Citation: *A. M. v. Minister of Employment and Social Development*, 2015 SSTAD 881

Appeal No. AD-15-349

BETWEEN:

A. M.

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 12, 2015. The General Division determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that her disability was not "severe" at her minimum qualifying period of December 31, 2011. The Applicant's Representative, a paralegal, filed an application requesting leave to appeal on June 9, 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 reviewed the medical evidence that was before the General Division. He submits that, in a real world context, the totality of the medical evidence establishes and supports a severe and prolonged condition that was present around the minimum qualifying period, which has not subsided. The Representative submits that the General Division "based its Decision without regard for the material before it" and that there exists a "concrete foundation to support a reasonable chance for success".

[4] The Representative referred to various legal authorities, including *MHRD v. Bennett* (July 10, 1977), CP 4757 (PAB); *Barata v. MHRD* (January 17, 2010) CP150058 (PAB); and *Inclima v. Canada (Attorney General)*, 2003 FCA 117, but did not suggest that the General Division failed to follow them.

[5] Although the Representative did not expressly set out the alleged errors committed by the General Division, I understand them to be the following, that the General Division erred when it:

(a) failed to consider the totality of the medical evidence, when it did not consider the Applicant's left knee at paragraph 17 of its decision;

(b) made an erroneous finding of fact at paragraph 17 of its decision that the Applicant's symptoms had shown a marked improvement, when this was in respect of the right knee only, and when she was still left with residual right knee pain;

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

THE LAW

[7] 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.

[8] 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.

[9] 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) Totality of evidence

[10] The Representative submits that the General Division erred when it failed to consider the totality of the medical evidence, when it did not consider the Applicant's left knee at paragraph 17 of its decision.

[11] The General Division summarized the medical evidence in its Evidence section, noting that the Applicant had bilateral knee pain as well as pain in her back and hips and depression. The General Division also noted that the Applicant has undergone head surgery for a head tumour, kidney stone surgery three times, as well as a cholecystectomy and parathyroidectomy. The Applicant's Representative made submissions before the General Division that the Applicant qualifies for a disability pension because she has chronic pain in her knees, back and hips, depression and has had numerous surgeries.

[12] The General Division reviewed the Applicant's medical history at paragraph 17 of its decision, in its Analysis section. The General Division referred to the injury to the Applicant's right knee and to her depression, which arose secondary to her physical condition. There was no mention in the Analysis section of any other specific complaints, such as the Applicant's left knee, which arose prior to the minimum qualifying period.

[13] In his brief medical letter dated January 3, 2014, the Applicant's family physician listed various medical conditions, in addition to the bilateral knee pain and depression, as follows (GT3-17):

- Right-sided facial pain as a result of right parotid gland tumour (resected surgically in 2007)
- Chronic loin pain –Applicant continued to have kidney stones, despite having undergone a lithotripsy and stent
- Chronic right shoulder pain as a consequence of rotator cuff syndrome, bilateral carpal tunnel syndrome with chronic hand pain and numbness
- Hypertension, diabetes mellitus, hyperthyroidism, parathyroid adenoma (resected October 2011)
- Fibromyalgia syndrome with chronic fatigue and insomnia
- Chronic migraine headaches with limited response to treatment

[14] I note also that a second orthopaedic opinion provided by Dr. Roscoe on March 30, 2011 suggested that the Applicant has "more of a regional pain syndrome and is getting into trouble with pain management". Dr. Roscoe was of the opinion that there should be consideration given to having the Applicant sent to a pain management clinic for treatment of her pain syndrome (GT6-149).

[15] The Applicant saw various medical specialists in connection with some of these complaints, although many of the specialists were seen prior to the minimum qualifying period of December 31, 2011. For instance, the Applicant saw Dr. Temple, a neurologist, in August and November 2009 for her migraine headaches. The headaches then were well controlled with Maxalt. The Applicant reported to Dr. Temple that she was also having temporandibular joint pain and that she was scheduled to see an oral surgeon, but it is unclear whether she indeed pursued and investigated TM joint pain. The Applicant does not appear to have seen Dr. Temple again after November 20, 2012.

[16] It may well be that by the time of the minimum qualifying period, some of these complaints resolved (for example, after the Applicant underwent a parathyroidectomy in October 2011), may not have arisen or been severe on or before the minimum qualifying period, or, may have been secondary to her right knee complaints. Nonetheless, I am satisfied that there is an arguable case that the General Division may not have considered the totality of the evidence, and in particular, the Applicant's complaints of left knee pain and for that matter, her other medical issues, given that there was no reference to or any analysis undertaken when assessing the severity of her disability. I am satisfied also that there is an arguable case that the General Division may not have considered the cumulative impact of these complaints on her functionality and capacity on or before the minimum qualifying period. I am satisfied that the appeal has a reasonable chance of success.

(b) Improvement in condition

[17] The Representative submits that the General Division made an erroneous finding of fact at paragraph 17 when it wrote that the Applicant's symptoms had shown a marked improvement, when this was in respect of the right knee only, and when she was still left

with residual right knee pain. I note that these same submissions were before the General Division (GT3-8).

[18] Paragraph 17 reads as follows:

> [17] The Appellant injured her right knee at work which caused pain and swelling for which she was prescribed Tylenol 3s and rest at home. She attempted to return to work on three occasions over the next seven months as a cook, with shortened hours and a chair for her to sit on as her symptoms had shown a marked improvement as stated by Dr. DiPasquale (*sic*). Each time she lasted only two days or so until she indicated her pain necessitated her to leave for further recuperation …

[19] The Applicant initially saw Dr. Di Pasquale in relation to her right knee, and then after February 2011, in relation to her left knee. He prepared three reports:

a) October 13, 2010 (GT1-50 / GT6-144 and GT6-153)[1]

b) November 23, 2010 (GT1-47 / GT6-155 and GT6-179)

c) June 13, 2011 (GT6-69)

[20] The General Division did not specify which report it was referring to when it wrote that Dr. Di Pasquale stated that "her symptoms had shown a marked improvement" but I assume that the General Division was referring to the report dated October 13, 2010. The Applicant had been referred to Dr. Di Pasquale for assessment of her right knee. He did not see her regarding any other medical issues which she might have been encountering then. Dr. Di Pasquale wrote in this report that for the first several months after her injury, she had significant pain and limitation. He also wrote that she had returned to work on modified duties and "has had significant improvement in her symptoms". It is clear that Dr. Di Pasquale was referring to the right knee only.

[21] In the context of the sentences preceding the reference to Dr. Di Pasquale's statement regarding the improvement in the Applicant's symptoms, it is clear that the

[1] Parties need not file multiple copies of the same documents.

General Division was referring to the right knee only. The General Division did not describe or list any other injuries or areas of complaints of pain. It is also clear from the decision that, despite the improvement in her right knee at that time, the Applicant continued to have residual pain in her right knee. There was no suggestion by the General Division that this had resolved by her minimum qualifying period.

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

(c) Review of medical evidence

[23] The Representative made extensive submissions regarding the medical evidence and how it supports a finding that the Applicant's disability is severe and prolonged. Essentially he seeks a reassessment of the evidence and asks that I come to a different conclusion than that rendered by the General Division. These particular submissions however do not address any of the enumerated grounds of appeal set out in subsection 58(1) of the DESDA. 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. I am not satisfied that the appeal has a reasonable chance of success on this ground.

APPEAL

[24] 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 ground upon which leave has been granted, did the General Division commit an error of law?

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

[25] 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

[26] The Application is granted.

[27] 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