Citation: *M. K. v. Minister of Employment and Social Development,* 2015 SSTAD 795

Appeal No. AD-15-263

BETWEEN:

**M. K.**

Applicant

and

**Minister of Employment and Social Development**
**(formerly Minister of Human Resources and Skills Development)**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division – Leave to Appeal Decision

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SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: June 23, 2015

## INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated February 5, 2015. The General Division determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan,* as it found that her disability was not "severe" at her minimum qualifying period of December 31 2011. The Applicant filed an application requesting leave to appeal on May 11, 2015. To succeed on this application, she must show that the appeal has a reasonable chance of success.

## ISSUE

[2] Does the appeal have a reasonable chance of success?

## SUBMISSIONS

[3] The Applicant seeks leave on two grounds: that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, and that it also based its decision on an erroneous finding of fact that it made in a capricious manner and without regard for the material before it.

[4] The Applicant submits that the decision does not reflect the testimony given in the course of the teleconference hearing on January 6, 2015. She submits that most of the discrepancies are correctly stated in physician's letters, tests or previous submissions. She cites three particular examples:

(i) She had a series of back injections and back surgery and still does not have satisfactory pain relief;

(ii) She had a series of injections involving both shoulders and has not had any significant relief; and

(iii) She also had injections involving her right knee and will be seeing another physician on June 10 for two more injections.

[5] The Applicant states that the only time she is "anywhere near comfortable" is when she is in a recliner with a pillow under each armpit and has a down pillow under her knees.

[6] The Respondent has not filed any written submissions.

**THE LAW**

[7] 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). The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[8] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out 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.

[9] The Applicant needs to satisfy me that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted.

**ANALYSIS**

**(a) Natural justice**

[10] Although the Applicant submits that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, she has not

set out any supporting details as to how the General Division might have failed to do so. An applicant ought to, at the very least, set out some bases for the leave application beyond making a general statement that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, without having the Appeal Division speculate as to what that failing might be. The Application is deficient in this regard and I am not satisfied that the appeal has a reasonable chance of success on this ground.

**(b) Erroneous findings of fact**

[11] Subsection 58(1) of the DESDA does not require that the erroneous finding of fact be made in both a capricious manner and without regard for the material before it. This would require the General Division to have acted conjunctively, when the legislation simply requires an erroneous finding to have been made in either manner.

[12] The Applicant alleges that the General Division based its decision on erroneous findings of fact made in a capricious manner and without regard for the material before it. She cites three specific examples, each of which involves injections to various areas, from which she has yet to realize any appreciable or marked improvement in her symptomology. She has not however made any specific allegations as to what erroneous findings of fact the General Division might have made.

[13] The Applicant also alleges that the findings of fact made in the decision do not reflect the evidence she gave at the hearing, but she did not provide any evidence to support these allegations. For instance, she could have pointed to any specific references in the recording of the hearing, but she did not do so.

[14] Here, the Applicant suggests that the General Division erred in its findings regarding injections she has had. The only references to injections are at paragraphs 24, 26, 27, 55, 57 and 61 of the decision of the General Division.

[15] At paragraph 24 of its decision, the General Division stated that it can take up to a year for a joint injection.

[16] At paragraph 26 of its decision, the General Division wrote that Dr. Boyd does not feel that she is a candidate for any more back surgery and that she should continue with injections.

[17] At paragraph 27, the General Division wrote that Dr. Kwee has been giving the Applicant injections into her shoulder and that she should have a shoulder replacement on the left shoulder.

[18] At paragraph 55, the General Division wrote that Dr. Christian Di Paola reported it would be reasonable for her to get an L5 selective nerve root injection on the right side, and that if the Applicant did not get relief, he would feel confident in proceeding with a limited decompression of the L3/L4 stenotic region without a fusion.

[19] At paragraph 57, the General Division wrote that the Applicant had undergone a steroid injection around her L5 nerve root. The Applicant is noted to have reported that this markedly reduced the pain in her knee and that it has been improving.

[20] At paragraph 61, the General Division wrote that the Applicant had just had a cortisone injection and it was noted the left AC joint had arthritis as well.

[21] Each of these paragraphs formed part of the evidence, and hence, were not strict findings of fact *per se.* If we were to assume, for the purposes of this leave application only, that indeed these paragraphs represented findings of fact, the facts set out by the General Division parallel those facts advanced by the Applicant in her leave application, other than perhaps at paragraph 57. In paragraphs 24, 26, 27, 55 and 61, the General Division referred to the injections the Applicant has had, but there is no indication in the decision that the injections alone have caused any marked improvement in her symptoms.

[22] There does appear to be some discrepancy between what the General Division wrote in paragraph 57, and the Applicant's submissions. The General Division suggested in paragraph 57 that the injections led to some improvement in her right knee, whereas the Applicant submits that she continues to have ongoing symptomology and denies any improvement in her right knee. However, when reviewing the medical records, the consultation report dated November 4, 2009 of Dr. Peter J. O'Brien, an orthopaedic surgeon (at Document GT1, page

134), indicates that the Applicant had undergone a steroid injection approximately one month ago around her L5 nerve root. The Applicant apparently reported that this markedly reduced the pain in her knee and that it has been improving since then. I am not satisfied that the appeal has a reasonable chance of success on this ground.

**(c) Concussion**

[23] If I were to restrict myself on this leave application to considering only those grounds alleged by the Applicant, I would readily dismiss the application, as she has not satisfied me that the appeal has a reasonable chance of success on the grounds which she has set out. However, that does not conclude the matter, as I may find that the General Division might have erred in law, whether or not the error appears on the face of the record.

[24] In the Questionnaire accompanying the Applicant's application for a Canada Pension Plan disability pension, she pointed to a number of illnesses or impairments which prevent her from working. She indicated that she suffers from post-concussion syndrome (she has had five concussions in seven years), amongst other things (Document GT1, pages 44 to 50). In the accompanying medical report dated December 29, 2008, Dr. J. Lorne (a locum for the Applicant's family physician, as noted at page 207) was of the opinion that the Applicant was "severely limited by back condition and post-concussive syndrome". The hearing file before the General Division also included a Fraser Health Concussion Clinic Report dated November 17, 2008, which was prepared by an occupational therapist (Document GT1, pages 101 to 106).

[25] In a letter dated January 4, 2010, in which she appealed the initial denial of the Minister's decision, she indicated that the final basis for her appeal is that she was still suffering from post-concussion syndrome (Document GT1, page 27).

[26] In her Notice of Appeal filed with the Office of the Commissioner of Review Tribunals in October 8, 2010 (Document GT1, pages 7 and 8), the Applicant noted one of the reasons she was seeking an appeal from the reconsideration decision of the Minister was that:

> Nowhere in the original decision or in the appeal decision has any mention been made of the post concussion syndrome that also prevents [her] from

> working. [She has] recall problems, words, problems with numbers, reading comprehension, difficulty following directions, and difficulty multitasking.

[27] The Applicant filed additional information with the Social Security Tribunal on April 3, 2014 (Document GT3, pages 2 to 5). In an undated letter, the Applicant addressed how her post-concussion syndrome affected her. The Applicant's spouse also prepared a brief letter, outlining his observations (Document GT3, page 6). The Applicant also included a Disability Tax Credit Certificate; her physician Dr. Eadie completed Part B of the Certificate, presumably in early 2014. The handwritten portion is largely illegible, but appears to read that the Applicant "needs supervision and constant re direction … is not independent". Dr. Eadie also mentioned the Applicant's memory and diagnosed her with brain damage (Document GT3, page 14).

[28] On July 6, 2014, the Applicant filed additional information with the Social Security Tribunal where she discussed the status of her concussion (Document GT5, page 4). She wrote:

> I did have some improvement (not much though) from my concussion. The improvement was taken back after my surgery. My husband and family advised me I seemed as confused with fine detail, memory and time loss as I was after the accident. There has been some improvement but I still do not pay our bills, don't cook very much at all, and don't watch my grandchildren alone. My daughter only lets them visit if there is some other adult there as well as I get easily distracted.

[29] Despite the Applicant's submissions regarding her post-concussion syndrome, the medical evidence and the General Division's discussion of her concussion in its evidence section at paragraphs 23, 47, 48 and 63, the General Division did not analyze the effects of her concussions on her functionality or capacity regularly of pursuing any substantially gainful occupation – whether alone or cumulatively with the remainder of her disabilities.

[30] Notwithstanding the fact that the General Division appears to have otherwise conducted a thorough examination and analysis of the medical and oral evidence before it, there is an arguable case that the General Division may have overlooked one of the central issues or grounds of appeal before it, where the Applicant's concussion and concussive syndrome is concerned. I am satisfied that this constitutes a ground upon which the appeal has a reasonable chance of success.

**APPEAL**

[31] 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, did the General Division commit an error of law?

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

[32] I must stress that the hearing of the appeal is not a *de novo* hearing. By that, I mean that I will not be taking evidence or hearing from witnesses.

[33] 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). If a party requests a hearing other than by written questions and answers, I invite that party to provide a preliminary time estimate for submissions.

**CONCLUSION**

[34] The Application is granted.

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

*Janet Lew*
Member, Appeal Division