Citation: *D. B. v. Minister of Employment and Social Development*, 2015 SSTAD 1159

Appeal No. AD-15-399

BETWEEN:

D. B.

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 29, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated March 31, 2015. The General Division conducted a videoconference hearing on February 2, 2015 and 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, 2011. The Applicant's representative, a paralegal, filed an application requesting leave to appeal on June 24, 2015. 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?

FACTUAL BACKGROUND

[3] The Applicant applied for a Canada Pension Plan disability pension on December 4, 2003 (GT1-101 to GT1-104). The Applicant's representative advises that the Respondent requested and received copies of the Applicant's records from the Workplace Safety and Insurance Board (WSIB) in respect of this 2003 application. The Respondent denied the application initially and upon reconsideration.

[4] The Applicant applied for a Canada Pension Plan disability pension a second time, on February 6, 2009 (GT1-61 to GT1-65). The Respondent denied the Applicant's second application for a Canada Pension Plan disability pension initially. The Applicant did not seek a reconsideration of the Respondent's decision.

[5] The Applicant applied for a Canada Pension Plan disability pension a third time, on August 9, 2011 (GT1-13 to GT1-16). The Applicant's representative submits that the Respondent did not seek updated copies of any records from WSIB. The Respondent denied the Applicant's third application for a Canada Pension Plan disability pension initially and upon reconsideration.

[6] The Applicant appealed the Respondent's reconsideration decision to the Office of the Commissioner of Review Tribunals.

[7] Under section 257 of the *Jobs, Growth and Long-term Prosperity Act,* any appeal filed before April 1, 2013 under subsection 82(1) of the *Canada Pension Plan,* as it read immediately before the coming into force of section 229, is deemed to have been filed with the General Division of the Social Security Tribunal on April 1, 2013. On April 1, 2013, the Office of the Commissioner of Review Tribunals transferred the Applicant's appeal of the reconsideration decision to the Social Security Tribunal.

[8] On March 12, 2014, the Applicant's representative filed a Notice of Readiness – Appellant, and on May 1, 2014, a Hearing Information Form. On October 7, 2014, the Social Security Tribunal advised the parties that the General Division Member intended to proceed by way of videoconference. The Social Security Tribunal notified the parties that they had until December 3, 2015 to file additional documents or submissions and until January 2, 2015 to file any response materials.

[9] The General Division conducted a videoconference hearing on February 2, 2015. It rendered its decision on March 31, 2015. Despite his numerous pain complaints, the General Division found the Applicant to have residual work capacity but also found that he had not attempted any work suitable to his condition and limitations since July 2008. The General Division also found that the WSIB has determined the Applicant to be 64% unemployable, due to various injuries sustained in a workplace accident on January 31, 2000. Despite the WSIB's determination, the General Division also found the Applicant to be independent in his household activities and normal life. The General Division pointed to a medical report dated March 2010 of Dr. Marie Slegr, a neurologist, in coming to this finding.

SUBMISSIONS

[10] The Applicant's representative submits that there is a factual discrepancy in the decision of the General Division, in that the WSIB found the Applicant to be 64% unemployable, when in fact, updated documentation which he enclosed with the leave

application deems the Applicant to be 70% unemployable. The Applicant's representative submits that this represents the severity of a worker's permanent impairment and that in his 20 years of experience, he has only ever encountered one other client with such a significant level of impairment. The Applicant's representative submits that this represents an error, as this is the first time he has encountered an applicant to be considered gainfully employed when the WSIB deems that individual to be unemployable.

[11] The Applicant's representative submits that the General Division based its decision on an erroneous finding of fact when it found that the Applicant showed a residual capacity to function during his full-time employment at the Algo Mall from September 2005 to August 2006, and that he lost this employment because of work shortage and performance issues. The Applicant's representative submits that in fact the Applicant lost his full-time employment because of work performance issues which were directly related to his medical condition.

[12] The Applicant's representative submits that the General Division based its decision on another erroneous finding of fact, when it found that the Applicant had not attempted any employment since his full-time employment ended in July 2008, when in fact the Applicant testified that he had "applied for countless jobs, probably about 100, and sent resume's [*sic*] and applications and he has secured job interviews".

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

ANALYSIS

[14] 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.

[15] 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.

[16] 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) WSIB determination

[17] The Applicant's representative refers to WSIB's determination that the Applicant is 70% unemployable. He notes that these records were not before the General Division, as the Respondent had not requested the updated WSIB file after the Applicant's first application for a Canada Pension Plan disability pension.

[18] Any additional or new records should relate to the grounds of appeal. The Applicant's representative submits that the General Division based its decision on an erroneous finding of fact that the WSIB determination was 64% rather than 70%. He suggests that this therefore would be a ground of appeal under paragraph 58(1)(c) of the DESDA. However, if such an error is to be properly caught by the paragraph, it must be one that is either perverse or capricious or without regard for the material before it. The Applicant's representative does not suggest that to be the case here, as the General Division made findings based on the evidence or material before it. It might have been an error had there been evidence before the General Division that the WSIB determination was 70%.

[19] If the Applicant's representative is requesting that we consider the updated WSIB records (or, for that matter, any additional forthcoming records), 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-hear the merits of the matter.

[20] Setting aside the issue as to whether "new facts" can be accepted for the purposes of a leave application, where they do not address any of the enumerated grounds of appeal under subsection 58(1) of the DESDA, the Social Security Tribunal is not bound by any determinations made by the WSIB, or for that matter, any other body. The General Division alluded to this at paragraph 67, when it found that the WSIB's focus is on causation, while that of the *Canada Pension Plan* is on capacity. The *Canada Pension Plan* strictly defines disability and the Applicant is still required to prove that he is disabled as defined by the *Canada Pension Plan*. I am not satisfied that the appeal has a reasonable chance of success under this particular ground of appeal.

(b) Loss of full-time employment in 2008

[21] The Applicant's representative submits that the General Division erred in finding that the Applicant was terminated from his employment in 2008 due to work shortages and performance issues, rather than for reasons relating to his medical condition.

[22] The Applicant's representative did not point to any evidence in support of this allegation, although I see from summaries prepared by the Respondent, copies of which were before the General Division, that the Applicant had indicated that he stopped working due to poor performance due to disability; in the Applicant's Questionnaire filed on February 6, 2009, he reported that he stopped working due to "shortage of work and health"; and in final submissions from the Applicant's representative on March 6, 2014, that the Applicant and his employer mutually agreed that the Applicant would stop working due to his inability to function at the job without pain. The submissions and summary do not qualify as evidence.

[23] While it appears that the General Division made an erroneous finding of fact, its decision must be closely examined. The General Division wrote that the "Applicant stated he lost his full time employment … because of a shortage of work and performance issues" and that "his performance at work wasn't sufficient for what he was being paid". The General Division based this particular finding on the Applicant's testimony.

[24] The Applicant's representative did not put forth any of the Applicant's testimony before the General Division to rebut its findings. There should be some evidence to support the allegations that the General Division erred -- such as an affidavit or preferably, an indication as to where within the recording of the hearing the Applicant's testimony arose. In this case, however, there is support for the submissions of the Applicant's representative at paragraph 17 in the decision of the General Division:

> The Appellant stated on his CPP Questionnaire that he left the company because of both a shortage of work and his medical condition. The Tribunal asked the Appellant if it was for both reasons and the Appellant agreed it was both.

[25] The decision of the General Division made no reference in its findings as to whether the Applicant had stopped working for medical reasons, despite the evidence before it. The General Division did not indicate whether it rejected the Applicant's testimony on this point, or otherwise. This therefore may represent a factual error on the part of the General Division, when it appears to have found that the Applicant left his last employment for reasons unrelated to his health, when the evidence shows that he left reportedly due to his health and because of a shortage of work.

[26] The General Division noted the results of a 2001 functional capacity evaluation, the fact that the Applicant had earned an Honours Bachelor of Commerce degree in 2005, and that he had been engaged in substantially gainful employment in the years 2006 to 2008. It seems implicit that the General Division found that, as the Applicant was able to engage in substantially gainful employment in 2008, that it must have rejected his testimony that he left his last employment for reasons of health, or found that his health represented only a small reason why he left his last employment. It seems that the General Division rejected any notion that the Applicant left his last employment largely for reasons of health, and that he had to have retained some residual work capacity even after he left his last employment. This may have represented an erroneous finding of fact.

[27] To properly fall within subsection 58(1) of the DESDA, it is insufficient to find an erroneous finding of fact, as an applicant must meet two other factors: firstly, the General Division must have based its decision on the erroneous finding of fact, and secondly, the

erroneous finding of fact had to have been made in a perverse or capricious manner or without regard for the material before it. Thus, it is also necessary to determine whether the General Division based its decision – whether wholly or partially – on this finding of fact.

[28] While the Applicant may have left his employment in 2008 because of a combination of health factors and a shortage of work, the General Division was left to determine what his capacity was at his minimum qualifying period. After all, simply because the Applicant may have exhibited some capacity after he left his employment in 2008 does not necessarily translate into capacity at his minimum qualifying period.

[29] The Applicant's minimum qualifying period was December 31, 2011, which was fully more than three years after his last employment in 2008. The General Division analyzed the medical evidence, but it did not appear to base its findings that the Applicant had some work capacity at his minimum qualifying period on the medical evidence before it. Rather, the General Division seems to have based its findings that the Applicant had work capacity at his minimum qualifying period on the fact that the Applicant had been left with some residual work capacity after he left his last employment sometime in 2008.

[30] Given these considerations, I am satisfied that the appeal has a reasonable chance of success on this ground.

(c) Job search efforts

[31] The Applicant's representative submits that the General Division based its decision on an erroneous finding of fact, when it found that the Applicant had not attempted any employment since his full-time employment ended in July 2008, when the evidence was otherwise. The Applicant's representative points to the Applicant's testimony that he had applied for numerous positions and had secured job interviews.

[32] The General Division was aware of the Applicant's testimony in this regard. At paragraph 65, the General Division noted that the Applicant had stated that he "applied to an excess of a hundred jobs". However, it was not a matter of the General Division finding that the Applicant had failed to look or apply for work of any type. Although the General Division wrote at paragraph 63 that the Applicant had not attempted any employment since his full-time

employment ended in July 2008, it also made clear at the end of the same paragraph that it was focused on the Applicant's job search efforts and work efforts "suitable to his condition and limitations since July 2008", or in other words, that his efforts at obtaining and maintaining employment were not unsuccessful for reasons relating to his disability, but rather, other factors, such as socioeconomic considerations. Hence, I am not satisfied that the appeal has a reasonable chance of success on this ground.

APPEAL

[33] If the parties intend to file submissions, the parties may wish to consider addressing the following issues:

(a) Whether the appeal can proceed on the record, or is a further hearing necessary;

(b) Based on the sole ground upon which leave has been granted, did the General Division base its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it?

(c) Based on the ground upon which leave has been granted, what is the applicable standard of review and what is/are the appropriate remedy/ies, if any?

[34] In the event that I should determine that a further hearing is required, the parties should request their desired form of hearing and make submissions also as to the appropriateness of that 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 and their dates of availability.

CONCLUSION

[35] The Application is granted.

[36] 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