Citation: *J. D. v. Minister of Employment and Social Development*, 2015 SSTAD 869

Appeal No. AD-15-316

BETWEEN:

J. 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 13, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated May 22, 2015. The General Division determined that the Applicant was not eligible to receive a disability pension, as it determined that his disability was not "severe" as defined by the *Canada Pension Plan,* on or before his minimum qualifying period of December 31, 2007. The Applicant's representative, a paralegal, filed an application requesting leave to appeal on May 27, 2015 on behalf of the Applicant. 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 submits that the General Division made the following errors, that it:

(a) erred in law in equating participation in a retraining program with capacity to work, particularly when those efforts at retraining or vocational rehabilitation failed and,

(b) erred in ruling that the Applicant's depression before the minimum qualifying period could not be severe, despite the fact that a diagnosis was made subsequently;

[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) Retraining

[8] The representative submits that attending a retraining program is not tantamount to work capacity. He submits that the work placement/employment that was offered was ultimately refused by the Applicant as a result of his medical limitations and on the basis of the severity of his condition. The representative submits that the evidence shows that the Applicant demonstrated effort through his participation in the labour market re-entry (LMR) program of Workplace Safety & Insurance Board of Ontario (WSIB) to obtain alternate employment. The representative submits that the Applicant attempted vocational rehabilitation and the program failed. These very same submissions were before the General Division (GT2-3 to GT2-4).

[9] The evidence regarding the Applicant's participation in the LMR program is at paragraph 10 of the decision of the General Division, which reads:

> [The Applicant] achieved a Grade 10 in Russia, but through a WSIB Labour Market Re-entry (LMR) program ending in July 2008, he successfully completed 35 weeks of English as a Second Language (ESL) studies. He injured his lower back lifting boxes while working as a butcher's assistant on September 19, 2006 and has not worked since with the exception of a work placement through his LMR program as a car jockey for a seniors' home from June 2 to July 26, 2008. File information notes that he was offered this part time position on a permanent basis but did not accept it as he was taking a vacation for three weeks at the time. He was deemed 'employable' at the conclusion of the WSIB program on July 30, 2008.

[10] And, at paragraphs 19, 20 and 21 of its reasons, the General Division wrote:

> [19] . . . From September 2007 until July 2008, the Appellant partook in a LMR program sponsored by WSIB, which, at its conclusion, he was deemed employable within his heavy restrictions of no heavy lifting and hard labour. The WSIB report also indicated that the Appellant had indeed been offered a part time job following a successful work placement as a car jockey for a seniors' home. . .
>
> [20] . . . The Appellant successfully completed a LMR program less than a year after his injury which led to a job offer. He has had thirty-five weeks of ESL study within that program . . .
>
> [21] Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment *has* been unsuccessful by reason of the person's health condition *(lnclima v. Canada (A.G.),* 2003 FCA 117). It is incumbent upon an Appellant to seek work within his restrictions if evidence of work capacity is evident. <u>The fact that the Appellant completed a comprehensive program of re-training and was offered employment indicates a residual capacity for work and that he should have sought employment within his limitations</u>. He refused the employment for reasons unrelated to his medical condition and there is no evidence that he made other efforts to obtain alternative employment. (My emphasis)

[11] The representative's submissions regarding the evidence do not appear to be supported by the evidence, as set out by the General Division. The representative submits that the Applicant attempted vocational rehabilitation and that ultimately the LMR program failed. Had that been the case, the representative ought to have referred me to the evidence in the hearing file where it shows that the LMR program failed. As it is, the General Division found that not only did the Applicant successfully complete the LMR program,

which ran from September 2007 to July 2008, but that he was also offered a part-time position driving residents of a retirement home to various appointments or events and delivering and picking up items. The General Division also noted that the Applicant refused the part-time employment offer, for reasons unrelated to his medical condition.

[12] The hearing file indicates that while the Applicant had initially refused to consider any job offers until he received three weeks of vacation, according to WSIB notes of a telephone conference with his wife, ultimately the Applicant accepted the part-time employment offer as a car jockey for three hours per day (GT1-106 to GT1-108). In this regard, the General Division may or may not have erred in concluding that the Applicant refused the part-time employment offer (GT1-249 to GT1-250), though it may have been a matter that the Applicant accepted the employment offer but then ultimately did not pursue it, for whatever reason. Either way, it does not mean that the LMR program itself failed.

[13] The evidence suggests that the Applicant did not attempt to work in a part-time capacity as a car jockey after August 1, 2008. His family physician's medical reports dated November 20, 2010 and February 2, 2011 indicate that the Applicant has not worked since his workplace injury in September 2006 (GT1-420 to GT1-423) and in the Questionnaire accompanying his application for a disability pension, the Applicant noted that he had been placed in a LMR plan, "but it failed to help me get re-employed" (GT1- 458). The representative's Final Submissions also indicate that the Applicant did not accept a part-time work placement, and that he never returned to work (GT2-3).

[14] It seems that, at some point, the Applicant's condition deteriorated, as he was unable to sit for longer than 15 minutes or drive for more than 20 minutes at a time. This is reflected in his physician's note of April 24, 2009 (GT1-82). The deterioration in the Applicant's condition may have accounted for the fact that he did not pursue the part-time position as a car jockey. These limitations likely would have impacted his ability to continue working as a car jockey, even if only on a part-time basis. It is unclear precisely when this deterioration arose, but I note that the Applicant was able to complete the LMR training which consisted of 35 weeks of studies in English language training and an 8-week suitable work placement as a car jockey for three to four hours per day up to July 2008, after

the minimum qualifying period had passed. The hearing file indicates that the Applicant was able to attend school for only four hours -- and sometimes only three hours -- per day due to his back.

[15] In other words, this deterioration, to the point that the Applicant could sit for only 15 minutes, would have arisen after the minimum qualifying period had long passed. In assessing the severity of the Applicant's disability, the General Division was required to determine whether the Applicant could be found disabled on or before his minimum qualifying period, and not simply at some point after the minimum qualifying period had passed.

[16] As for the representative's submissions that the General Division equated attendance in a retraining or vocational rehabilitation program as exhibiting work capacity, that does not take into account all the findings made by the General Division in relation to this issue. It was not simply a matter of the Applicant attending a retraining program that led the General Division to conclude that the Applicant held some residual work capacity. Significantly, the General Division made findings about the length of the retraining program, the physical requirements expected of the Applicant, the nature of the program itself, the Applicant's performance upon conclusion of the program, whether any prospective employers considered him capable of performing the work which he performed during the program, and whether this led to any offers of employment.

[17] Ultimately, the General Division required that the Applicant demonstrate that he had been unable to obtain and maintain employment, and that such efforts had been unsuccessful by reason of his health condition. The evidence is uncontested that the Applicant had been offered a part-time position. The Applicant however did not attempt this part-time employment offer, as he was required to do so (*Inclima v. Canada (A.G.),* 2003 FCA 117*),* and it was on this basis that the General Division concluded that the Applicant did not meet the test of a severe disability under the *Canada Pension Plan.*

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

(b) Depression

[19] The representative submits that the General Division erred in ruling that the Applicant's depression before the minimum qualifying period could not be severe, despite the fact that a diagnosis was made subsequently, and despite the fact that the Applicant's family physician was of the opinion that the depression was an early factor (GT2-12 to GT2-15).

[20] In fact, the General Division was aware of the family physician's opinion that depression was an early factor; the General Division referred to this opinion at paragraph 19 of its decision. And, the fact of a diagnosis alone does not determine the severity of a disability. Essentially the representative is asking for a reassessment of the evidence where it relates to the Applicant's depression and to come to a different conclusion than that made by the General Division. I would not interfere with the reassessment undertaken by the trier of fact, as he was best placed to assess the evidence that was before him. In any event, a reassessment is beyond the scope of a leave application. As a starting point, any grounds of appeal ought to address any of the enumerated grounds of appeal under subsection 58(1) of the DESDA. The DESDA requires that there be at least one reviewable error which not only falls into any of the enumerated grounds of appeal under subsection 58(1) of the DESDA, but that the appeal also has a reasonable chance of success. The DESDA does not contemplate a reassessment of the evidence before the General Division at the leave stage.

CONCLUSION

[21] The Application for leave to appeal is refused.

Janet Lew
Member, Appeal Division