

Citation: *M. V. v. Minister of Employment and Social Development*, 2015 SSTAD 975

Appeal No. AD-15-174

BETWEEN:

M. V.

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 12, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated February 4, 2015. The General Division conducted a videoconference hearing on February 3, 2015, after which it determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that she did not have a severe disability on or before December 31, 2012.

[2] Counsel for the Applicant filed an Application Requesting Leave to Appeal to the Appeal Division on April 10, 2015, along with a brief medical report dated September 17, 2014 of Dr. B. Tazkarji and medical report dated November 11, 2014 of Dr. Zohair Syed. Leave is sought on numerous grounds. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

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

SUBMISSIONS

[4] The Representative submits that the General Division erred as follows, in:

- (a) Failing to ensure that the medical reports of Drs. Syed and Tazkarji had been received by the Social Security Tribunal, despite the fact that the physicians had reportedly provided the Social Security Tribunal with their respective reports in advance of the hearing of the appeal;
- (b) Failing to place copies of the medical reports of Drs. Syed and Tazkarji into evidence, despite the fact that they had reportedly provided the Social Security Tribunal with them;
- (c) Proceeding with hearing of the appeal, rather than adjourning it, despite the fact that the medical reports of Drs. Syed and Tazkarji apparently did not form part of the hearing file before it;

- (d) Failing to properly consider the Applicant's history of ongoing psychological conditions, including post-traumatic stress disorder, agoraphobia, major depressive disorder and generalized anxiety disorder. Drs. Syed and Tazkarji expressed opinions about the seriousness of the Applicant's ongoing psychological conditions. Although the General Division did not have the medical opinions of Drs. Syed and Tazkarji before it, it was aware of their respective reports;
- (e) Attributing the Applicant's reluctance to work to harassment, without considering that she developed psychological issues as a result of workplace harassment that made her medically unsuitable to work;
- (f) Failing to consider that Dr. Tazkarji was of the opinion that the Applicant is not able to work, and that Dr. Syed stated that the Applicant had a "permanent, recurrent and substantial mental condition";
- (g) Failing to provide the Applicant with a full and fair opportunity to be heard. The Applicant was unrepresented at the hearing.

[5] On April 23, 2015, the Social Security Tribunal sent a letter to Counsel for the Applicant, posing the following questions to his client:

1. Does the Applicant have any evidence to show when she submitted the medical reports of Dr. Zohair Syed and of Dr. B. Tazkarji, dated November 11, 2014 and September 17, 2014, respectively? If so, please produce copies of any evidence.
2. Notwithstanding counsel's submissions in the Application Requesting Leave to Appeal to the Appeal Division, how would each of the reports have been helpful in addressing the Applicant's capacity at her minimum qualifying period of December 31, 2012, when, in the case of Dr. Syed, he wrote, "My report reflects her impairments and restrictions as of September 16, 2014", and in the case of Dr. Tazkarji, he wrote, "I believe at this time, as a result of the trauma and treatments given to help this problem, she is not employable" (my emphasis).
3. Please identify precisely what part(s) of the Applicant's testimony was/were mischaracterized. (A copy of the recording of hearing is attached. While a transcript would be helpful, it will suffice if counsel identifies what point(s) in the recording have been allegedly mischaracterized.)

4. How does the Applicant and her counsel reconcile the admission before the General Division that she “admitted that she is capable of employment and has been seeking a job based on her ability to work” and that “she has been and continues to seek employment”? (at paragraphs 31 and 33). Does counsel allege this to be an error of law? If so, please provide either cite or provide copies of any supporting legal authorities.

[6] The Social Security Tribunal requested that the Applicant provide any responses to these questions, by no later than May 29, 2015. Counsel did not provide any responses on behalf of his client by that date. The Social Security Tribunal contacted counsel and enquired whether responses were forthcoming. Counsel advised that he had a new address and that he had not received the letter dated April 23, 2015 from the Social Security Tribunal. The Social Security Tribunal re-sent the letter to counsel, via e-mail. Counsel acknowledged receipt of the letter and advised that they would attempt to respond by July 8, 2015.

[7] The Social Security Tribunal also mailed a letter to counsel on June 5, 2015, copying him with the letter of April 23, 2015. The Social Security Tribunal also confirmed that it could expect to receive any responses to its questions, by July 8, 2015.

[8] On July 7, 2015, counsel wrote to the Social Security Tribunal, advising that he had been unavailable and therefore required an extension until “the end of this month”. On July 8, 2015, the Social Security Tribunal wrote to counsel by mail and e-mail, advising that the Appeal Division Member was prepared to grant an extension to July 27, 2015, but would not be granting any further extensions, absent any compelling reasons.

[9] Despite the extension of time to July 27, 2015, counsel did not provide any further submissions by August 12, 2015 and did not request any further extensions.

ANALYSIS

[10] 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.

[11] Subsection 58(1) of the *Department of Employment and Social Development Act* sets out the grounds of appeal as being limited to 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.

[12] 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.

(a) Fair hearing

[13] Counsel submits that the General Division failed to provide the Applicant, who was unrepresented at the time, with an opportunity to fully present her case. Counsel submits that this amounts to a failure of natural justice. Counsel submits that the Applicant “did not feel that the hearing panel was willing to consider her position or give her a full opportunity to make her case”. Beyond these general statements, counsel or her Applicant needs to specify how the Applicant might have been denied a fair hearing, and given that there is a recording, show where this occurred. For instance, did the General Division refuse to hear evidence or did it cut her short, and where does it appear in the recording? While allegations of this nature do not need to be proven at the leave stage, they need to be substantiated to some extent.

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

(b) Medical reports of Drs. Syed and Tarkarji

[15] Counsel submits that the General Division failed to ensure that the medical reports of Drs. Syed and Tarkarji were in the hearing file. Counsel submits that this too amounts to a failure of natural justice.

[16] The General Division did not refer to the medical reports of Drs. Syed and Tarkarji in its decision. The two doctors reportedly submitted their respective medical reports directly to the Social Security Tribunal.

[17] There was no evidence before me as to when these two doctors reportedly provided copies of their reports to the Social Security Tribunal. The Applicant did not provide copies or bring copies of these reports with her to the hearing, despite the fact that they did not form part of the “legacy file” transferred from the Office of the Commissioner of Review Tribunals to the Social Security Tribunal. It would be good practice for any party at any hearing to bring extra copies of any reports or records to the hearing, including a copy for him- or herself.

[18] It is unclear whether the Applicant actually enquired as to whether the General Division had these two reports and if it did not have the reports, whether she made any submissions regarding their content, or even requested an adjournment. Without some evidence as to what submissions were made regarding the existence and nature of these two medical reports, and how they were material towards the central issues in the appeal, I cannot necessarily infer that the General Division erred in not ensuring that it had copies or that the reports were necessarily placed into evidence.

[19] However, while it would certainly have been ideal to have a complete medical history, that by no means indicates that the inclusion of these two reports could or necessarily would have altered the outcome of the proceedings.

[20] The medical report of Dr. Syed is dated November 11, 2014. He indicates that his report reflects the applicant’s impairments and restrictions “as of September 16, 2014”. The medical report of Dr. Tazkarji is dated September 17, 2014. While I would not outrightly dismiss consideration of any medical evidence that was prepared well after the minimum

qualifying period, in this case neither doctor related any of their opinions to December 31, 2012. Indeed, Dr. Syed was in no position to be able to render an opinion regarding the Applicant's condition at her minimum qualifying period, given that she had only recently become a patient. Although the Applicant provided a history that the symptoms she encounters have been recurrent for many years, that does not address the central issue as to the severity of those symptoms at her minimum qualifying period.

[21] Similarly, Dr. Tazkarji did not address the Applicant's disability at her minimum qualifying period. While counsel submits that Dr. Tazkarji wrote that the Applicant is not able to work, he did not address the central question either as to the severity of her disabilities at her minimum qualifying period. Indeed, he wrote, "I believe at this time, as a result of the trauma and treatments given to help this problem, she is not employable" (my emphasis).

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

(c) Psychological history

[23] Counsel submits that the General Division failed to properly consider the Applicant's history of ongoing psychological conditions, including post-traumatic stress disorder, agoraphobia, major depressive disorder and generalized anxiety disorder. Counsel does not specify what aspects of the Applicant's medical history the General Division failed to consider, or where these particular psychological conditions can be found in the testimony or the documentary evidence.

[24] While the General Division made limited reference to the post-traumatic stress disorder, depression and anxiety, it did not specifically mention agoraphobia, major depressive disorder and generalized anxiety disorder. However, counsel has not shown that evidence of these psychological conditions were before the General Division, whether in the documentary record or in the Applicant's testimony. In a cursory review of the hearing file, the undated medical report of Dr. L.Y. Chan showed a diagnosis of gender identity disorder / gender dysphoria, depression and anxiety, (AD1-36 to AD1- 39). There was no mention of other psychological conditions. There was limited documentary evidence before the General

Division. Counsel also did not point any specific portions of the recording of the hearing and I cannot infer that the Applicant testified about these other psychological conditions and how they might have impacted her.

[25] While I recognize that Dr. Tazkarji wrote that the Applicant suffers from agoraphobia and shows symptoms of post-traumatic stress disorder and has been prescribed anti-anxiety medication and is currently undergoing psycho-therapy treatments, and that Dr. Syed discussed the Applicant's post-traumatic stress disorder, major depressive disorder and generalized anxiety disorder, those two reports – had they been before the General Division -- do not, in any event, address the Applicant's disabilities at her minimum qualifying period. The reports do not indicate when each of the conditions might have arisen, how often they recur and their duration, the prognosis for them and what impact they have had on her. These considerations might have been of some assistance in assessing severity.

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

(d) Workplace harassment

[27] Counsel submits that the General Division mischaracterized the evidence regarding the workplace harassment to which the Applicant was subjected. Counsel submits that the “real problem is that she has developed psychological conditions, including as a result of workplace harassment that make her medically unsuitable to work”.

[28] In fact, the General Division recognized that workplace harassment could very well result in a mental health disorder. In this case however the General Division found that there was no evidence to support a finding of a mental health condition. At paragraph 31 of its decision, the General Division wrote:

I recognize that harassment and or discrimination may result in the need for therapy and/or mental health support, which, in turn, may result in a diagnosed mental health disorder. Such a diagnosis alone or in combination with other health conditions and factors noted in *Villani* may give rise to a finding of “severe.” In this case, there was no medical evidence to support a finding of a mental health condition; rather, the Appellant admitted that she is capable of employment and has been seeking a job based on her ability to work. In her view, she is unable to find

employment due to her transgender status and her limited abilities with her left hand.

[29] Unless counsel had pointed to some contrary evidence to suggest that the General Division had made an erroneous finding of fact, his submissions in essence amount to a request for a reassessment, which is beyond the scope of a leave application.

CONCLUSION

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

Janet Lew

Member, Appeal Division