Citation: *W. T. v. Minister of Employment and Social Development*, 2015 SSTAD 678

Appeal No. AD-15-33

BETWEEN:

W. T.

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: June 2, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated November 25, 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 his minimum qualifying period of December 31, 2006. The Applicant's Representative, an associate of psychiatric nursing, filed an Application Requesting Leave to Appeal to the Appeal Division on January 23, 2015. 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. On February 26, 2015, the Representative filed additional submissions, along with enclosures, in response to my questions of January 28, 2015. To succeed on this application, the Applicant must satisfy me that the appeal has a reasonable chance of success.

SUBMISSIONS

[2] The Representative submits that the General Division erred as follows, that it:

a) Failed to observe a principle of natural justice by refusing to admit additional documentation which the Applicant wished to rely upon;

b) Was unqualified to make any legal decisions and therefore was not impartial;

c) Erred in law in failing to properly apply *Inclima v. Canada (Attorney General)* 2003 FCA 117, in that it routinely determined that the Applicant was ineligible for a disability pension because he worked after his minimum qualifying period;

d) Erred in law in failing to properly apply *Villani v. Canada (Attorney General),* 2001 FCA 248. The Representative submits that the General Division "expanded [it] in a creative way resulting in denial of the appeal";

e) Erred in law in failing to apply paragraphs 14 to 17 of *Klabouch v. Canada (Social Development)* 2008 FCA 33 in that it "did not follow the natural justice process"; and

f) Omitted facts and erred in failing to consider all of the evidence before it.

[3] The Respondent has not filed any submissions.

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) Failure to observe principle of natural justice

[7] The Representative submits that the General Division ought to have accepted documents which she attempted to file at the hearing. She alleges that she is more effective when she can read and refer to documents when making oral submissions, particularly as she has been diagnosed with a learning disability. She also alleges that the General Division failed to record the entire proceedings, including any submissions which she may have made regarding the admissibility of the documents and hence, there is no evidence of her attempts to file the documents with the General Division.

[8] Paragraph 27(1)(a) of the *Social Security Tribunal Regulations* allows the parties to file additional documents or submissions within 365 days after the day on which the appeal is filed. Theoretically, neither the DESDA nor the Regulations specifically preclude a party from filing any additional documents or submissions after the lapse of 365 days after the day on which the appeal is filed. The current practice afforded by the Social Security Tribunal is that a party may continue to file documents or submissions until a specified date or within 30 days of a scheduled hearing date, subject to the discretion of the General Division Member. Here, the Social Security Tribunal notified the parties by letter dated July 25, 2014 that any additional documents or submissions could be filed until September 26, 2014. The Representative availed herself of the opportunity to file additional documents on August 25, 2014.

[9] In this particular case, the General Division did not refer to the Applicant's additional documents, nor explain why it may have excluded the additional documents or submissions. While the General Division was not required to accept these additional documents, it would have been prudent to have made reference to them, and to have set out the basis upon which they were being sought to have been tendered, and why they were excluded, if that had been the case.

[10] The documents consist of 40 pages of type-written submissions and a document titled "*ICD-9 Codes for Family Medicine 2011-2012: the FPM Long List*".

[11] In my questions of January 28, 2015, I requested an explanation as to how any of the documents which the General Division allegedly refused to accept was material or relevant to any of the issues before the General Division, and how they could have affected the outcome of the proceedings. The Representative responded that "the original panel of the Commissioner of Review Tribunal was adjourned to investigate the IDC systems and how it relates to this case". The Representative did not offer any explanation as to how the 40-page document might have been material or relevant to any of the issues before the General Division.

[12] The Representative's 40-page document, which she marked as "Evidence A", does not qualify as evidence. The document contains an overview of the Applicant's medical history and the Representative's argument. While the document summarizes some of the medical records, that does not thereby qualify it as evidence. And, even if it did somehow qualify as evidence, it would not represent the "best evidence" available, as the original or copies of the actual records are preferred. Under these circumstances, the General Division properly excluded the Representative's summaries of the medical evidence as representing "evidence".

[13] Of more concern to me however is whether the General Division permitted the Representative to make adequate submissions, irrespective of whether they were made orally or in writing. By this, I do not suggest that a party is entitled to an indefinite time to make oral submissions, or that duplication of oral or written submissions is encouraged. Sometimes, there is inadequate time to make full oral submissions, so prepared written submissions can be useful to add to or buttress any oral submissions that might have otherwise been made had time permitted. On the other hand, the Representative does not allege that she did not have the opportunity to make adequate or any oral submissions.

[14] The Representative alleges that she is more effective when she can read and refer to documents when making oral submissions. That may be so, but I fail to see why the written submissions had to have been filed with the General Division for her to be able to refer to and read them during the course of making oral submissions. Presumably, she would have retained copies of these. She does not allege that the General Division did not permit her to

make oral submissions or that she did not make the same oral submissions that she had in her written submissions.

[15] That said, while the written submissions raise a number of issues, I will focus on one as an example. The General Division wrote that the "parties agree … that the MQP date is December 31, 2006".

[16] Starting at page AD1A-32, the Representative argued that the Respondent had miscalculated the minimum qualifying period. The Representative submitted that the minimum qualifying period should have been December 31, 2008 or 2009, rather than 2006. Unfortunately, the Representative does not advise whether she made any oral submissions on this issue, or whether she abandoned the issue altogether, on behalf of the Applicant. It would seem to me that, given the breadth of the written submissions on this point, that neither the Applicant nor his Representative would have abandoned this issue. Yet, there is no indication or any reference in the decision of the General Division that there was any dispute at all between the parties over the minimum qualifying period. Even if the issue had been raised and the Applicant abandoned the issue during the course of the proceedings, it would seem reasonable that the General Division would have made reference to this in the decision.

[17] I do not raise the issue of the minimum qualifying period to suggest that the General Division erred in its calculation; indeed, I arrive at the same calculation for the minimum qualifying period. I raise this issue however to explore or show that possibly there were other submissions which had been made which could have been persuasive and determinative of the final issues. On this basis, I find that an arguable case has been made.

[18] I have not undertaken an exhaustive review of the written submissions or of any of the case authorities referred to therein, for the purposes of undertaking any reassessment of the Applicant's claim for a disability pension, as it would not be appropriate to do so at this juncture. I have reviewed the written submissions only in a cursory manner to determine whether, apart from the issue of the minimum qualifying period, the General Division was alive to the issues raised by the Representative in her written submissions. This does not mean that the General Division was required to reproduce the written submissions verbatim.

The strengths or weakness of these written submissions is irrelevant to any enquiry as to whether the General Division was aware of them. Generally, I am satisfied that the written submissions of the Representative may have raised issues which may have been overlooked and may have impacted the ultimate outcome.

[19] I do note that the Representative made forceful written submissions disputing numerous facts and findings made by a medical adjudicator working on behalf of the Respondent. I find it significant that the Representative did not make any submissions in her responses of February 26, 2015 or in the leave application that the 40-page written document was material or relevant to any of the issues, or how the documentation might have affected the outcome of the proceedings.

[20] The Representative's focus rather was on the exclusion of the ICD-9 Codes. She advises that this document clarifies the international disease coding system and was why the hearing before a Review Tribunal on September 12, 2012 had been adjourned. I have been provided with a copy of the hearing file and see that this document was indeed before the General Division, at pages GT1-199 to GT1-200 and GT1-204. An additional copy of this same document was filed with the Social Security Tribunal on October 24, 2013. Therefore, I find that that there is no substance to this particular submission that the General Division failed to file the document on ICD-9 Codes. The Applicant has not satisfied me that there is a reasonable chance of success on the grounds that the General Division failed to accept the ICD-9 Codes.

(b) Bias

[21] The Representative alleges that the Member of the General Division was not qualified and therefore could not have been impartial. In particular, she alleges that the Member "is not a law expert, she was a retired Dental Hygienist (*sic)* who was trained by HRDC on the ACT".

[22] Allegations of bias are very serious. The Representative did not present any evidence to support any reasonable apprehension of bias. These allegations alone are

insufficient to make out an arguable case. The Applicant has not satisfied me that there is a reasonable chance of success on this ground.

(c) Failure to apply *Inclima*

[23] The Representative alleges that the General Division erred in failing to properly apply *Inclima*, in that triggered a routine determination that the Applicant was ineligible for a disability pension, by virtue of the fact that he worked after his minimum qualifying period. She submits that the General Division ought to have considered that these attempts were short-lived because of his disabilities and their impact on his overall capacity.

[24] In *Inclima*, the Federal Court of Appeal stated that where there is evidence of work capacity, the applicant must not only show that he has a serious health problem, but must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.

[25] The General Division considered the Applicant's evidence that he had been terminated from his contract position with Correctional Services Canada due to illness and disability. The General Division wrote that it recognized that he had some work absences and that he encountered limitations, but ultimately found that this employment constituted a "substantially gainful occupation". The General Division then proceeded to explain how it came to that conclusion. The General Division considered various factors, such as the length of this employment, when he ceased to work, the hours worked by the Applicant during his employment, and whether he required any accommodations. Hence, it cannot be said that the fact that the Applicant worked after his minimum qualifying period triggered a routine determination by the General Division that he was ineligible for a disability pension. The Applicant has not satisfied me that there is a reasonable chance of success under this ground.

(d) Failure to apply *Villani*

[26] The Representative alleges that the General Division erred in failing to properly apply *Villani,* in that it "expanded [it] in a creative way resulting in denial of the appeal". I find this submission to be somewhat ambiguous and without sufficient particularity to

enable me to properly assess whether leave ought to be granted. The Applicant has not satisfied me that there is a reasonable chance of success under this ground.

(e) Failure to apply *Klabouch*

[27] The Representative alleges that the General Division erred in failing to apply paragraphs 14 to 17 of *Klabouch* v. Canada (Social Development) 2008 FCA 33. I find these submissions duplicate the Representative's submissions regarding *Inclima* and to that extent, the Representative has not satisfied me that there is a reasonable chance of success.

[28] The Representative further alleges that the General Division "did not follow the natural justice process" set out in *Klabouch*. In her response filed on February 28, 2014, she explains that the General Division should have been composed of a medical doctor, as only an expert can understand the Applicant's "disease process and its complications". She submits, for instance, that a one-person Chair at a hearing is not experienced with the IDC-9 Codes and could not have come to a valid "expertise conclusion". She submits that an expert would have appreciated that, once the Applicant had been diagnosed as being "totally disabled" in 2000, he would encounter recurring health issues in connection with the diagnosis. *Klabouch* does not stand for this proposition. Indeed, it is an applicant's capacity to work and not the diagnosis of his disease that determines the severity of the disability under the *Canada Pension Plan.* In any event, I see that the General Division was aware of the diagnosis, although found that it did not arise until well after the minimum qualifying period.

(f) Omission of facts and failure to consider all of the evidence

[29] The Representative submits that the General Division failed to consider all of the evidence and facts before it. The Representative again refers to the documents which she alleges she attempted to file with the General Division before the hearing formally commenced. She wrote that "evidence was submitted prior to the hearing and was not even mentioned in the decision. This evidence was partially reviewed and denied". She notes three particular omissions and wrote:

> Primary diagnosis utilizing the IDC coding which was presented is 720 to 721.3___which is Spondyloarthropathy and that the secondary diagnosis 338.4___due to Chronic pain since the beginning of the onset of his symptoms in 2000 and not 740 or 759 which refers to a congenital anomalies. Primary diagnosis are what is used as a first point of reference for disability benefits.
>
> The evidence that ought to have been relied upon by the Chair was the IDC documents itself and that was not done.
>
> The Chair refered to section #40 and #42 in her decision as proof that [the Applicant] had lucrative contract with Corrections Canada as evidence of working pass the Appellant MPQ and used to denied benefits instead of using the entire evidence that the [Applicant] tried to return to work and only earn less than a ¼ of his contract before he was dismissed due to the inability to perform his duties because of his health related issues. (*sic* throughout the submissions*)*

[30] The Representative further submits that the General Division erred in finding that there was a "troubling lack of medical evidence submitted from the Appellant's physicians during the period from 2001 to the MQP date of December 31, 2006". She submits that this finding is contradicted by the evidence set out at paragraphs 18, 19 and 21 of the decision. Paragraph 18 deals with medical reports dated December 21, 2000 and May 24, 2001 of Dr. W. Gittens, a neurosurgeon; paragraph 19 deals with a medical report dated April 4, 2001 of Dr. E. Morris; and paragraph 21 deals with a medical report dated July 2001 of Dr. J. Crosby, a neurologist. While the Representative did not refer to it, paragraph 22 deals with a lumbar spine x-ray of February 8, 2006. Otherwise, the General Division did not refer to any other evidence between July 2001 and February 8, 2006.

[31] The General Division characterized the medical evidence between 2001 and December 31, 2006 as a "lack of medical evidence". There was some evidence before it, rather than an absence of medical evidence. Therefore, it cannot be said that the General Division erred in stating there was a "lack of evidence". The Representative has not satisfied me that there is a reasonable chance of success on this particular submission.

[32] I note that there was more evidence for this timeframe than the General Division suggests. There were in fact a number of consultation reports, an operative report and some diagnostic examinations which were conducted during the years 2000, 2004, 2005 and 2006,

but neither the General Division nor the Representative referred to these. There is no suggestion from the Representative however that these medical consultations were relevant to the Applicant's overall disability. It is well established in the jurisprudence that a decision-maker is not required to refer to all of the evidence before it in its decision.

[33] In *Simpson v. Canada (Attorney General),* 2012 FCA 82, the applicant's counsel in that case had identified a number of medical reports which she said that the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the Applicant's application for judicial review, 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 fact that the General Division may not have referred to all of the evidence before it in its decision does not qualify as an erroneous finding of fact or as a legal error.

[34] Had the evidence which the Representative alleges was omitted been material and relevant to the Applicant's disability, that might have changed the complexion of this matter. As I referred to above, it is an applicant's capacity to work and not the diagnosis of his disease that determines the severity of the disability under the *Canada Pension Plan: Klabouch.*

[35] I notice again that part of these submissions duplicate the Representative's submissions regarding *Inclima* and to that extent, the Representative has not satisfied me that there is a reasonable chance of success on this ground of appeal.

APPEAL

[36] 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 sole ground upon which leave has been granted, namely, that the General Division may have failed to observe a principle of natural justice, what is the applicable standard of review

c) Did the General Division fail to observe a principle of natural justice

d) If so, what is the appropriate remedy, if any?

[37] 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 (other than of course if the hearing should proceed by written questions and answers).

CONCLUSION

[38] The Application is granted.

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

Janet Lew
Member, Appeal Division