Citation: *H. T. v. Minister of Employment and Social Development*, 2015 SSTAD 1122

Appeal No. AD-15-279

BETWEEN:

H. 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 22, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated February 11, 2015. The General Division conducted an in-person hearing on December 16, 2014 and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan,* as it found that there was "insufficient evidence upon which to base a finding of a severe and prolonged disability" on or before his minimum qualifying period of December 31, 2013. The Applicant's representative, a licensed paralegal, filed an application requesting leave to appeal on May 14, 2015 on behalf of the Applicant. 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] In the leave application, the Applicant's representative submits that the General Division failed to observe a principle of natural justice and otherwise acted beyond its jurisdiction; that it erred in law in making its decision whether or not the error appears on the face of the record; and based its decision on an erroneous finding of fact that it made in an arbitrary manner.

[4] In particular, the Applicant's representative submits that the General Division failed to provide the Applicant with a fair hearing, when it held that submissions on the issue of the severity of the Applicant's medical condition were unnecessary. The Applicant's representative submits also that the General Division erred by rendering a decision without regard for the totality of the medical evidence and opinion before it, by confusing the criteria for the prolonged nature of the medical condition with the criteria for severity and finally, by failing to consider the impact of the Applicant's spouse's disability on the Applicant's activities of daily living.

[5] The Applicant's representative advised in the initial leave application filed on May 14, 2015 that he would be "completing a more formal submission". He requested that the leave application be held in abeyance until formal submissions had been filed. On May 19, 2015, the Social Security Tribunal wrote to the Applicant's representative, advising that the application was incomplete and that more information, namely, contact information for the Applicant, and a declaration signed by the Applicant, was necessary. On June 19, 2015, the Applicant's representative provided the outstanding information, as well as a consultation report of a physiatrist, dated July 15, 2011, and some diagnostic imaging, dated March 1, 2011 and June 23, 2011. The Applicant's representative did not provide any accompanying submissions as to the purpose for which these various medical records were provided.

[6] On June 30, 2015, the Applicant's representative contacted the Social Security Tribunal and advised that he would be filing legal submissions with applicable case authorities. The Social Security Tribunal attempted to follow up with the Applicant's representative by telephone on July 2, 3 and 10, 2015. The Applicant's representative indicated by telephone that he would file these submissions by no later than July 17, 2015. The Social Security Tribunal confirmed that it could expect to receive submissions from the Applicant's representative by July 17, 2015. The Applicant's representative further requested that he be permitted to file submissions by July 24, 2015. The Social Security Tribunal granted this further request. On July 27, 2015, the Applicant's representative requested an extra 10 days to file submissions. The Social Security Tribunal granted this further request as well. Fully more than one month has passed since the deadline for submissions offered by the Applicant's representative himself, but no additional submissions have been received from either the Applicant or his representative, and no further requests for an extension have been made. As the time for filing submissions has now long passed and no further requests for an extension have been made, it is appropriate to review the leave application.

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

ANALYSIS

[8] 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.

[9] 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.

[10] 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) Natural justice

[11] The Applicant's representative submits that the General Division failed to provide the Applicant with a fair hearing, when it held that submissions on the issue of the severity of the Applicant's medical condition were unnecessary. Presumably this is allegedly in the context of the hearing before the General Division, as the Social Security Tribunal had invited the parties to file any additional documents or written submissions in its letters of August 1 and September 15, 2014. The Social Security Tribunal also invited the parties to respond to any documents filed up to October 14, 2014 by no later than November 13, 2014. The Social Security Tribunal advised the parties that if any documents were not filed within the appropriate timelines and if a decision had yet to be issued, the General Division Member making the decision would only consider them at his or her discretion. The Respondent filed written submissions on September 26, 2014. Neither the Applicant nor his representative availed themselves of the opportunity to file any additional documents or submissions during this

timeframe. Given that they had been invited to provide any documents or submissions, it cannot be said that they had been denied an opportunity to make written submissions.

[12] It would have been of some assistance had the Applicant's representative referred me to specific portions of the recording of the hearing before the General Division to support his allegations that the General Division failed to provide the Applicant with a fair hearing, when it held that submissions on the severity issue were unnecessary. Even if, for whatever reason, the Applicant's representative was unable to access the recording of the hearing, he nonetheless has not procured any evidence – such as an affidavit from his client – to support these allegations. It would have been of some assistance too had the Applicant's representative advised me as to what these proposed submissions were. The General Division summarized each of the parties' submissions, but the Applicant's representative has not indicated if any proposed submissions simply would have bolstered those submissions which had already been made, or were entirely different submissions altogether. Without something more to substantiate these allegations, I am not satisfied that the appeal has a reasonable chance of success under this ground of appeal.

(b) Totality of evidence

[13] The Applicant's representative submits that the General Division erred when it failed to consider the totality of the evidence before it.

[14] There is a presumption in law that a decision-maker considers all of the evidence before it. This presumption is rebuttable, but in this case, the Applicant's representative failed to identify what evidence he alleges the General Division did not consider in coming to its decision. In any event, I note the words of the Federal Court of Appeal in *Simpson v. Canada (Attorney General),* 2012 FCA 82, where counsel in that case identified a number of medical reports which she said that the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted. The Federal Court of Appeal dismissed the application for judicial review before it, stating that "a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence".

[15] Without anything more to substantiate this allegation, I am not satisfied that the appeal has a reasonable chance of success.

(c) Criteria for prolonged and severe

[16] The Applicant's representative submits that the General Division erred when it confused the criteria for prolonged and severe. He did not however explain how the General Division might have confused the criteria.

[17] The General Division set out the test for severe and prolonged at paragraph 8 in its decision. It is unclear from the submissions of the Applicant's representative how the General Division might have confused the criteria, when it re-stated the test for a severe and prolonged disability set out in paragraph 42(2)(a) of the *Canada Pension Plan.* Without substantiating the allegations, I am not satisfied that the appeal has a reasonable chance of success on this basis.

(d) Activities of daily living

[18] The Applicant's representative submits that the General Division erred when it failed to consider the impact of the Applicant's spouse's disability on the Applicant's activities of daily living.

[19] This might have been but one consideration in the overall assessment as to whether the Applicant's disability could be found to be severe and prolonged, but it certainly would not have been determinative of the outcome. Unless the facts are of sufficient probative value, a decision-maker can be expected to set out only the most important factual findings and justifications for them. As Stratas J.A. in *Canada v. South Yukon Forest Corporation and Liard Plywood and Lumber Manufacturing Inc.,* 2012 FCA 165 wrote:

> … trial judges are not trying to draft an encyclopedia memorializing every last morsel of factual minutiae, nor can they. They distill and synthesize masses of information, separating the wheat from the chaff and, in the end, expressing only the most important factual findings and justifications for them.

[20] If the Applicant's representative is suggesting that the General Division erred in law, he has not pointed to any legal authorities in support of this proposition, and I am not aware of any

that would require the General Division to consider the impact of a spouse's disability on his activities of daily living. I am not satisfied that the appeal has a reasonable chance of success on this alleged ground.

(e) Additional medical records

[21] The Applicant's representative provided an additional medical consultation report of a physiatrist, along with two diagnostic reports. If these qualify as "new facts", any new facts should relate to the grounds of appeal in a leave application. The Applicant's representative has not indicated how the additional medical records might fall into or address any of the enumerated grounds of appeal. If he is requesting that we consider these additional facts, re-weigh the evidence and re-assess the claim in the Applicant's 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.

[22] If the Applicant's representative has filed these additional medical records in an effort to rescind or amend the decision of the General Division, he 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.

[23] The "new facts" as filed and presented by the Applicant's representative 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

[24] The Application is refused.

Janet Lew

Member, Appeal Division