Citation: *A. J. v. Minister of Employment and Social Development*, 2015 SSTAD 956

Appeal No. AD-15-348

BETWEEN:

A. J.

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: August 5, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated March 16, 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, 2009. The Applicant filed an application requesting leave to appeal on June 10, 2015. His counsel made numerous submissions. 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 appeal has a reasonable chance of success for the following reasons, that the General Division:

(a) failed to provide an interpreter, despite the fact that the Applicant lacked "English understanding";

(b) failed to consider the clinical notes and medical reports from 2007 to 2009;

(c) misinterpreted the medical reports and misunderstood the pathological bases of the Applicant's chronic conditions caused by auto-immune factors;

(d) considered ulcerative colitis but failed to consider secondary conditions and the cumulative impact of all of them;

(e) was misled by the Applicant's employer that he was able to work until 2013, when he was in fact on long-term disability for a number of years;

(f) erred in giving weight to the Minister's submissions about the Applicant's lack of attempts to return to work, without considering the Applicant's actual attempts at a return to work; and

(g) erred in placing undue weight on the medical opinion of Dr. Kreaden and in totally ignoring the information contained in the clinical notes of the family physician.

[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] The reasons for appeal should fall into one of the enumerated grounds of appeal under subsection 58(1) of the DESDA. Ultimately, I need to be satisfied that the appeal has a reasonable chance of success, before I can grant leave.

ANALYSIS

(a) Interpreter

[8] Counsel notes that the Applicant was born overseas and that he came to Canada in 1987. The Applicant has a grade 10 education in Tamil, his mother tongue. The Applicant had little English-language training after his arrival in Canada. Counsel submits that the Applicant's English skills are poor. The hearing before the General Division proceeded without the assistance of an interpreter. Counsel submits that the Applicant's poor English skills should have been obvious when his testimony was compared to the documentary record, and that the General Division should have enquired as to whether the Applicant required an interpreter. Counsel acknowledges that the Applicant did not request the services of an interpreter, but submits that the General Division failed to assess the need for one. Counsel submits that the "interpreter's assistance to [the Applicant] was all the more important because the onus of convincing the Tribunal rested with him".

[9] Counsel submits that when the Applicant testified that he could lift approximately 25 pounds for 200 to 300 metres, could walk four to five km within an hour and could sit for a maximum of one hour and stand for two to three hours, that this should have "raise[d] serious questions about [the Applicant's] understanding". In fact, the Applicant did not give this evidence; the purported testimony from the Applicant about his various functional capacities or limitations were in the written responses provided by the Applicant in the Questionnaire accompanying his application for Canada Pension Plan disability benefits.

[10] I am not at all persuaded by these particular submissions that the Applicant's testimony -- as cited by counsel -- proved that he lacked sufficient English comprehension at the hearing.

[11] In this particular case, the Applicant had legal representation prior to and at the hearing before the General Division. (The Applicant's current counsel did not represent him at the hearing before the General Division. The Applicant's representative at the General Division is a licensed paralegal, although the General Division referred to him generically as a representative.)

[12] In April 2014, the Applicant's legal representative completed a Hearing Information form on behalf of the Applicant (Document GT3). In it, he advised that the Applicant speaks English well enough to present his appeal and answer questions during the hearing. There was an opportunity then to specify the language(s) in which the Applicant would be comfortable expressing himself.

[13] Had the Applicant required an interpreter, it was incumbent upon him or his then legal representative to notify the Social Security Tribunal or the General Division and make arrangements to secure an interpreter, even if the need for an interpreter only became apparent to either the Applicant or to his legal representative during the course of the hearing. The fact that an individual may have been born overseas, came to Canada as a young adult and had relatively little English-language training does not necessarily signal that he or she may not be able to comprehend English and give evidence in English. The Applicant saw a number of different health professionals, yet it is not obvious that he required an interpreter in his interactions with those health professionals. His wife was noted to have accompanied him during one visit, but it appears that he saw his health practitioners alone, without an interpreter. While most of the medical consultative reports are relatively brief, they indicate that the Applicant was able to give a consistent family and medical history. And, indeed, the General Division assessed the Applicant as being competent to give evidence in English, by being able to directly address any questions posed to him. Surely the Applicant's legal representative would have been more familiar with his client than the General Division would have been, and would have recognized any language deficiencies and any resulting need for an interpreter, had there been any.

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

(b) Medical records from 2007 to 2009

[15] The Federal Court of Appeal has held that there is no requirement that a decision-maker list the evidence before it, as it "is presumed to have considered all the evidence": *Simpson v. Canada (Attorney General),* 2012 FCA 82. However, that presumption can be rebutted.

[16] At paragraph 10 in the Evidence section of its decision, the General Division wrote that it had carefully reviewed and considered all of the medical and written evidence in the hearing file.

[17] Counsel suggests that when the General Division wrote at paragraph 42 of its decision that, "medical evidence submitted to the Tribunal are dated a few years past the Appellant's [minimum qualifying period] and do not offer a retrospective assessment" that it neglected to consider any of the medical evidence at all, as it was prepared after the minimum qualifying period.

[18] Counsel submits that the General Division failed to consider the clinical notes and medical reports from 2007 to 2009 in assessing the severity of the Applicant's disability up to and at his minimum qualifying period. In particular, counsel submits that the General Division failed to consider the clinical notes of the family physician who had recorded the Applicant's complaints to him and his own observations and findings of the Applicant's condition on or before the minimum qualifying period. Counsel advises that these clinical records are contained in the Appeal Record, "beginning at [Document] GT- 1 onwards". (Counsel has not identified the pages, but I note the pre-2010 records are between pages 74 and 167.)

[19] Had counsel correctly quoted the decision, the quote would have read, "**several medical reports** submitted to the Tribunal are dated a few years past the Appellant's [minimum qualifying period] and do not offer a retrospective assessment" (my emphasis). Had this been the only statement by the General Division regarding what records it assessed, I would not have necessarily interpreted that to mean that the General Division had failed to consider all of the medical evidence before it, as it clearly referred to just the medical reports which largely did not offer a retrospective assessment.

[20] However, in considering the evidence before it, the General Division also wrote,

> [The report dated March 7, 2011 of the gastroenterologist] **is the only medical evidence** that refers back to the date when the Appellant last qualified for a disability pension. (My emphasis)

[21] The decision of the General Division indicates that there was no other evidence – apart from the report dated March 7, 2011 of the gastroenterologist – that addressed the Applicant's medical status on or before his minimum qualifying period.

[22] It may well be that when the General Division wrote that the report of the gastroenterologist dated March 7, 2011 is "the only medical evidence" it was referring to medical reports, but while I have only perused the hearing file in a cursory manner (Document GT1) at this juncture, I note that there are at least three consultation reports which were prepared close to and around the minimum qualifying period. These reports were prepared by the gastroenterologist on January 20, March 19 and August 27, 2009 (at pages 90, 77 and 74, respectively). The gastroenterologist also prepared an Attending Physician Supplementary Statement in May 2009 (at pages GT1-75 and 76). I refer to these reports simply to show that there was other medical evidence, other than the report dated March 7, 2011, which address the Applicant's status on or before his minimum qualifying period.

[23] If the General Division was referring to medical evidence *per se,* and if its focus was the minimum qualifying period, then apart from the medical reports which I have cited, there were also lab test results for January 2009 (at pages GT1-89 and 92) and March 2009 (at pages GT1-81 and 82).

[24] The suggestion by the General Division that there was no medical evidence or reports that addressed the Applicant's disability at his minimum qualifying period, other than the gastroenterologist's report of March 7, 2011, raises an arguable ground as to whether the General Division considered all of the medical evidence before it. I am satisfied that the appeal has a reasonable chance of success on this ground.

(c) Etiology

[25] Counsel submits that the General Division misinterpreted the medical reports and misunderstood the pathological bases of the Applicant's chronic conditions caused by auto-immune factors. Counsel submits that in so doing, the General Division erred in finding that the Applicant did not develop sero-negative degenerative arthritis until 2014. Counsel relies

on the medical report dated August 14, 2014 of Dr. Amba, which he submits explains the auto-immune link between ulcerative colitis and degenerative arthritis. Counsel suggests that the link definitively establishes that the Applicant had to have been suffering from degenerative arthritis early on, though does not indicate when it might have arisen.

[26] In fact, the General Division accepted that there was a link between the two diseases but clearly found that the existence of ulcerative colitis did not establish the immediate onset or accompaniment of degenerative arthritis. Indeed, it appears that the General Division accepted that the Applicant might have had peripheral arthritis prior to the minimum qualifying period, but rejected that any symptomology in connection with the disease might have been severe or necessarily could have become so. The General Division wrote,

> [44] The Appellant also claims joint pain, particularly his shoulders. The Tribunal relies on the report from Dr. Amba, a rheumatologist, and finds that the Appellant suffered **peripheral arthritis that was related to his ulcerative colitis condition** . . . Unfortunately, the evidence of the Appellant's peripheral arthritis came in after December 31, 2009 and does not refer to the Appellant's condition at the time. Since I rely on the expertise of Dr. Amba, who opined that the arthritis was incidental to the control of the colitis, the Tribunal draws the conclusion that since the Appellant's colitis was controlled between 2009 and 2011, there was no severe condition of arthritis at the time . . . (My emphasis)

[27] The first reference to right knee inflammatory arthritis in the setting of ulcerative colitis appears in Dr. Amba's consultation report dated March 22, 2012. The Applicant had had issues involving his joints, particularly in his right knee, for the past two years. In his examination of the Applicant, there were no markers for sero-negative or positive arthritis, though Dr. Amba noted that x-rays showed early degenerative arthritis, bilaterally, and early degenerative change in his ankles. Dr. Amba diagnosed the Applicant with degenerative arthritis with possible sero-negative inflammatory arthritis related to ulcerative colitis (page GT1-239).

[28] If the Applicant exhibited or complained of severe joint pain or other symptoms relating to the peripheral arthritis on or before his minimum qualifying period, his counsel has not pointed them out. I see that the Applicant had x-rays of both knees in June 2008, but

the fact that he had x-rays (which were normal) does not establish the severity of any symptomology he might have been experiencing at that time (page GT1- 101). It may be that the peripheral arthritis was underlying throughout the material time, but that alone does not establish that the symptoms were severe or could be expected to be severe, and certainly there was no expert opinion before the General Division to support any submissions along these lines.

[29] I am not satisfied that this ground raises an arguable case or that the appeal has a reasonable chance of success on this point.

(d) Secondary conditions and totality of evidence

[30] Counsel submits that the General Division considered the Applicant's ulcerative colitis as his primary disability but failed to consider secondary conditions and the cumulative impact of all of them. Counsel submits that the General Division, in other words, failed to consider the totality of the evidence in assessing the severity of the Applicant's disability. Counsel submits that the Applicant suffered from numerous conditions including rotator cuff tendinitis, degenerative arthritis, diabetes, prostatitis, bilateral bicipital tendinitis, urinary tract infections, perianal abscess, depression, anxiety and insomnia, all of which should have been considered by the General Division.

[31] Counsel submits that the General Division erred in concluding that the Applicant's conditions were not severe without considering the family physician's clinical records, the degenerative and inflammatory nature of his auto-immune conditions and the effectiveness of treatment.

[32] Naturally, there had to have been some documentary evidence of these conditions before the General Division, before it could consider and assess them, in the context of the severity of the Applicant's disability. While there was some evidence of shoulder tendinitis and degenerative or peripheral arthritis and while the General Division addressed these issues at page 12 of its decision, I do not readily see any medical opinions or references to the prostatitis, urinary tract infection, depression, anxiety and insomnia in the medical records.

[33] Dr. David Kreaden, a gastroenterologist, noted that the Applicant had developed a perianal abscess, but the Applicant had incision and drainage done in emergency in September 2007, after which it does not appear to have been an issue. Dr. Kreaden also noted that the Applicant developed steroid dependent diabetes, but by March 2009, this had resolved with the tapering of steroids.

[34] Apart from the shoulder tendinitis and degenerative arthritis, unless counsel is able to show that these other medical issues were either in existence at or around the minimum qualifying period, or have arisen since then, I am not satisfied that the appeal has a reasonable chance of success on the grounds that the General Division failed to consider the totality of the medical evidence.

(e) Employer's statement

[35] Counsel submits that the employer's statement of May 4, 2013 may have misled the General Division that the Applicant was able to work until 2013, when in fact the Applicant had been on long-term disability until 2011 when he was laid off permanently.

[36] The evidence before the General Division was that the employer stated that the Applicant was on long-term disability from December 15, 2007 and that he got laid off as of January 2009. From this, the General Division was clearly aware that the Applicant was in receipt of long-term disability. I do not see any reference in the decision where the General Division could be seen to have been misled by the employer into believing that the Applicant might have been working or was able to work until 2013. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(f) Minister's submissions and return to work efforts

[37] Counsel submits that the General Division erred in its assignment of weight to the Minister's submissions. I would not characterize it as a matter of assignment of weight, as the parties' submissions do not qualify as evidence. In the case of submissions, the General Division either accepts or rejects the submissions of a party, but it does not assign weight to them.

[38] That said, I understand that counsel's submissions essentially amount to alleging that the General Division based its decision on an erroneous finding of fact without regard to the material before it. In this instance, counsel submits that the General Division erred when it found that the Applicant had not provided any evidence that he had been looking for work or that he had tried to find suitable employment. Counsel cited two "examples" of the Applicant's efforts at returning to work. These include the Applicant's desire to return to work and his explanation that he was not working, as his employer did not offer graduated hours. This calls for a reassessment of the evidence, which is beyond the scope of a leave application, as leave considerations must necessarily fall within any of the enumerated grounds listed under subsection 58(1) of the DESDA. Even so, I would not have considered a desire to return to work as job search efforts.

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

(g) Weight of evidence

[40] Counsel submits that the General Division placed undue weight on the medical opinion of Dr. Kreaden and totally ignored the information contained in the clinical notes of the family physician.

[41] As this is simply an issue of the weight assigned to the report, this particular submission does not raise an arguable case. In *Simpson*, 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".

[42] Essentially counsel requests a reassessment of the evidence that was before the General Division. 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. Generally, the subsection does not permit me to undertake a reassessment of the evidence that was before the General Division.

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

APPEAL

[44] Issues which the parties may wish to address on appeal include the following:

(i) What level of deference does the Appeal Division owe to the General Division?

(ii) Based on the ground upon which leave has been granted, did the General Division commit any errors of law or base its decision on any erroneous findings of fact without regard to the material before it?

(iii) 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?

(iv) If the Applicant proves that the General Division failed to address the medical evidence from 2007 to 2009 and that it establishes that the Applicant's disability was severe on or before his minimum qualifying period, how does this overcome paragraph 43 of the decision, where the General Division found that the Applicant presently is not disabled for the purposes of the *Canada Pension Plan?*

[45] 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

[46] The Application is granted.

[47] 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