Citation: *J. L. v. Minister of Employment and Social Development*, 2015 SSTAD 1158

Appeal No. AD-15-967

BETWEEN:

**J. L.**

Applicant

and

**Minister of Employment and Social Development**
**(formerly Minister of Human Resources and Skills Development)**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division – Leave to Appeal Decision

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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 June 2, 2015. The General Division conducted an in-person hearing on May 29, 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, 2010. Counsel for the Applicant filed an application requesting leave to appeal on August 20, 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?

## HISTORY OF PROCEEDINGS

[3] The Applicant applied for a Canada Pension Plan disability pension on August 17, 2011 (GT1-17 to GT1-20). The Respondent denied the application initially and upon reconsideration. The Applicant appealed the Respondent's reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT).

[4] 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 OCRT transferred the Applicant's appeal of the reconsideration decision to the Social Security Tribunal.

[5] On April 2, 2014, counsel filed a Notice of Readiness – Appellant, and on April 14, 2014, a Hearing Information Form. On June 11, 2014, counsel filed a medical-legal report dated August 5, 2013 of Dr. Sundeep Thinda, a registered psychologist (GT4), and on June 17, 2014, the Respondent filed an addendum to the submissions of the Minister (GT6).

[6] On December 9, 2014, the Social Security Tribunal advised the parties that the General Division Member intended to proceed by way of personal appearance (GT0). On January 14, 2015, the Social Security Tribunal advised the parties that the hearing had been rescheduled (GT0A). The Social Security Tribunal notified the parties that they had until January 29, 2015 to file additional documents or submissions and until February 28, 2015 to file any response materials.

[7] The hearing proceeded on May 29, 2015 and the General Division rendered its decision on June 2, 2015. The General Division was skeptical of the testimony and written submissions of the Applicant, finding that he had a tendency to embellish and exaggerate his symptoms and the effect of his medical condition on his level of functioning. It found inconsistencies in his oral and written submissions. The General Division found that the medical evidence did not support a finding that the Applicant had a severe disability by his minimum qualifying period. The General Division also found minimal objective evidence of serious pathology to account for the extreme reports of pain and loss of functional abilities. The General Division found Drs. Thinda and Tarazi, an orthopaedic surgeon, to be advocates on behalf of the Applicant and therefore found their medical opinions to be unreliable. Having found that the Applicant had some residual work capacity, the General Division also found that the Applicant had not sufficiently undertaken any efforts to obtain and maintain employment, as he had given away his new computer and had not made any efforts to utilize voice-activated computer software.

**SUBMISSIONS**

[8] Counsel submits that the General Division based its decision on various erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it.

[9] Counsel submits that the General Division erroneously interpreted the Applicant's testimony and the medical documents. Counsel submits that the expert medical documents and reports – such as those of Drs. Thinda and Tarazi – were ignored, ultimately resulting in adverse inferences being drawn about the Applicant. Counsel cites, for instance, that when the Applicant testified that he looked after his three children while his wife is away at work, the General Division interpreted this to mean that the Applicant is the sole caregiver, while

ignoring the Applicant's wife's contribution and the fact that two of the children are largely independent. Counsel submits that the Applicant attempted to explain this during the oral hearing, but the testimony was repeatedly discredited by the General Division.

[10] Counsel submits that the General Division erred in drawing conclusions about the Applicant's credibility, without reviewing multiple medical reports, including those of Drs. Thinda and Tarazi.

[11] Counsel submits that it was reasonable for the Applicant to obtain medical opinions to support his appeal, yet the General Division was dismissive of them and found that they "were garnered to assist in advocating for the [Applicant]". Counsel submits that both doctors performed an independent medical examination and were not advocating on behalf of the Applicant. Counsel submits that this is an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it. Counsel submits that it was unreasonable for the General Division to merely acknowledge the opinions of Drs. Tarazi and Thinda and overlook their medical expertise.

[12] Counsel requests that the evidence and testimony be considered again before the Appeal Division and submits that the issue regarding the Applicant's entitlement to a Canada Pension Plan disability pension ought to be heard anew.

[13] The Respondent has not filed any written submissions in response to the leave application.

**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) Caregiving responsibilities

[17] At paragraph 14 of its decision, the General Division wrote:

> [14] At one point in the hearing he testified that his wife does all the housework, but later acknowledged that he solely looks after their 3 children (born 2013, 2009 and 2008), during the day, while his wife works at a local grocery store 3 to 4 times per week.

[18] And, at paragraph 36, it wrote:

> [36] . . . He claims that his wife does all of the household work, yet he also acknowledged that he solely looks after their 3 young children during the day while his wife works.

[19] Counsel submits that the General Division based its decision on an erroneous finding of fact when it erroneously interpreted the Applicant's testimony in regards to the extent to which he cares for his three children while his wife is away at work. Counsel submits that the General Division determined that the Applicant is the sole caregiver of the three children, while ignoring the fact that his wife assumes some of the caregiver responsibilities, such as cooking, cleaning and food preparation, and the fact that two of his children are independent and able to care for themselves. (The Applicant's children were born in 2008, 2009 and 2013.) Counsel submits that the Applicant attempted to explain this during the oral hearing, but the testimony was repeatedly discredited by the General Division.

[20] Counsel did not provide any evidence to support the allegation that the Applicant testified about the extent of his caregiving responsibilities. She did not point to any portions of the recording of the hearing. Counsel submits that the Applicant attempted to explain his responsibilities during the oral hearing before the General Division, but it remains unclear whether he in fact gave evidence on this matter and if so, what that evidence might have been, or whether the General Division declined to hear evidence on this point. However, I do see from the medical report of Dr. Tarazi that the Applicant reported that his "wife has always done all the cooking, cleaning and laundry and continues to do so" and that Dr. Tarazi was of the opinion that the Applicant would continue to require his wife to do all the cooking, cleaning and laundry, as the Applicant could not do any of these activities in his present condition, secondary to his right ankle and left wrist symptoms. Dr. Tarazi was also of the opinion that if the Applicant's wife were not able to do these activities, then he would have to hire other people to perform them (GT2).

[21] In reviewing the decision of the General Division on this issue, I do not see that its conclusions are inconsistent with counsel's submissions. Counsel submits that the Applicant's wife does the cooking, cleaning and food preparation. The General Division did not rule this out and suggest that the Applicant was the only caregiver and that only he did these household chores. The General Division wrote that he solely looks after the three children during the day while his wife works. There was evidence to this effect. The General Division did not spell out what the Applicant did and did not do during the wife's absence. Obviously the wife's contribution could only be made while she is at home and while she is absent, he is left to care for the children. Thus, it cannot be said that there was no evidentiary basis for the General Division to draw the conclusion that the Applicant was the sole caregiver while his wife was away at work. I am not satisfied that the appeal has a reasonable chance of success on this particular ground.

**(b) Credibility**

[22] Counsel submits that the General Division erred in drawing conclusions about the Applicant's credibility, without reviewing multiple medical reports, including those of Drs. Thinda and Tarazi.

[23] Essentially counsel calls for a reassessment of the Applicant's credibility, taking into account the medical reports. This does not speak to one of the enumerated grounds of appeal under subsection 58(1) of the DESDA, and does not qualify as an erroneous finding of fact made without regard for the material before it. In assessing credibility, a decision-maker can look to contradictions within a witness's evidence and between evidence given on different occasions, discrepancies between his evidence and previous statements given to others, amongst other considerations, and then assign what the General Member perceives to be the appropriate amount of weight to that evidence.

[24] Counsel raises the issue that the General Division did not consider some of the evidence, in assessing the Applicant's credibility. The Federal Court of Appeal has previously addressed this submission in other cases, that the Pension Appeals Board failed to consider all of the evidence or had not assigned the appropriate amount of weight to the evidence. In *Simpson v. Canada (Attorney General),* 2012 FCA 82, the Federal Court of Appeal held 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". Counsel has not pointed me to anything within the decision of the General Division that would cause me to question whether the presumption ought to be rebutted or displaced.

[25] The General Division based its findings on credibility of the Applicant largely on what it perceived as inconsistencies in his oral and written submissions. The General Division assessed and assigned what it deemed to be the appropriate amount of weight to the evidence before it, in assessing his credibility. I am not satisfied that the appeal has a reasonable chance of success on this ground.

**(c) Medical opinions**

[26] Counsel submits that the General Division based its decision on an erroneous finding of fact when it found that Drs. Thinda and Tarazi were necessarily advocating on behalf of the Applicant. Counsel submits that the General Division erred when it rejected these medical opinions for reasons of advocacy. Counsel submits that it was reasonable for the Applicant to obtain medical opinions to support his appeal. She further submits that both doctors performed an independent medical examination and were not advocating on behalf of the Applicant.

[27] The General Division wrote at paragraph 44 and 45 of its decision that:

> [44] The Tribunal finds that the medical opinions of Drs. Thinda and Tarazi in 2013 and 2014, respectively, are not reliable. The reports were prepared at the request of the Appellant's representative, and it appears the opinions were garnered to assist in advocating for the Appellant, rather than treat the Appellant. The Appellant was examined several years following his work stoppage and his MQP. Physical capacity limitations are supported by minimal objective medical findings, and indications of pain seem to rely heavily upon the unreliable complaints of the Appellant. Both doctors were required to make assumptions in regard to the cause of medical findings and continuing complaints due to the effluxion of time since the work place injuries.
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> [45] In 2013, Dr. Thinda found the problem with the employability of the Appellant is his limited pain tolerance and emotional stamina. It is not clear, given complaints of unbearable pain, why the Appellant was not able to consume analgesics or pursue pain counselling to assist with his tolerance and stamina. In his 2014 report, Dr. Tarazi said the Appellant is practically unemployable, yet he did not mention the results of any functional testing or comment on objective medical evidence to support his opinion. He also appears to have relied upon the Appellant's complaints of pain and loss of mobility in the ankle and wrist. It appears that the reports of Drs. Thinda and Tarazi were prepared with a focus on the Appellant's ability to return to his former job, and not on other employment options including part-time, since neither report comments on alternative employment.

[28] The General Division found the medical opinions of Drs. Thinda and Tarazi to be unreliable for a number of reasons, including the fact that they had been prepared at the request of counsel, and that as such, they "were garnered to assist in advocating for the [Applicant]".

[29] Had the General Division found that the two physicians were advocating on behalf of the Applicant simply as a result of the fact that counsel had requested and obtained the two medical reports, this would have been an error of law. Advocacy does not naturally arise from the fact that a party chooses to obtain supporting medical opinion. Indeed, it is welcomed, if not encouraged, to have expert opinion, as clinical records and diagnostic reports alone are usually insufficient to speak to issues such as diagnosis, functionality, recommendations for treatment and prognosis.

[30] The General Division however did not find the two reports to be unreliable simply because counsel obtained the reports. Rather, the General Division pointed to a number of other reasons why it considered the two medical opinions to be unreliable, including the fact that they had been prepared ““several years following his work stoppage and his [minimum qualifying period]”, i.e. they could not possibly have addressed the Applicant’s condition at his minimum qualifying period. The General Division found that there were minimal objective medical findings and that both doctors were required to make assumptions in regards to the cause of medical findings and continuing complaints. The General Division wrote that Dr. Tarazai did not mention the results of any functional testing or comment on objective medical evidence to support his finding. Considering these factors together would seem to support the General Division’s findings.

[31] However, the General Division suggests that there was no objective basis to account for the Applicant’s symptoms involving his left wrist. Yet, Dr. Tarazi noted that an MRI scan of the left wrist taken on November 21, 2012 reportedly revealed an old non-united fracture of the ulnar styloid process. Accordingly, Dr. Tarazai was of the opinion that the Applicant had sustained a left wrist ulnar styloid fracture, likely from the work injury of October 31, 2008, and that it did not appear significant initially due to much more serious other injuries, and that it likely became more noticeable two years later when the Applicant began to increase his physical activity level. From that perspective, the report merited consideration and ought not to have been deemed unreliable on account that it was prepared after the minimum qualifying period.

[32] I recognize that the Applicant had been seen by a physiatrist in February 2011 in regards to his left hand numbness and pain, but the Applicant was referred for an assessment of possible left carpal tunnel syndrome, and indeed, the physiatrist seems to have restricted his assessment to whether the Applicant has carpal tunnel syndrome (GT1-45 to GT1-46). In other words, Dr. Tarazi addressed a number of relevant and material issues regarding the Applicant’s left wrist, which do not appear to have been addressed by the physiatrist or any other practitioner, for that matter.

[33] The General Division also found that the report of Dr. Tarazi was prepared with a focus on the Applicant's ability to return to his former job, and "not on other employment options including part-time, since neither report comments on alternative employment". Yet, Dr. Tarazi had this to say:

> In my opinion, his left wrist condition is causing significant limitations. He is not suited for any physically laborious jobs anymore. He also is not suited to do any jobs that involve lifting, twisting or turning with the left hand. Jobs that require typing should also be avoided. In my opinion, Mr. J. L. will have very significant difficulty finding gainful employment, secondary to his multiple injuries sustained in the work accident of October 31, 2008. He is not able to walk on his right foot and uses a cane in the right hand. His left hand function is also quite limited. It is my opinion that he is now practically unemployable, secondary to his work injuries of October 31, 2008.

[34] Overall, I am satisfied that there is an arguable case and that the appeal has a reasonable chance of success on this particular ground.

**(d) Relief sought**

[35] Counsel seeks a re-hearing. As the grounds of appeal are limited to those under subsection 58(1) of the DESDA, it seems that a "circumscribed review" is contemplated, i. e. there is no *de novo* hearing and no opportunity to re-hear the evidence: *Canada (Attorney General) v. Merrigan,* 2004 FCA 253, but counsel may make further submissions on this issue.

**APPEAL**

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

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

(b) Based on the sole ground upon which leave has been granted, did the General Division base its decision on an error of law or 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?

[37] 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**

[38] The Application is granted.

[39] 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