Citation: *K. S. v. Minister of Employment and Social Development*, 2015 SSTAD 868

Appeal No. AD-15-267

BETWEEN:

K. S.

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 February 18, 2015. The General Division determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan,* as it found that his disability was not "severe" at his minimum qualifying period of December 31, 2010. The Applicant filed an application requesting leave to appeal on May 12, 2015. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

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

SUBMISSIONS

[3] The representative for the Applicant submits that the General Division made the following errors, that it:

(i) based its decision on an erroneous finding of fact that was made in a perverse or capricious manner or without regard for the material before it;

(ii) erred in law; and

(iii) exceeded its jurisdiction by making a medical diagnosis and not a finding of fact.

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

THE LAW

[5] 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.

[6] 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.

[7] 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.

ANALYSIS

(a) Erroneous finding of fact

[8] The Applicant submits that the General Division based its decision on an erroneous finding of fact. His representative refers to paragraph 33 of the decision of the General Division, which reads:

> … The Tribunal finds that the Appellant is not incapable regularly of pursuing any substantially gainful occupation because he did not mitigate his treatment options with regards to his mental health condition and its relationship to his chronic pain after it had been recommended by most doctors who evaluated him.

[9] The representative notes that at paragraph 31 of the decision, the General Division wrote that, "…a trial of Effexor at the starting dose was not adequate treatment for the Appellant's posttraumatic stress disorder, anxiety and depression". The representative submits that this does not address the Applicant's chronic pain, headaches and sensitivity to light and noise – his primary disabling conditions. The representative submits that the Applicant's mental health may be a contributing factor, but he has never claimed that this condition alone prevents him from working. While that may be so, at the same time, the

representative does not suggest that the General Division failed to address the Applicant's chronic pain, headaches and sensitivity to light and noise.

Indeed, at paragraph 30 of its decision, the General Division recognized that the severe posttraumatic stress disorder, depression or anxiety were not the primary features in the Applicant's overall disability, as they "appeared to be contributing to [the Applicant's] condition".

[10] I note that the General Division found that "numerous doctors have suggested evaluation and treatment for the Appellant's mental health issues" and that it was "unreasonable for the Appellant not to follow suggestions of antidepressant/antianxiety medications and consultations with a psychologist for his evaluation and treatment" (at paragraph 31 of the decision). When paragraphs 31 and 33 are read together, one could infer that "most doctors" had suggested antidepressant and antianxiety medications and consultations with a psychologist for evaluation and treatment. The General Division did not list which doctors it might have been referring to when it described "most doctors".

[11] The representative submits that it was an error for the General Division to have found that "most doctors" who evaluated the Applicant made recommendations regarding treatment of his mental health condition. The representative submits that, when reaching its conclusion that the Applicant had failed to mitigate, the General Division relied primarily on (1) a report dated April 6, 2009 that was written by Mary Kemp, an occupational therapist, and (2) a consultation report dated October 29, 2009 of Dr. J.R. Capstick, an anaesthesiologist, referred to at paragraphs 31 and 21 of the decision, respectively. (Paragraph 21 of the decision refers to a medical report prepared by Dr. Berkman, anaesthesiologist, so I assume that the representative is referring to paragraph 15 of the decision for the summary of Dr. Capstick's report.)

[12] There may be other physicians, but I note that Dr. Javidan, a neurologist, suggested in his consultation report dated April 7, 2010 that the Applicant might benefit from psychological treatment (Document GT1, page 72). Dr. Berkman also made suggestions in his consultation report dated August 19, 2010, regarding whether the Applicant might benefit from a mood-stabilizing drug, but he made it clear that this was something that he

would leave to the family physician (Document GT1, page 75). While his medical-legal report of June 5, 2012 was prepared after the minimum qualifying period, Dr. Berkman also made recommendations for future treatment. Options included cognitive behavioural therapy, ongoing medication, memory training and probably vocational training (Document GT1, page 102). In another medical-legal report, dated February 3, 2013, Dr. Berkman again recommended psychological counselling, as a means of helping the Applicant cope with his pain; there was no mention that this recommendation was intended to address his depression or anxiety (Document GT2, page 29). On February 28, 2014, Dr. Berkman noted that he had recommended that the Applicant follow up with the Nanaimo Regional General Hospital's Interdisciplinary Pain Management Clinic's psychologist, but due to the Applicant's memory problems, he had missed quite a few appointments (Document GT4, page 3). In November 2014, Jen Mazur, a registered psychologist, strongly suggested that the Applicant receive a neuropsychological assessment to gain a complete picture of his strengths and deficits (Document GT10, page 6).

[13] The representative submits that the General Division erred in finding that the Applicant had failed to "mitigate his treatment options with regards to his mental health condition", by relying on the opinion of Mary Kemp. She wrote in her report of April 6, 2009 that the Applicant needed psychological assistance with his frustrations with his pain and perceived level of disability. She recommended a psychologist, but noted that the Applicant preferred to attend a chronic pain group. The representative submits that Ms. Kemp lacked appropriate medical training and was therefore unqualified to provide a medical opinion. In fact, Ms. Kemp appears to also be a physiotherapist, so while she is not a medical doctor, it cannot be said that she does not have any medical training. I agree however that, either way, she may not have the appropriate expertise to provide any advice and treatment recommendations where one's mental health is at issue. Apart from that, the representative submits that a careful reading of Ms. Kemp's report shows that the Applicant was indeed compliant with all of the treatments that were recommended by his physicians.

[14] The representative submits that while it is true that Dr. J.R. Capstick was of the opinion that the Applicant might benefit from counselling, there is no indication in his report

that he discussed this subject with the Applicant or that the Applicant declined treatment. The representative refers to Dr. Capstick's opinion:

> Finally, he may benefit from Mental Health referral for counselling and assessment of his anxiety disorder. Unfortunately, due to funding cutbacks, we no longer have a clinical psychologist affiliated with our clinic.

[15] The representative further submits that as Dr. Capstick sent his consultation report to the family physician, there is no evidence that the Applicant was even aware of Dr. Capstick's opinion that he might benefit from counselling. The representative submits that there is no evidence from the family physician that the Applicant ever declined any treatment that was recommended.

[16] It is unclear from the decision of the General Division as to whether the Applicant addressed the issue of his awareness of any recommendations which Dr. Capstick might have made regarding counselling. If the Applicant was unaware of this particular recommendation from Dr. Capstick, this raises an arguable case as to whether the Applicant reasonably followed treatment recommendations that he seek out counselling.

[17] The representative notes that the Applicant saw three psychologists. While they were seen after the minimum qualifying period had passed, the representative submits that the fact that the Applicant saw them demonstrates that he did not decline psychological treatment. The representative submits that there is no medical evidence to support a conclusion that the Applicant refused treatment by "most medical doctors who evaluated him". The representative submits that, in fact, the Applicant took advantage of counselling when this form of therapy was made available to him. This raises an arguable ground, as to whether and when an applicant is required to access treatment. Is an applicant required to access treatment recommendations before or soon after the minimum qualifying period, so that he can be seen to have mitigated his treatment options?

[18] The representative notes that the Medical Services Plan of BC does not cover the cost of treatment by a clinical psychologist, but did not make any particular submissions in this regard. I can only infer from this reference to the Medical Services Plan that the Respondent may not have accessed treatment of a clinical psychologist until it was made

available to him, due to financial constraints, though there is no evidence of this or that any counselling or treatment he may have accessed was funded by other means.

[19] To the extent that these submissions simply request a reassessment of the evidence upon which the General Division determined whether the Applicant had mitigated his treatment options, I would refuse leave, as the trier of fact is in the best position in which to assess the evidence. However, if, as the representative submits, that there were only two health caregivers -- one being an occupational therapist/physiotherapist and not a doctor – can it be said that "most doctors" suggested antidepressant and antianxiety medications and consultations with a psychologist for evaluation and treatment? Can it also be said that an applicant failed to mitigate if he may have been unaware of specific treatment recommendations, or if he learned of them, but ultimately did not access treatment options until sometime well after the minimum qualifying period? And, although the Applicant in this case expressed his preference to attend chronic pain groups, did the General Division assess the reasonableness of the Applicant's perceived non-compliance? These considerations raise an arguable case. Overall, I am satisfied that the appeal has a reasonable chance of success, given these considerations.

[20] The representative submits that the General Division failed to give any weight to the report dated June 5, 2012 from Dr. Berkman (Document GT1-95). Despite the fact that Dr. Berkman first saw the Applicant on August 19, 2010 and saw him again during the two years before the minimum qualifying period, the Respondent had argued that the report could not be relied upon because it was written "well after" the Applicant's minimum qualifying period. In fact, the Respondent's submissions that the report of Dr. Berkman cannot be relied upon relates to the physician's subsequent report dated February 2013. There is no indication that the General Division acceded to any submissions or suggestion that it should disregard Dr. Berkman's report(s), owing to the fact that they were prepared after the minimum qualifying period. If that had been the case, that might have qualified as an error. But, as this is simply an issue of the weight assigned to the report, this particular submission does not raise an arguable case. In *Simpson v. Canada (Attorney General),* 2012 FCA 82, 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 the appeal has a reasonable chance of success on this particular ground.

(b) Jurisdiction

[21] The representative submits that the General Division acted beyond its jurisdiction when it went beyond making findings of fact and made a medical diagnosis. The representative points to paragraph 30 of the decision of the General Division, which reads:

> The Tribunal finds it understandable why later treatments by another pain clinic of Botox injections or epidural injections were unsuccessful, as Dr. Capstick had already ruled these out as the cause.

[22] The representative submits that the General Division does not have the jurisdiction to assess the efficacy of the medical treatment (which it submits refers to treatment provided by Dr. Berkman).

[23] To the extent that the General Division rendered an opinion as to why the Botox injections or epidural injections were unsuccessful, that went beyond its expertise and jurisdiction. Be that as it may, I am not satisfied that this raises an arguable ground or that the appeal has a reasonable chance of success on this point, as ultimately the issue as to why certain treatments may not have been successful were not determinative of the final issues.

[24] The representative submits that effectively the General Division rendered an opinion on the efficacy of the Applicant's medical treatment. The statement however does not appear to represent a direct finding by the General Division on the efficacy of the medical treatment itself. Rather, the General Division appears to have adopted the opinions of the medical experts that the treatments had been unsuccessful, as part of its findings. This particular ground does not raise an arguable case, and I am not satisfied that the appeal has a reasonable chance of success on this point.

[25] The representative also points to paragraph 31 of the decision of the General Division, which reads:

> A trial of Effexor at the starting dose was not adequate treatment for the Appellant's posttraumatic stress disorder, anxiety and depression.

[26] The representative submits that this statement represents more than just a finding of fact and that it represents a medical opinion. While the statement could represent a medical opinion, I find that in this case it represents a finding of fact. It was well within the jurisdiction of the General Division to make such a finding of fact, given the evidence before it. Notably, the Applicant had testified that the antidepressant he tried was not effective. His testimony was referred to in the same paragraph. There is a notation in the CPP Medical Report (at Document GT1-47) that Effexor had been discontinued. One could infer, rightly or wrongly, that the antidepressant was ineffective, given that the drug had been discontinued and given the Applicant's ongoing mental health issues. This particular ground does not raise an arguable case, and I am not satisfied that the appeal has a reasonable chance of success on this point.

(c) Error of law

[27] The representative submits that the General Division erred in applying *Lalonde v. Canada (MHRD),* 2002 FCA 211. The representative agrees with the General Division that *Lalonde* requires a tribunal to consider whether an appellant's refusal to undergo treatment is reasonable and what impact that refusal might have on the appellant's disability status, should the refusal be considered unreasonable.

[28] However, the representative submits that although there is no direct evidence that the Applicant ever refused any medical treatment, the General Division inferred that this had been the case because of a discussion the Applicant held with an occupational therapist (comments that were contained in a report by Dr. Capstick), and the Applicant's testimony about the use of antidepressants.

[29] The representative further submits that the General Division failed to explain how it concluded that had the Applicant seen a psychologist in 2009 or 2010 or taken more antidepressants, that it would have had any impact on the Applicant's disability, i.e. that he

would have seen any improvement in his condition. The representative submits that there was no medical evidence before the General Division to support such a conclusion.

[30] There is no disputing that the General Division identified the proper legal test to apply where the issue as to the Applicant's compliance with treatment recommendations is concerned. Essentially what the Applicant is seeking however is a reassessment of what the General Division characterized as the reasonableness of the Applicant's non- compliance with any treatment recommendations. That is a question of judgment best left to the trier of fact, and one with which I am therefore reluctant to interfere. This particular ground, that the General Division made an error of law, does not raise an arguable case, and I am not satisfied that the appeal has a reasonable chance of success on this point.

[31] While the representative has characterized these submissions as an error of law, they could also be characterized as an error of mixed fact and law or as erroneous findings of fact on the part of the General Division. In other words, if, as the representative alleges, there was no direct evidence that the Applicant had ever refused any medical treatment and the General Division made findings otherwise, this could have been characterized as an erroneous finding of fact made without regard for the material before it. However, the representative suggests that the General Division based its decision on "indirect" evidence, including the Applicant's own testimony. The General Division may draw findings of fact based on the evidence before it, irrespective of whether the evidence is considered to be "direct" or "indirect" evidence. As long as there is an evidentiary basis, it can make findings of fact. As such, I am not satisfied that the appeal has a reasonable chance of success on this point.

[32] The representative submits that there was no medical evidence before the General Division for it to have made a finding that the Applicant would have necessarily seen any improvement in his condition had he seen a psychologist in 2009 or 2010 or taken more antidepressants. I do not see how the General Division may have erred in law in relation to *Lalonde*. Generally, as long as recommendations have been made, an appellant is required to comply with them, as he may see some improvement such that it could have an impact on

the severity of his or her disability. The fact that improvement is by no means certain is immaterial to *Lalonde*.

[33] The applicant in *Lalonde* contended that she had been notified by a physiotherapist at the onset of her medical problems that treatment which had been unanimously recommended to her by specialists on several occasions could be harmful to her. The Federal Court of Appeal held that the Pension Appeals Board had failed to determine whether Ms. Lalonde's physical disability was "severe and prolonged". Part of this examination involved considering whether Ms. Lalonde's refusal to undergo physiotherapy treatment was unreasonable and what impact that refusal might have on her disability status should the refusal be considered unreasonable.

[34] These submissions, that there was no evidence that treatment recommendations would have improved the Applicant's condition, do not allow an applicant to escape any requirements that he ought to comply with reasonable treatment recommendations. The issue of reasonableness of compliance is not only relevant but central to any consideration as to whether the Applicant's disability can be considered severe. Reasonableness of compliance can be measured in part on the risks and likelihood of outcomes of the proposed treatment. The General Division appears to have addressed this issue at paragraph 31 of its decision. I am not satisfied that the appeal has a reasonable chance of success on this point.

APPEAL

[35] 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 grounds upon which leave has granted, did the General Division base its decision on any erroneous findings of fact?

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

[36] 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

[37] The Application is granted.

[38] 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