Citation: *Y. P. v. Minister of Employment and Social Development,* 2015 SSTAD 797

Appeal No. AD-15-321

BETWEEN:

Y. P.

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 24, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated May 7, 2015. The General Division determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan,* as it found that she did not have a severe disability at her minimum qualifying period of December 31, 2014. The representative for the Applicant, a paralegal, filed an Application Requesting Leave to Appeal to the Appeal Division on June 1, 2015. To succeed on this application, the Applicant must establish that the appeal has a reasonable chance of success.

SUBMISSIONS

[2] The Representative for the Applicant submits that the General Division erred in assessing the Applicant's claim for a disability pension. The Representative submits that the medical evidence on file supports the severity of the Applicant's overall condition, which consists of a severe low back disability, fibromyalgia, somatic symptom disorder and depression. The Representative also submits that the Applicant has extreme difficulty with memory and concentration, due to heavy doses of medication prescribed by her psychiatrist.

[3] The Representative submits that the medical opinions of the Applicant's primary treating psychiatrist as well as other primary treating practitioners were not given sufficient weight.

[4] The Representative filed additional records with the Social Security Tribunal on June 16, 2015, including a one page medical report dated June 16, 2015 from the Applicant's family physician and an MRI report of the Applicant's cervical, thoracic and lumbar spine, dated June 8, 2015. The Representative submits that the MRI shows deterioration in the Applicant's spine condition. The Representative advised that she would be obtaining an updated medical report from the treating physician to support the findings.

[5] The family physician reported that the Applicant has been experiencing ongoing severe back pain radiating to her left lower limb. She had been seen by a pain specialist and was placed on pain medication. She was sent for spinal x-rays recently and found to have

degenerative changes to her cervical spine, as well as advanced degenerative changes to the lumbar spines with total loss of disc space. The family physician was of the opinion that the Applicant was unlikely to require surgical intervention. He advised that the Applicant was awaiting an appointment with a back orthopaedic surgeon.

ANALYSIS

[6] 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.

[7] 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;
>
> (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.

[8] I need to be satisfied 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.

(a) Weight of medical evidence

[9] Counsel submits that the General Division did not place sufficient weight on some of the medical 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 had 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". I am not satisfied that this issue raises an arguable case or that the appeal has a reasonable chance of success on this ground.

(b) Assessment

[10] The Representative submits that the General Division erred in its assessment. Essentially she calls for a reassessment of the evidence that was before the General Division. For the purposes of a leave application, I am restricted to considering only those grounds of appeal which fall within subsection 58(1) of the DESDA. Generally, the subsection does not permit me to undertake a reassessment of the evidence that was before the General Division.

[11] I am not satisfied that the appeal has a reasonable chance of success under this ground.

NEW RECORDS

[12] The Representative recently filed a medical opinion and MRI report with the Social Security Tribunal. The General Division did not have these reports before it, as they were prepared only relatively recently. If the Applicant is requesting that we consider these additional reports as well as any which she anticipates obtaining, re-weigh the evidence and re-assess the claim in her favour, I am unable to do so at this juncture, given the constraints of subsection 58(1) of the DESDA. Neither the leave application nor the appeal provides any opportunities to re-hear the merits of the matter. In the event that the Applicant intends to file any "new" opinions or records, she should note they ought to fall into or relate to one of the enumerated grounds of appeal set out under subsection 58(1) of the DESDA.

[13] If the Applicant intends to file any additional medical records in an effort to rescind or amend the decision of the General Division, she must comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations*, and must also file an application for rescission or amendment with the same Division that made the decision. There are strict deadlines and requirements that must be met to succeed in an application for rescinding or

amending a decision. Subsection 66(2) of the DESDA requires an application to rescind or amend a decision to have been made within one year after the day on which a decision is communicated to a party, while paragraph 66(1)(b) of the DESDA requires an applicant to demonstrate that the new fact is material and that it could not have been discovered at the time of the hearing with the exercise of reasonable diligence. Under subsection 66(4) of the DESDA, the Appeal Division in this case has no jurisdiction to rescind or amend a decision based on new facts, as it is only the Division which made the decision which is empowered to do so.

CONCLUSION

[14] The application for leave to appeal is refused.

Janet Lew
Member, Appeal Division