Citation: *M. T. v. Minister of Employment and Social Development*, 2015 SSTAD 878

Appeal No. AD-15-293

BETWEEN:

M. T.

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 15, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated March 24, 2015. The General Division determined that the Applicant was not eligible to receive a disability pension -- or for that matter, benefits for a closed period -- under the *Canada Pension Plan* during the period that she was off work between January 2009 and January 2012, as it was not satisfied that her disability was "severe or prolonged" on or before her minimum qualifying period of December 31, 2010. Counsel filed an application requesting leave to appeal on May 20, 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] Counsel for the Applicant submits that the General Division made the following errors, that it:

(a) based its decision on an erroneous finding of fact made without regard for the material before it;

(b) erred in law in making its decision when assessing the "severe" criterion in a real context; namely, by not assigning sufficient weight to the language proficiency factor;

(c) overlooked and misinterpreted important information from the medical records, reports and pharmacy printouts provided by the Applicant;

(d) failed to consider the "CPP Disability Adjudication Framework" criteria available on the website of Employment and Social Development Canada, when deciding that the Applicant's disability was not prolonged;

(e) failed to distinguish the facts in *Canada (Minister of Human Resources Development) v. Henderson*, 2005 FCA 309 (CanLII) from the facts in the proceedings before it; and

(f) erred in concluding from the evidence prior to and around the minimum qualifying period that the Applicant would eventually recover and be able to return to work.

[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* 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] Counsel submits that the General Division based its decision on an erroneous finding of fact regarding the Applicant's sitting capacity, made without regard for the material before it. Counsel cites, for instance, the fact that the General Division noted at paragraph 63 of its decision that "[Dr. Raffi] did not specify a time limitation on sitting whereas he indicated standing straight was limited to 10 minutes". Counsel submits that in fact the evidence shows that Dr. Raffi, a chiropractor, did specify a time limit for sitting, when he commented at page 4 of his report dated January 28, 2010 that the Applicant "continues to have difficulty with walking and sitting for long period of time" (my emphasis), which he defined earlier in his report as "more than 10 minutes" (GT5- 43). Dr. Raffi had written:

> Standing straight for a long period of time (more than 10 minutes) was an aggravating factor. Lower back pain which was aggravated by sitting as well.

[9] The General Division interpreted the reference to "more than 10 minutes" as being restricted to the Applicant's capacity for standing. This reference to "more than 10 minutes" could have also served as the definition of "a long period of time" and hence, applied to the Applicant's capacity for sitting. Essentially, counsel calls into question the General Division's interpretation of a "long period of time" as it relates to the Applicant's sitting capacity. While an alternate interpretation to a "long period of time" could well have been made, this does not render it an erroneous finding of fact.

[10] In terms of the Applicant's sitting capacity, the General Division was particularly focused on the timeframe between late April 2010 and December 2010. It noted that in the Questionnaire accompanying the Applicant's application for disability benefits that the Applicant had stated that she was able to sit for 45 minutes, while in the hearing before it, the Applicant testified that by then, she was able to sit for only 5 to 6 minutes. The General Division found that the medical record suggested an improvement in the Applicant's low back. It referred to Dr. Raffi's opinion at page 4 of his report that the subjective complaints

of lower back and neck symptoms had decreased 40%. The General Division was aware of Dr. Raffi's opinion also that the Applicant continued to have difficulty with walking and sitting for long periods of time.

[11] At the same time, Dr. Raffi's opinion regarding her sitting capacity was not the only consideration which the General Division took into account in assessing the Applicant's capacity for alternative work. The General Division also noted that, in terms of the Applicant's restrictions, "he only specified 'medical contraindications to her returning to work at this time due to unresolved adhesive capsulitis'". The General Division also looked to the opinion of the Applicant's family physician.

[12] I am not satisfied that the appeal has a reasonable chance of success on the ground that the General Division based its decision on an erroneous finding of fact made without regard for the material before it.

(b) Error of Law

[13] Counsel submits that the General Division erred in law in its application of *Villani v. Canada (Attorney General),* 2001 FCA 248, particularly when it assessed the Applicant's language proficiency, and that it also erred in its assignment of weight to this evidence. The General Division wrote:

> The Tribunal has also considered the Appellant's real-world factors. Given her Grade 12 education, proficiency in English (she had recently completed a PSW course in English at a private college), and relatively young age, i.e. 52 at the date of application, the Tribunal believes the Appellant had the aptitude and ability to pursue retraining for sedentary work within her limitations.

[14] Counsel submits that the General Division erred in its assessment, as the Applicant's ability to communicate in the English language can be classified, at best, as "limited working proficiency". Counsel notes that the Applicant required a "Twi" translator at the most recent appeal to aid in her understanding of the questions posed of her, and as such, she did not have the aptitude or ability to pursue retraining for sedentary work within her limitations.

[15] The Applicant's proficiency with the English language was one of the bases for her appeal of the reconsideration decision before the General Division (formerly the Canada Pension Plan Review Tribunal) (GT1-08). This was not lost on the General Division, as it sought particulars of the Personal Support Worker course which the Applicant had taken. Counsel suggests that the fact that the Applicant relied on a Twi worker ought to have been determinative of her language proficiency. However, the fact that the Applicant relied on an interpreter at a hearing alone is not evidence and it was indeed proper and necessary for the General Division to have explored the extent to which she might have been exposed to or used either of the two official languages of Canada.

[16] Essentially, counsel is requesting that I reassess the evidence as it pertains to the Applicant's personal characteristics, in assessing whether, in a real world context, she can be found disabled. In this regard, I note the words of the Federal Court of Appeal in *Villani*, that:

> . . . as long as the decision-maker applies the correct legal test for severity – that is, applies the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) he or she will be in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantial gainful occupation. The Assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere. (My emphasis)

[17] I would not interfere with the assessment undertaken by the General Division, where it has noted the correct legal test and taken the Applicant's personal circumstances into account, as it has done here.

[18] As for the issue of the assignment of weight, 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": *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

(c) Overlooked or misinterpreted evidence

[19] Counsel submits that the General Division overlooked or misinterpreted critical information from the medical records, reports and pharmacy printouts.

[20] Counsel submits that the General Division erred in finding that the Applicant's family physician had not "diagnosed (*sic)* medication for anxiety or depression or referred the Applicant to a psychiatrist for treatment", or that the Applicant had ever been prescribed any anti-depressant or anti-anxiety medication prior to the minimum qualifying period. Counsel refers to page 8 of Shih Pharmacy's "Patient Profile Condensed" (GT5-106). Counsel submits that "Rx#1203555 indicates that [the family physician] did in fact prescribe the Appellant Amitriptyline Hydrochloride", which he submits is a psychostimulant anti-depressant, and that it was prescribed on April 2, 2009, prior to the minimum qualifying period.

[21] When the General Division wrote that the family physician "did not indicate [that] he ever diagnosed (*sic*) medication for anxiety or depression", this should have been clear that this was in reference to the timeframe between March 11, 2009 and January 18, 2014. The family physician indicated that within that time, he had prescribed a number of different medications, including Vimovo 375/20 mg during various visits, Celebrex 200 mg during various visits, Mobicox 7.5 mg daily and Tylenol #2 one or two tablets daily as needed.

[22] I agree with counsel that the pharmacy printout at GT5-106 indicates that in fact the Appellant had been prescribed an antidepressant, over a course of two weeks in April 2009, and that the General Division erred in finding otherwise.

[23] Having found that the General Division erred in finding that the Applicant had not been prescribed any antidepressants prior to the minimum qualifying period of December 31, 2010, did it base any part of its decision on this particular finding?

[24] While Amitriptyline was prescribed prior to the minimum qualifying period and fell within the timeframe between January 2009 and January 2012 on which the General Division placed its attention, it is clear from its overall decision that the General Division was focused on the Applicant's physical complaints and her physical limitations and

restrictions. Although the General Division acknowledged that the Applicant was anxious and depressed, there was no other evidence before it, other than the pharmacy printout, regarding the Applicant's anxiety and depression. The prescription for Amitriptyline was given in or about April 2009, which was little more than 1.5 years prior to the minimum qualifying period of December 31, 2010. Given this latter consideration, it would appear that the fact that the General Division's erroneous finding that the Applicant had not been prescribed any antidepressant medication prior to the minimum qualifying period was not something upon which it based its decision. Had the prescription been given closer to the minimum qualifying period and also been regularly renewed, this might have been a consideration which could have influenced the General Division. I am not satisfied that the appeal has a reasonable chance of success on this point.

(d) "CPP Disability Adjudication Framework"

[25] Counsel submits that the General Division failed to follow the "CPP Disability Adjudication Framework" available on the Employment and Social Development Canada website, and in having failed to do so, erred in its assessment as to whether the Applicant's disabilities could be considered "prolonged".

[26] Paragraph 42(2)(a) of the *Canada Pension Plan* defines a prolonged disability as one, "if it is likely to be long continued and of indefinite duration or is likely to result in death".

[27] Counsel submits that the General Division ought not to have considered the fact that the Applicant had returned to the workforce in 2012 – albeit on a part-time basis at modified duties – as the Framework indicates that "prolonged" applies only at the initial determination, i.e. when the Respondent's medical adjudicator makes a decision on an application. Counsel submits that the assessment does not allow for a retrospective consideration.

[28] The Framework is not binding on the Social Security Tribunal and has no force or applicability. At most, it provides some guidance to laypersons and others accessing the

website in determining what qualifies as "prolonged", in the absence of any further statutory or regulatory definition beyond paragraph 42(2)(a) of the *Canada Pension Plan*.

[29] The Framework seems to suggest that it is to be used in the circumstances where one might wish to predict the likelihood of improvement. If an applicant successfully returns to the workforce and is engaged in what might be considered a substantially gainful occupation (other than on a failed attempt to return to work), he or she would not meet the definition of "prolonged" under the *Canada Pension Plan* at that time, as the disability would no longer "likely to be long continued and of indefinite duration or is likely to result in death". There would be no need to predict the likelihood of improvement as the Framework provides, as the outcome is, at that point, certain. In other words, even if the Framework were binding, it is rendered irrelevant when an applicant is able to engage in a substantially gainful occupation.

[30] In *Gervais v. the Minister of Social Development*, 2010 FCA 53, the Federal Court of Appeal dismissed an application for judicial review. The issue before the Federal Court of Appeal was whether the Pension Appeals Board had erred when it determined that the Minister of Social Development had properly terminated Mr. Gervais's disability pension. The Pension Appeals Board had found the termination of the disability pension to be appropriate because the Minister had met the onus of establishing that as of April 1984, Mr. Gervais was no longer disabled within the meaning of the *Canada Pension Plan.* Mr. Gervais submitted that the Pension Appeals Board had erred by considering events that occurred subsequent to the termination of benefits. On this issue, the Federal Court of Appeal found that the Pension Appeals Board had not erred, as the fact that Mr. Gervais remained gainfully employed following April 1984 was seen to be consistent with the termination of the pension beginning in April 1984 "and so was a relevant consideration for the Board". I find *Gervais* to be analogous and applicable to the circumstances before me. The fact that the Applicant returned to the workforce was a fact that was known to the General Division when it assessed the Applicant's claim for a disability benefit, and the fact that she was employed in a substantially gainful occupation by then was certainly "a relevant consideration".

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

(e) *Canada (Minister of Human Resources Development) v. Henderson*

[32] The General Division relied on *Henderson* for the proposition that a disability pension for a "closed period" is unavailable under the *Canada Pension Plan.* Counsel submits that the General Division failed to distinguish the facts in *Henderson* to those of the Applicant, and that by doing so, erred in finding that the Applicant did not qualify for benefits for a closed period between January 2009 and January 2012.

[33] While there are obvious factual differences between *Henderson* and the Applicant's own circumstances, the General Division found that the "Court's pronouncement in paragraph 11 … was broad and unqualified" and that it indicated that the "Court ruled that payment for closed periods of time is not available under the CPP". In other words, any factual differences were immaterial to the General Division, as it found that benefits for a closed period are not available. The General Division also referred to *Litke v. Canada (Human Resources and Social Development),* 2008, FCA 366, as affirmation that a disability pension for a closed period is not available in cases of temporary disability.

[34] Counsel submits that "the Applicant cannot be seen to be a claimant seeking a pension to 'tide' herself over a temporary period where a medical condition prevents her from working". The fact that the Applicant is seeking a pension between January 2009 and January 2012 belies this submission.

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

(f) Return to work

[36] Counsel submits that the General Division erred in concluding from the evidence prior to and around the minimum qualifying period that the Applicant would eventually recover and be able to return to work. Counsel submits that there was insufficient evidence of a favourable prognosis for a return to work before the General Division. Counsel submits that the evidence and medical reports were inconclusive and instead suggested that the Applicant's capacity to do any work could not be predicted with any definitive degree of

certainty at the time of review. Even if, or while there may have been a lack of or insufficient evidence to support the finding made by the General Division, the prognosis was borne out that the Applicant would be able to return to work. I know of no authority that restricts a decision-maker to considering only the medical evidence prior to or around the minimum qualifying period, when assessing the prolonged nature of the disability. I am not satisfied that the appeal has a reasonable chance of success on this ground.

CONCLUSION

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

Janet Lew
Member, Appeal Division