Citation: *J. R. v. Minister of Employment and Social Development*, 2015 SSTAD 1011

Appeal No. AD-15-133

BETWEEN:

J. R.

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 25, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated December 18, 2014. The General Division determined that she 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, 1994 or, as a result of proration, that she had become disabled between January 1, 2010 and March 31, 2010. To succeed on this leave 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] In her undated letter received by the Social Security Tribunal on March 17, 2015, the Applicant submits that the General Division Member erred as follows:

(a) failed to observe a principle of natural justice:

(i) as the Member informed the Applicant at the outset that there should have been two Members of the General Division presiding over the hearing;

(ii) did not provide her with an opportunity to fully give evidence at the hearing; and

(iii) at paragraph 23 of the decision, although the General Division referred to the Applicant's fibromyalgia, the Member did not pursue more details about her pain or fatigue levels and did not seek more detail or information regarding her fibromyalgia.

(b) based her decision on various erroneous findings of fact:

(i) at paragraph 22 of the decision, in finding that the Raynaud's phenomenon or syndrome never affected the Applicant's hands or her writing. The Applicant submits that she testified that both hands go white from the wrist down and she is unable to write when this occurs. The Applicant did not testify further that when she has tremors, she is unable to write as well and can hardly feed herself, but did not suggest that the General Division did not permit further testimony. The Applicant also notes that the General Division misspelt Raynaud's, suggesting that the General Division could not have been attentive when she was giving evidence regarding her Raynaud's phenomenon;

(ii) the Applicant knows others who have fibromyalgia who have not been referred to a fibromyalgia clinic, yet are each receiving a disability pension under the *Canada Pension Plan*;

(iii) at paragraph 26 of the decision, in finding that the Applicant had never been prescribed an anti-depressant or been referred to a psychiatrist. The Applicant acknowledges that she has not taken any anti-depressants, but says that she has been prescribed medication when under great stress, although this was a fact that she had neglected to disclose at the hearing. The Applicant also submits that she had seen a psychiatrist years ago and had also seen a therapist a few times in the past 10 to 15 years;

(iv) at paragraph 27, in finding that the exercises she performs resolves her pain, when in fact, the exercises merely alleviates some of her pain;

(v) at paragraph 30, misstated or neglected to consider portions of Dr. Paulseth's medical report of June 24, 1993. (In fact, the General Division referred to the report of August 24, 1994.) The Applicant suggests that the General Division erred in relying on Dr. Paulseth's

opinions. She submits that while Dr. Paulseth had diagnosed her with multiple sclerosis in past, he now is of the opinion that she remains a "diagnostic dilemma". The Applicant denies any psychosomatic cause for her problems, and states that there is diagnostic and objective evidence of her problems; and

(c) committed an error of law in failing to recognize her intentions to quit smoking. Indeed, she stopped smoking just before Christmas (after the hearing had already taken place). The Applicant also notes that no one has sent her to smoking cessation counselling or referred her to anyone.

[4] The Applicant provided an update on her current medical status. She advised that she has been on antibiotics five times in the past year, and before then, had been on and off antibiotics for a period of three years for urinary tract infections. She had worked at a daycare in extreme discomfort and pain. She now has to undergo more tests to diagnose the problem. She also advised that she requires drugs for almost every small cold.

[5] The Applicant advised that she was considering retaining counsel to represent her and would notify the Social Security Tribunal in due course.

[6] On May 6, 2015, the Social Security Tribunal wrote to the Applicant and posed the following questions:

1. In the Application Requesting Leave to Appeal and the accompanying letter, you indicate that you are considering and might be getting a lawyer. Have you retained or do you still expect to retain a lawyer? If so, please have your lawyer file a signed Authorization to Disclose as soon as possible, otherwise this matter will continue to proceed.

2. You allege that, at the outset, the General Division made comments that there should be two people at the hearing to assess your case. A recording of the hearing is enclosed. Please identify where in the recording the Member of the General Division is alleged to have made these comments.

3. In reference to paragraph 22 on page 6 of the decision, please identify where in the recording you testified that both hands go white and that you are unable to write on those occasions. Please also identify where in the recording other evidence you may have given describing how the Raynaud's syndrome may have affected your hands or writing.

4. In reference to paragraphs 22 and 23, you advise that you did not give detailed evidence. If you are alleging that this was in any way associated with how the hearing was conducted, please identify where in the recording the Member of the General Division gave any orders regarding the conduct of the hearing and what evidence she might have indicated she was prepared to receive.

   If you are alleging that you were restricted from giving further evidence and there is some evidence of this, generally what evidence would you have given had you been provided with the opportunity to do so?

5. In reference to paragraph 26 … did you testify at any time that you had seen a psychiatrist and/or therapist regarding your mental health? If so, please identify where in the recording you gave this evidence.

[7] The Applicant was advised that she was not required to respond, but if she chose to do so, that she was requested to do so in writing by June 20, 2015.

[8] The Applicant sought an extension beyond this date. The Applicant submitted a response on July 20, 2015. She explained that her computer is broken and that she therefore has been unable to listen to the recording of the hearing before the General Division and therefore unable to point to any evidence she gave regarding her Raynaud's phenomenon. In any event, she also made gestures using her hands, which of course would not have been picked up by the recording. The Applicant also noted that the General Division Member had not commenced recording when she advised that there should have been two Members presiding over the hearing.

[9] The Applicant advised that the General Division did not cut her off from giving evidence. She stated that as she did not prepare any written aides, she simply forgot and neglected to provide vital information when she testified before the General Division.

[10] The Applicant advised that she was still trying to find a lawyer, but found it financially prohibitive. She was optimistic that she had nonetheless found a lawyer, and hoped that that lawyer would be filing the appropriate documentation with the Social Security Tribunal by month's end.

[11] The Respondent has not filed any submissions.

THE LAW

[12] Some arguable ground upon which the proposed appeal might succeed is required for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC). The Federal Court of Appeal has held that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success: *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[13] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) 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.

[14] 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

[15] Much of the Applicant's submissions before me consist of argument that properly ought to have been brought before the General Division, as they address the merits of the claim for a disability pension, rather than any of the grounds of appeal under subsection 58(1) of the DESDA. Neither the leave nor the appeal affords an opportunity to review and reassess the evidence. I am not satisfied that the appeal has a reasonable chance of success based on any submissions that do not address any of the grounds of appeal under subsection 58(1) of the DESDA and solely call for a reassessment of the evidence.

(a) Alleged failure to observe a principle of natural justice

[16] In her initial submissions filed on March 17, 2015, the Applicant suggests that there should have been two Members of the General Division hearing her appeal. This is based on the information she was provided by the General Division Member, before the hearing formally commenced.

[17] Assuming that what the Applicant says is accurate, that the General Division Member advised that there should have been a second Member present, this does not confer any entitlement to a two-person panel. The DESDA is quite specific that hearings shall be conducted by one-person panels. Section 61 of the DESDA states that every application to the Social Security Tribunal is to be heard before a single member.

[18] Initially, the Applicant also suggested that the General Division denied her the opportunity to fully give her evidence, but the Applicant's letter of July 20, 2015 clarifies that this was not the case.

[19] The Applicant submits that the General Division should have sought more information from her regarding her fibromyalgia. It appears from paragraph 23 of the decision, that the General Division canvassed what symptoms the Applicant experiences. The Applicant also referred the General Division to the medical report of Dr. Shah. Here, it appears that the General Division considered that it had a generally comprehensive picture of the Applicant's fibromyalgia. It was under no obligation to pursue further questioning on

this area, unless perhaps the Applicant had motioned then that there was more evidence and that it was of some probative value.

[20] I am not satisfied that the appeal has a reasonable chance of success based on the ground that the General Division failed to observe a principle of natural justice.

(b) Alleged erroneous findings of fact

(i) Raynaud's phenomenon

[21] The Applicant submits that the General Division found that her Raynaud's phenomenon never affected her hands or her writing. This was set out in paragraph 22 of the decision. In fact, paragraph 22 forms part of the evidence, rather than the specific findings of fact. Indeed, I do not see that the General Division made any findings regarding the Raynaud's phenomenon. From this, one could infer that either the General Division did not consider the Raynaud's phenomenon to be a primary or significant contributor to the Applicant's overall disability, or that it arose sometime well after the minimum qualifying period. It is however unclear from the evidence as to when the Applicant became symptomatic with Raynaud's phenomenon. I note that the consultation report dated August 7, 1998 of Dr. Savelli indicates that there was no obvious Raynaud's (GT1-73), although it seems that she was investigated for this in July 2010 (GT1-103). The medical report dated August 8, 2011 of Dr. Raymond C. Lo confirmed that she has Raynaud's phenomenon but does not indicate when this arose (GT1-299). The Applicant's letter dated October 21, 2014 also speaks to her limitations caused by the Raynaud's phenomenon.

[22] The General Division misspelt Raynaud's as "Reynard's" at paragraph 22 of its decision. This is an obvious typographical error, as I see that the General Division correctly spelt the phenomenon at paragraph 37. I do not see that anything turns on it.

[23] There is a slight suggestion that if the General Division misspelt Raynaud's, that it must have been inattentive to her testimony on this point. It might have been helpful had the Applicant referred me to specific portions of the recording, but there was a documentary history available to the General Division. I am not satisfied that the appeal has a reasonable chance of success on this alleged ground.

(ii) Fibromyalgia

[24] The Applicant submits that she knows others who have fibromyalgia who are receiving a disability pension under the *Canada Pension Plan.* This is not a valid ground of appeal under subsection 58(1) of the DESDA. In any event, each case is fact specific. For instance, part of the challenge for the Applicant is that she has a dated minimum qualifying period. That may not have been a consideration in the other cases referred to by the Applicant.

(iii) Anti-depressants and psychiatric care

[25] The Applicant alleges that the General Division made an erroneous finding of fact at paragraph 26 of its decision, in finding that she had never been prescribed an anti-depressant or been referred to a psychiatrist.

[26] Paragraph 26 forms part of the evidence, rather than the specific findings of fact made by the General Division. That being so, the Applicant does not dispute the accuracy of the General Division's summary of her testimony. The Applicant now submits that in fact she had seen a psychiatrist and a therapist in the past. It is not an error on the part of the General Division if the Applicant had neglected to give certain testimony. Even had this evidence been before the General Division, that evidence alone would have not established severity. I am not satisfied that the appeal has a reasonable chance of success on this alleged ground.

(iv) Exercise

[27] The Applicant submits that the General Division erred at paragraph 27 in finding that exercise resolves her pain. Again, this forms part of the evidence, rather than the specific findings of fact made by the General Division. In any event, even had this formed part of the findings, the evidence pertained to a specific timeframe. When the General Division wrote that, "She said that many years ago when she had back problems, she did exercises and then everything was okay", the effects of exercising seems to have been limited to that timeframe. I am not satisfied that the appeal has a reasonable chance of success on this alleged ground.

(v) Dr. Paulseth's medical report

[28] The Applicant submits that the General Division erred in relying on and making findings based on Dr. Paulseth's medical report. Again, this forms part of the evidence, rather than the specific findings of fact made by the General Division. The Applicant does not suggest that the General Division misstated Dr. Paulseth's opinion; rather, she submits that the opinion he expressed in his earlier report that she has multiple sclerosis was inaccurate and that he has since determined that she is a "diagnostic dilemma". In fact, the General Division wrote, "[Dr. Paulseth] found no evidence that the [Applicant] had MS".

[29] The Applicant refutes any psychosomatic basis or functional overlay to her complaints, as suggested by Dr. Paulseth in his report. The General Division however did not address causation, nor address any medical opinion that the Applicant's complaints might have a psychosomatic origin.

[30] The General Division could only assess the evidence which was before it, so if Dr. Paulseth subsequently formed the opinion that she is a "diagnostic dilemma", it would have been incumbent upon the Applicant to adduce this evidence.

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

(c) Error of Law – Smoking

[32] The Applicant submits the General Division failed to recognize her intentions to quit smoking, and indeed, she stopped smoking just before last Christmas (after the hearing had already taken place). The Applicant also notes that no one has sent her to smoking cessation counselling or referred her to anyone.

[33] The General Division was aware of the Applicant's intentions to quit smoking. This was set out at paragraph 25 in the evidence section. However, the General Division determined that her intentions alone were insufficient to meet the legal test that it required of her that she had to have sought treatment and made reasonable efforts to respond to medical

advice. While ultimately the Applicant quit smoking, that occurred after the hearing. The General Division could only render a decision based on the best evidence it had before it.

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

(d) New Facts

[35] The Applicant has provided an update as to her current medical status. In a leave application, any new facts should relate to the grounds of appeal. The Applicant has not indicated how the proposed additional facts might fall into or address any of the enumerated grounds of appeal. If she is requesting that we consider these additional facts, re-weigh the evidence and re-assess the claim in her favour, I am unable to do so at this juncture, given the constraints of subsection 58(1) of the DESDA. Neither the leave application nor the appeal provides any opportunities to re-assess or re-hear the claim to determine whether the Applicant is disabled as defined by the *Canada Pension Plan.*

[36] If the Applicant has set out these additional facts in an effort to rescind or amend the decision of the General Division, she must now comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations*, and must also file an application for rescission or amendment with the same Division that made the decision. There are strict deadlines and requirements under section 66 of the DESDA for rescinding or amending decisions. Subsection 66(2) of the DESDA requires an application to rescind or amend a decision to have been made within one year after the day on which a decision is communicated to a party, while paragraph 66(1)(b) of the DESDA requires an applicant to demonstrate that the new facts are material and could not have been discovered at the time of the hearing with the exercise of reasonable diligence. Under subsection 66(4) of the DESDA, the Appeal Division in this case has no jurisdiction to rescind or amend a decision based on new facts, as it is only the Division which made the decision which is empowered to do so.

[37] The new facts as presented by the Applicant do not raise nor relate to any grounds of appeal and I am therefore unable to consider them for the purposes of a leave application.

CONCLUSION

[38] For the reasons set out above, the Application for leave to appeal is refused.

Janet Lew
Member, Appeal Division