Citation: *S. E. v. Minister of Employment and Social Development*, 2015 SSTAD 713

Appeal No. AD-15-291

BETWEEN:

S. E.

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 8, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated February 22, 2015. The General Division found the Applicant to have a severe and prolonged disability, with an onset in October 2012, and that payments of a disability pension should commence as of February 2013. Counsel for the Applicant filed an Application Requesting Leave to Appeal to the Appeal Division on May 20, 2015. The Applicant submits that the minimum qualifying period ought to be January 1, 2010 and that payment of the disability pension therefore ought to commence sometime within the range of January 1, 2010 and December 31, 2012. To succeed on this application, the Applicant must satisfy me that the appeal has a reasonable chance of success.

SUBMISSIONS

[2] Counsel for the Applicant submits that the General Division committed an error of fact and law, in establishing dates of onset of disability and payment of October 2012 and February 2013, respectively.

[3] Counsel cites paragraph 9 of the decision of the General Division, which states that the Tribunal had to decide whether it was more likely than not that the [Applicant] had a severe and prolonged disability on or before the date of the minimum qualifying period. Counsel submits that the General Division erred in its calculation of the minimum qualifying period, as she calculates it to be January 2010. She also submits that "the MQP is stated to be Jan 1 2010 to Dec 31 2012" and that the payment of benefits therefore ought to fall within this range.

[4] Counsel submits that the General Division came to the date of onset of disability of October 2012 in an arbitrary manner, without considering the totality of the evidence before it. She submits that the General Division failed to articulate in its reasons how it arrived at the date of onset of disability.

[5] Counsel submits further that:

> While the Applicant had a further devastating injury in October 2012, the medical and other evidence, on balance of probabilities supports the commencement of the severe and prolonged disability to be at the beginning of the MQP of Jan 1 2010, given the original injury date of July 2009 that broke all the bones in the lower left leg, crushed foot and ankle and caused substantial soft tissue, nerve damage, swelling, ulcers, arthritis and (*sic)* in the injured areas.

[6] She submits that the evidence relied upon by the General Division to support a finding of disability applied equally before and after the further injury in October 2012.

[7] The Respondent has not filed any submissions.

ANALYSIS

[8] 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 and in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, the Federal Court of Appeal found that an arguable case at law is akin to determining whether legally an application has a reasonable chance of success.

[9] Subsection 58(1) of the *Department of Employment and Social Development Act* ("DESDA") 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;
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> (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.

[10] 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. Counsel for the Applicant has raised a number of issues. I will deal with each in succession.

a) Minimum qualifying period

[11] The minimum qualifying period establishes the latest date when an applicant is required to be found disabled for the purposes of assessing entitlement under the *Canada Pension Plan*. An applicant could have an onset of disability well before the minimum qualifying period and be entitled to a disability pension. On the other hand, if the disability arises after the minimum qualifying period, there is no entitlement to a disability pension.

[12] Counsel for the Applicant now says that the minimum qualifying period is January 2010, or alternatively, sometime between January 1, 2010 and December 31, 2012. I note that the General Division wrote that the parties agree that the minimum qualifying date is December 2012. Counsel does not allege that the General Division was mistaken about the parties' position on the minimum qualifying period at the hearing of the appeal. However, as this matter raises an error of law that might have been made on the part of the General Division, it may be moot as to whether or not the parties agreed to a minimum qualifying period. I will consider whether this issue might raise a reasonable chance of success.

[13] Section 19 of the *Canada Pension Plan* stipulates that proration is only available upon the occurrence of a triggering event, which in this case would be the onset of disability. Counsel effectively submits that there is a prorated date of January 2010. In other words, the General Division would have had to have found the onset to disability to have occurred sometime in January 2010. Yet, this cannot have been the case, as counsel suggests that causation for the Applicant's disability under the *Canada Pension Plan* originates with a motor vehicle accident that occurred on July 14, 2009.

[14] I am mindful too that counsel suggests that the onset of disability occurred on January 1, 2010, but counsel has not provided any factual or evidentiary basis for this date. I can only assume that counsel has calculated the minimum qualifying period to be January 1, 2010, as this coincides with the maximum retroactivity of fifteen months from the date of application for disability benefits, for a deemed disability.

[15] Paragraph 42(2)(b) of the *Canada Pension Plan* states:

> 42(2) *When person deemed disabled* – For the purposes of this Act,
>
> . . .
>
> (b) a person is deemed to have become or to have ceased to be disabled at the time that is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person – including a contributor referred to in subparagraph 44(1)(b)(ii) – be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made. (my emphasis)

[16] The date when a person is deemed disabled is contingent upon the making of any application for a disability pension, but it does not necessarily coincide with the actual onset of disability, nor should it be confused with the minimum qualifying period. Provided that an applicant became disabled as defined by the *Canada Pension Plan* by his or her minimum qualifying period, he or she would qualify for a disability pension. Subparagraph 42(2)(b) arose to provide some actuarial certainty; without maximum retroactivity provisions, there could be enormous strains on the Canada Pension Plan in instances where large numbers of applicants make late applications for disability pensions, years or even decades after the onset of their respective disabilities.

[17] In some instances, a later minimum qualifying period can be advantageous, as it provides a longer window of opportunity by which an applicant can be found disabled. Having a later minimum qualifying period does not define the onset of the disability, as it is the date of the making of any application which determines the deemed date of disability.

[18] The *Canada Pension Plan* has a strict formula for calculating the minimum qualifying period. Paragraph 44(2)(b) of the *Canada Pension Plan* also sets out how the minimum qualifying period is calculated. The calculation is based in part on when an applicant made valid contributions to the Canada Pension Plan. The minimum qualifying period has a definitive date. There is no range of dates available for a minimum qualifying period. There is no suggestion by counsel that the General Division applied the wrong formula.

[19] Given the above considerations, the Applicant has not satisfied me that there is a reasonable chance of success under this ground.

(b) Date of onset of disability

[20] Counsel for the Applicant submits that the General Division erred in determining the date of onset of disability and submits that, based on a balance of probabilities and the evidence before it, the General Division should have found the Applicant disabled as of January 2010. Counsel has not provided me with any specific evidentiary or legal basis for this submission. Indeed, counsel's acknowledgment that there was a "further devastating injury in October 2012" seems to undermine her submissions that there is no support for a date of onset of October 2012.

[21] Counsel submits that the General Division did not assign the appropriate weight to some of the evidence. The Federal Court of Appeal has previously addressed this submission in other cases that the Pension Appeals Board failed to consider all of the evidence or have not assigned the appropriate amount of weight to the evidence. In *Simpson v. Canada (Attorney General),* 2012 FCA 82, the Applicant's counsel identified a number of medical reports which she said that the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted. The Federal Court of Appeal 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".

[22] Counsel further submits that the General Division came to the date of onset of disability of October 2012 in an arbitrary manner, without considering the totality of the evidence before it. She submits that the reasons of the General Division are deficient in explaining the date of onset of disability. In fact, at paragraph 60 of its decision, the General Division explained how it determined the date of onset of October 2012. It found the Appellant had fallen and was further disabled as a result.

[23] While the General Division may not have exhaustively referred to nor analyzed each medical record before it, the General Division did not come to its decision in a vacuum. The General Division considered and referred to some of the medical opinions, and also

noted that it considered the limitations set out in the Applicant's questionnaire, the occupational therapist's report and the Applicant's testimony. In any event, I note the remarks 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).

[24] Essentially, counsel is requesting that I re-weigh the evidence and come to a different conclusion than that made by the General Division. This is beyond the scope of a leave application. The DESDA does not contemplate a reassessment of the evidence before the General Division at the leave stage. The DESDA requires an applicant to satisfy the Appeal Division that there is at least one reviewable error that has a reasonable chance of success. The Applicant has not done so under this ground.

(c) Payment of disability pension

[25] The General Division wrote that, for payment purposes and, according to section 69 of the *Canada Pension Plan*, payments therefore commenced four months after the date of disability which in this case was February 2013.

[26] Counsel submits that the payment of the disability pension ought to have commenced sometime between January 1, 2010 and December 31, 2012, rather than four months later in February 2013. Counsel did not provide any legal or factual authority for the submission that the General Division did not comply with section 69 of the *Canada Pension Plan,* or that it somehow exceeded its authority or jurisdiction in determining the commencement date of a disability pension. Counsel also did not provide any explanation as to how she came to a different calculation. Absent any particulars as to how the General Division allegedly erred, or how counsel came to a different calculation for the

commencement of payment of a disability pension under section 69 of the *Canada Pension Plan*, the Applicant has not satisfied me that there is a reasonable chance of success.

CONCLUSION

[27] The application for leave is refused.

Janet Lew
Member, Appeal Division