Citation: *P. D. v. Minister of Employment and Social Development*, 2015 SSTAD 866

Appeal No. AD-15-286

BETWEEN:

P. D.

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: July 10, 2015

INTRODUCTION

[1]   The Applicant seeks leave to appeal the decision of the General Division dated April 23, 2015. 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 January 31, 2012, the month before a retirement pension became payable.

[2]   The Applicant filed an Application Requesting Leave to Appeal to the Appeal Division on June 22, 2015. The Applicant submitted that the General Division made errors pursuant to paragraph 58(1)(c) of the *Department of Employment and Social Development Act* (DESDA)*,* in that it based its decision on erroneous findings of fact made without regard for the material before it. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

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

SUBMISSIONS

[4]   The Applicant submits that his disability is severe and prolonged within the meaning of the *Canada Pension Plan,* due to the worsening effects of a colectomy which started before January 31, 2012, although he was not diagnosed with Crohn's disease until later in the year. The Applicant submits that he has an arguable case, as the General Division failed to refer to the fact that he has been diagnosed with Crohn's disease. The Applicant notes that his family physician and specialists query the decision of the General Division, particularly as he frequents washrooms with over 20 visits per day. He notes that there is no relief from this condition. He submits that there is no work environment that accommodates his medical needs.

[5]   The Respondent did not file any written submissions.

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 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.

[9]   The Applicant submits that the General Division erred as it failed to cite the fact that he has Crohn's disease, his primary disabling condition. He notes, for instance, that it is excessively disruptive, as it results in frequent visits to the bathroom, something which he refutes any employer would accommodate. He also notes that his family physician and specialists are supportive of his claim for a disability pension.

[10]   While it is true that the General Division did not specifically mention Crohn's disease, the General Division was cognizant of the fact that the Applicant has 20 to 30 bowel movements per day. The General Division made reference to this evidence at paragraphs 14, 16 and 17 of its decision. The General Division characterized this as the "worsening effects of a total colectomy". The General Division noted the Applicant's

evidence and his family physician's opinion that the Applicant's condition continued to worsen, up to the day he stopped working.

[11]   While the General Division did not specifically cite Crohn's disease, the Federal Court of Appeal has stated that it is the capacity to work and not the diagnosis or the disease description that determines the severity of the disability under the *Canada Pension Plan: Klabouch v. Canada (Social Development),* 2008 FCA 33 at para. 14. That said, it might have been helpful towards understanding the extent of the Applicant's disability had the General Division referred to the Applicant's diagnoses.

[12]   Overall, I am not satisfied that there is an arguable case or that the appeal has a reasonable chance of success, given that the General Division also found that the Applicant had "considerable residual work capacity after his MQP", as evidenced by the fact that the Applicant continued to work for approximately 10 months after his minimum qualifying period of January 2012 and the fact that he had earnings of approximately $50,000 in 2012.

[13]   A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. The General Division concluded that the Applicant's employment earnings of approximately $50,000 in 2012 were a good indicator of a substantially gainful occupation. The General Division found that these earnings supported a "considerable residual work capacity after his [minimum qualifying period]". So, while the General Division may not have specifically noted Crohn's disease, despite describing the symptoms which the Applicant endured, at the same time, it found that he was able to work for about 10 months after his minimum qualifying period and that he had considerable residual work capacity within this timeframe.

CONCLUSION

[14]   Given the considerations above, the Application for leave to appeal is refused.

                                                                    Janet Lew
                                                                    Member, Appeal Division