Citation: *D. T. v. Minister of Employment and Social Development*, 2015 SSTAD 1057

Appeal No. AD-15-400

BETWEEN:

D. 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: September 8, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated April 15, 2015. The General Division conducted an in-person hearing in Calgary, Alberta on March 3, 2015 and 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, 2012. The Applicant filed a leave to appeal application package requesting leave to appeal, on June 24, 2015. She raised a number of grounds. 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 leave to appeal application package includes the following:

(a) completed application requesting leave to appeal;

(b) 5-page attachment for grounds under paragraph 58(1)(f);

(c) 4-page attachment for grounds under paragraph 58(1)(c);

(d) audio recording of hearing before the General Division; and

(e) various medical letters and reports of Drs. Elumir, Arlene D. Cox, Angie Yang, Hilda Morales and Reta Blakely. These medical records were before the General Division.

[4] The Applicant submits that the General Division made various errors, including errors in law and erroneous findings of fact. In particular, she submits that the General

Division erred in finding that none of the medical practitioners considered the Applicant unable to work full- or part-time.

[5] The Applicant submits that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction when it refused to admit or consider any medical reports, if they were prepared after her minimum qualifying period of December 31, 2012. The Applicant submits that these reports nonetheless addressed her medical history and therefore were relevant to her disability at the minimum qualifying period.

[6] The Applicant further submits that we should reject the submissions of the Respondent, which are summarized at paragraph 43(a) and (b) of the decision of the General Division.

[7] The Applicant further submits that we should consider the medical reports of Drs. Blakely and Morales and find that she is disabled for the purposes of the *Canada Pension Plan.* The Applicant advises that her family physician referred her to a psychiatrist, but as that psychiatrist no longer specializes in post-traumatic stress disorder, she has to continue to find a specialist and may have to relocate to Toronto. The Applicant further submits that we should consider her work history and functional limitations and restrictions on her capacity regularly of pursuing any substantially gainful occupation.

[8] The Respondent did not file any written submissions.

ANALYSIS

[9] 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.

[10] 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.

[11] 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. Erroneous findings of fact

[12] The Applicant submits that the General Division based its decision on erroneous findings of fact made without regard for the material before it. The Applicant submits that at paragraph 54 of its decision, the General Division wrote, "it is the Tribunal's finding that none of the Appellant's doctors considered her unable to work full or part-time". The Applicant submits that this is an obvious error, as there are at least five doctors' reports which are mentioned in the decision of the General Division which contradict this finding.

[13] The Applicant refers to, for instance, the medical report of Dr. Cox, a psychologist with the Alberta Health Services Chronic Pain Centre. The General Division summarized this report at paragraph 29. The report reads in part, "We do not see a potential for [the Applicant] to improve such that she would be capable of returning to work. As such, her current disability from work is seen as permanent."

[14] The Applicant also points to the medical opinion of Ms. Yang from the AHS Chronic Pain Centre, which the General Division summarized at paragraph 30 of its decision. Ms. Yang wrote:

> . . . Given the results of the interview, this limited functional assessment and the ongoing cognitive concerns reported by this patient, it is my professional opinion that [the Applicant] is not ready to commit to any type of employment in a meaningful way and most likely with low sustainability rate.

[15] The Applicant also points to Dr. Blakely's report of May 7, 2012 (GT1-88). The Applicant submits that Dr. Blakely concluded that there was insufficient improvement in her conditions to allow her to participate in regular employment. If this is the report at page GT1-88, I do not see that Dr. Blakely provided such a conclusion.

[16] In her medical note dated November 4, 2010 and medical letter dated March 22, 2011, Dr. Elumir also wrote that the Applicant was not capable of working because of medical reasons. These records were before the General Division at GT7-49 and GT7- 50.

[17] The General Division may have based its decision in part on its finding that there were no medical opinions which considered the Applicant unable to work, yet there was evidence before it which indicated otherwise. I am satisfied that the appeal has a reasonable chance of success on this ground.

b. Breach of natural justice

[18] The Applicant submits that the General Division refused to admit or consider any medical reports which were prepared after the minimum qualifying period, on the pretext that they were not relevant to the issue as to whether the Applicant could be found disabled by her minimum qualifying period of December 31, 2012. She submits that this qualifies as a breach of natural justice.

[19] The General Division in fact summarized a number of medical reports that were prepared after the minimum qualifying period, including reports dated March 12, 2014 of Dr. Cox, a limited functional reassessment dated February 24, 2014 prepared by Ms. Yang and medical report of Dr. Morales. Hence, it cannot be said that the General Division excluded them as being inadmissible.

[20] I recognize that the General Division did not refer to these opinions in its final analysis, but as the Supreme Court of Canada has expressed in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A

> decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion *(Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.,* [1975] 1 S.C.R. 382, at p. 391).

[21] Hence, I am not satisfied that the appeal has a reasonable chance of success on the ground that the General Division did not admit or consider any reports which might have been prepared after the minimum qualifying period.

c. Submissions of the Respondent before the General Division

[22] The Applicant further submits that we should reject the submissions of the Respondent, which are summarized at paragraph 43(a) and (b) of the decision of the General Division. The Applicant has prepared responses to these submissions in the leave application.

[23] Paragraph 43(a) and (b) of the decision of the General Division represent the submissions of the Respondent. The paragraph does not represent the findings made by the General Division. In essence, the Applicant’s submissions on this point call for a reassessment of the evidence that was before the General Division. It does not properly speak to any of the enumerated grounds of appeal under subsection 58(1) of the DESDA. I am not satisfied that these particular submissions raise an arguable case or that the appeal has a reasonable chance of success on this ground.

d. Medical considerations and work history

[24] The Applicant further submits that we should consider the medical reports of Drs. Blakely and Morales and her work history and find that she is disabled for the purposes of the *Canada Pension Plan.* The Applicant advises that her family physician referred her to a psychiatrist, but as that psychiatrist no longer specializes in post-traumatic stress disorder, she has to continue to find a specialist and may have to relocate to Toronto. The Applicant submits that she has numerous functional limitations, which interfere with her capacity regularly of pursuing any substantially gainful occupation.

[25] These submissions also call for a reassessment, but as they do not speak to any of the enumerated grounds of appeal under subsection 58(1) of the DESDA, I am not satisfied that they raise an arguable case or that the appeal has a reasonable chance of success on these grounds.

APPEAL

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

(a) Based on the ground upon which leave has been granted, did the General Division base its decision on any erroneous findings of fact?

(b) 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?

[27] I invite the parties to make submissions also as to whether a further hearing is required and if so, what form it should take (e.g. 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 the parties to provide preliminary time estimates for submissions and dates of availability.

CONCLUSION

[28] The Application is granted.

[29] 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