

[12] Counsel submits that the General Division exceeded its jurisdiction by refusing to consider and undertake any analysis of any Pension Appeals Board decisions upon which she relied, while at the same, relied on a 1988 Pension Appeals Board decision. Counsel alleges that the General Division advised that it was not obligated to follow Pension Appeals Board decisions.

[13] While counsel classifies this ground as a jurisdictional matter, I do not share that view. Had the General Division indicated that it lacked jurisdiction to consider any of the case authorities from the Pension Appeals Board, that would have been another matter altogether. As it is, it relied upon a Pension Appeals Board decision, so it cannot be said that it declined "jurisdiction" by refusing to consider and undertake any analysis of any Pension Appeals Board decisions. Rather than couching it as a matter of jurisdiction, likely it was a matter as to whether

the General Division considered decisions of the Pension Appeals Board to be of precedential or persuasive value.

[14] When there may have been some factual similarities with the Applicant's circumstances, it might have been of some guidance had the General Division undertaken some analysis and distinguished the authorities upon which counsel relied, had that been appropriate, but it was under no obligation to do so. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Supreme Court of Canada remarked 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).

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

(b) Did the General Division err in failing to properly assess the Applicant's disability at the minimum qualifying period?

[16] Counsel submits that the General Division erred in law in failing to properly assess whether the Applicant had sustained a severe and prolonged disability on or before "the actual minimum qualifying period which was December 31st, 2008".

[17] I do not know what value the word "actual" imparts, as the parties agree that December 31, 2008 is the minimum qualifying period. I understand that counsel's submissions essentially are that the General Division ought to have focused on the medical evidence at the minimum qualifying period.

[18] The Applicant submits that the General Division should have found that the Applicant had sustained traumatic injuries following a motor vehicle accident in May 2008, and that by

December 2008, the Applicant continued to be in the "early stages of recovery", was "essentially homebound", and required approximately 10 hours of attendant care per week, various assistive devices and approximately 9 hours of housekeeping assistance per week, in addition to outside maintenance assistance. Counsel points to the orthopaedic surgeon's report dated October 15, 2009, as evidence of the Applicant's severe disability. While the orthopaedic surgeon's assessment occurred several months after the minimum qualifying period and the Applicant's wedge compression fracture of the L2 vertebrae had by then healed, nonetheless, the Applicant had ongoing pain and restrictions. Counsel submits that if the Applicant continued to experience this extent of severely disabling pain and restrictions, even after some improvement, then he had to have been severely disabled in December 2008.

[19] Counsel relies on *D'Errico*, where the Federal Court of Appeal held that the decision of the Pension Appeals Board was unreasonable, as it did not apply the applicable legal standards. For one, it found that the Board had failed to examine the appellant's "condition at the time of her minimum qualifying period and afterward". Stratas J.A. found that, indeed, the Board's consideration was misplaced, as it looked at only the appellant's more recent condition.

[20] Counsel also relies on *Woodward v. Canada (Minister of Social Development),* 2004 CarswellNat 6490 (PAB), for the proposition that the crucial timeframe that the General Division should have considered is the period before the minimum qualifying period. There, the Pension Appeals Board asked itself whether the appellant's disability could be "severe" at the minimum qualifying period, as there was little doubt that as her chronic lymphatic leukemia had progressed after the minimum qualifying period, her disablement had increased and her condition was considered unquestionably "prolonged".

[21] Given that the minimum qualifying period occurred relatively soon after the motor vehicle accident in which the Applicant allegedly sustained traumatic injuries, it is not implausible that the Applicant continued to experience acute symptoms at the minimum qualifying period. However, notwithstanding counsel's submissions that the Applicant was essentially homebound and required attendant care and housekeeping assistance, I note that the occupational therapy in-home functional reassessment #2 dated December 4, 2008 indicates that,

apart from snow clearance and some ongoing functional limitations, the Applicant by then no longer required attendant care or housekeeping assistance.

[22] I acknowledge that a further occupational therapy home assessment report was conducted in July 2009, after which it was determined that the Applicant required some housekeeping assistance, including vacuuming, bathroom cleaning, assistance with transportation of heavy groceries and outdoor maintenance activities. The Applicant was also seen to require other assistive devices and services, including psychological intervention and occupational therapy intervention in July 2009 (page GT1-535). A further occupational therapy progress report was prepared in July 2011. Additional recommendations for intervention and support were made (page GT1-571). However, it is questionable to suggest that in December 2008, the Applicant remained essentially homebound and was receiving attendant and other care, in the face of the occupational therapy in-home functional reassessment #2 dated December 4, 2008.

[23] At paragraph 39 (at AD1-39) of her submissions, counsel submits that there was no indication of any significant improvement after the minimum qualifying period. She also suggests that the Applicant's injuries "have progressed" (paragraph (viii) on page AD1-42). That may well be so, but the primary issue here is whether or not the General Division assessed the Applicant's disability at the minimum qualifying period. The Applicant has satisfied me that there is a reasonable chance of success under this ground.

(c) Did the General Division err by failing to conduct an inquiry into whether the Applicant was capable regularly of pursuing any substantially gainful employment?

[24] Counsel submits that the General Division erred in law in concluding that the Applicant was capable of substantially gainful employment without "actually completing the appropriate and required inquiry as to whether the [Applicant] was capable of regularly pursuing substantially gainful employment".

[25] Counsel sets out the test which she submits the General Division ought to have conducted as being "whether the Applicant was capable of regularly pursuing substantially

gainful employment". This misstates the test. Paragraph 42(2)(a) of the *Canada Pension Plan* defines disability as a physical or mental disability that is severe and prolonged, and a person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. The distinction between the two is seemingly nominal, but it is significant. The test is not whether an applicant is capable, but whether he or she is incapable. This is a more onerous test for an applicant to meet. The General Division correctly stated the test for severity at the outset, at paragraph 7 of the decision.

[26] Even had the test been properly enunciated, I find this submission to be somewhat ambiguous and without sufficient particularity to enable me to properly assess whether leave ought to be granted. Again, the Applicant and his counsel ought to have particularized what enquiry counsel submits the General Division ought to have embarked upon and how the General Division might have failed to conduct an enquiry into whether the Applicant was incapable regularly of pursuing any substantially gainful occupation.

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

(d) Did the General Division err in assessing the Applicant's disability by focusing on his purchase of a horse?

[28] Counsel submits that the General Division erred in law in failing to properly assess whether the Applicant had a severe and prolonged disability at his minimum qualifying period and instead focused upon the fact that the Applicant had purchased a horse as the basis for concluding that he did not satisfy the applicable legal test for entitlement to a disability pension.

[29] Counsel further submits that the General Division erred in equating the Applicant's purchase of a horse several years after the minimum qualifying period with capacity, without considering that the purchase was short-lived and had a rehabilitative impact, and ultimately required his brother's assistance to complete the physical tasks related to the ownership of the horse.

[30] The General Division's analysis and assessment of the severity of the Applicant's disability addressed numerous issues, unrelated to the purchase of a horse. In any event, the reference to the purchase and ownership of the horse was in the context of whether it could qualify as a substantially gainful occupation. The Applicant has not satisfied me that this ground has a reasonable chance of success.

(e) Did the General Division err in following *Mosher* and in failing to apply *Villani?*

[31] Counsel submits that the General Division erred in law in following *Mosher,* in that it failed to conduct the "real world" analysis set out in *Villani* and in *D'Errico.*

[32] A review of the decision of the General Division however suggests that the General Division did in fact apply *Villani.* Firstly, the General Division referred to *Villani* at paragraph 45 of its decision and then secondly, appears to have proceeded to undertake the *Villani* analysis required of it at paragraph 46, where it wrote:

> The Appellant was 42 years of age at the date of the MQP. He was a full participant in a competitive business and was able to obtain many skills in the business. He has language proficiency, and the ability and intelligence to learn new skills. He has transferable skills and his work and life experience is a good basis for an alternate occupation.

[33] Given that the General Division appears to have considered the Applicant's personal circumstances or characteristics, I would have expected counsel to particularize these submissions beyond providing a general statement that *Villani* was not applied. The Applicant has not satisfied me that there is a reasonable chance of success under this ground.

(f) Did the General Division err in its assignment of weight?

[34] Counsel submits that the General Division failed to give appropriate weight or even acknowledge a number of facts, including that:

i. The Respondent had made a predetermined intentional decision not to attend the hearing on April 9, 2014, before the General Division;

ii. The Respondent had acknowledged in its Explanation of Decision under Appeal to the Social Security Tribunal – General Division dated August 21, 2013, that the Applicant may be unable to work at this time; and

iii. The Respondent had acknowledged that the Applicant suffered a serious motor vehicle accident and suffers from and will continue to have ongoing chronic pain in his low back and heel.

[35] Counsel submits that the General Division failed to note that the Respondent was not present at the hearing, or that the Applicant had expressed concerns regarding the Respondent's Explanation of Decision Under Appeal to the General Division.

[36] Counsel further submits that the General Division failed to give proper weight to the medical evidence which confirmed that the Applicant suffers from a severe and prolonged disability. Counsel points to the ambulance report and emergency records, various diagnostic scans, and medical records of various physicians, as having been given insufficient weight by the General Division.

[37] Counsel submits that had the General Division acknowledged these facts and assigned the appropriate weight to them, it might have had some influence on the outcome of the proceedings.

[38] Counsel submits that this latter consideration confirms that the Applicant's disability is indeed prolonged, and had the General Division assigned the appropriate weight to this fact, it would have found the Applicant's disability to be prolonged.

[39] As noted above, the Supreme Court of Canada has held that a decision-maker need not include all the arguments, jurisprudence or other details: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board).* And, the Federal Court of Appeal has refused to interfere with the decision-maker's assignment of weight to the evidence before it, holding that that properly was a matter for "the province of the trier of fact": *Simpson v. Canada (Attorney General),* 2012 FCA 82. It clearly was within the purview of the General Division to determine the weight to assign to the evidence before it. I see no basis or authority upon which

the Appeal Division ought to interfere with this assignment. The Applicant has not satisfied me that there is a reasonable chance of success on this ground.

(g) Did the General Division fail to follow *Rice?*

[40] Counsel submits that the General Division failed to follow *Rice,* by focusing on the socio-economic factors relating to the Applicant's employment at the time of the motor vehicle accident of May 2, 2008, when the Federal Court of Appeal has held that socio-economic factors such as labour market conditions were not relevant factors in assessing disability under the *Canada Pension Plan.* At paragraph 8, Rothstein J.A. (as he then was) wrote:

> However, as indicated, we would take this opportunity to make the point that indeed, as the Minister has argued, socio-economic factors such as labour market conditions are irrelevant in a determination of whether an individual is disabled pursuant to subsection 42(2) of the *Canada Pension Plan,* R.S.C. 1985, c. C-8.

[41] The General Division wrote,

> The [Applicant] purchased a race horse, and as noted by Dr. Doxey this planned occupation may be unprofitable due to associated costs of hiring physical labour. The fact the attempt was not financially successful is not determinate (*sic)* of a severe and prolonged disability. … Racing horses is based on results, which can be profitable or can result in no economic reward.

[42] While the General Division may have spoken about financial considerations in horse ownership and operations, it clearly said that these were irrelevant factors in determining whether the Applicant is disabled under the *Canada Pension Plan,* when it wrote "the fact the attempt was not financially successful is not determinate (*sic)* of a severe and prolonged disability". The Applicant has not satisfied me that there is a reasonable chance of success on this ground.

(h) Did the General Division base its decision on erroneous findings of fact*?*

i. Horse Industry

[43] Counsel submits that the General Division based its decision on an erroneous finding of fact, namely, that the Applicant had not returned to any employment on the basis that the horse

industry profitability had declined, despite the absence of any evidence in support of such an allegation. She submits that this also overlooks the fact that, provided that the Applicant was able to withstand any physical demands on him, employment was available with his family's horse racing farm.

[44] It is irrelevant that the General Division referred to other factors underlying what it perceived to be the Applicant's lack of motivation to pursue any alternate work or any substantially gainful occupation outside the horse racing industry. For instance, at paragraph 34 of its decision, the General Division found that the Applicant was of the position that he would have difficulty adjusting to the role of an employee, would miss the excitement of horse racing and is not good with people. It is enough to raise a reasonable chance of success if indeed the General Division based its decision on an erroneous finding of fact, made without regard to the material before it. Paragraph 34 does not refer to and makes no reference whatsoever to the profitability of the horse racing industry. While the General Division spoke about the economics of horse racing, it did so in the context of whether it could qualify as a substantially gainful occupation. The Applicant has not satisfied me that there is a reasonable chance of success on this ground.

ii. Sedentary Employment

[45] Counsel did not raise any submissions that the General Division based its decision on erroneous findings of fact, without regard for the material before it in her Reasons for Leave to Appeal (at pages AD1-26 to AD1-30), but she raises it in her Reasons for Appeal (at page AD1-49), that none of the doctors who have assessed the Applicant, including Drs. Kumbhare and Dunlop, recommended retraining and that they were of the opinion that the Applicant could not return to work, and had not released him from care to return to work. At paragraph 39 of its decision, the General Division referred to the opinion of Dr. Doxey, that retraining might be preferable to the unprofitable horse business. In the following paragraph, the General Division referred to the medical opinion of Dr. Kumbhare that the Applicant is not able to work in any type of employment for which he has been trained and educated and has experience. The General Division inferred from these two medical opinions that the Applicant has the capacity to be retrained for sedentary positions or occupations not involved in horse racing.

[46] Dr. Doxey prepared a medical-legal report dated March 20, 2012. Significantly, Dr. Doxey is a clinical psychologist. While he wrote that "re-training for a new career may be preferable to pursuing his planned occupation", apart from the fact that Dr. Doxey is not qualified to render an opinion on an individual's physical capacities, Dr. Doxey did not offer any opinions in his report as to the Applicant's physical capacity for sedentary work. The fact that Dr. Kumbhare indicated that the Applicant is unable to work in any type of employment for which he has been trained and educated and has experience also does not appear to speak to the Applicant's capacity for sedentary or other employment. While there may have been other bases upon which the General Division came to the finding that the Applicant has the capacity to be retrained for sedentary or other employment, it appears that the General Division relied upon the opinions of Drs. Doxey and Kumbhare to make these findings.

[47] Given these considerations, counsel has satisfied me that there is a reasonable chance of success under this ground.

APPEAL

[48] 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?

[49] 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

[50] The Application is granted.

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

Janet Lew
Member, Appeal Division