Citation: *M. D. v. Minister of Employment and Social Development*, 2015 SSTAD 1195

Appeal No. AD-15-404

BETWEEN:

M. D.

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: October 6, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated March 27, 2015. The General Division conducted a teleconference hearing on February 19, 2015. The General Division 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. Counsel for the Applicant filed an application requesting leave to appeal on June 29, 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?

SUBMISSIONS

[3] Counsel has made extensive submissions. He submits that the General Division made numerous errors of law, as follows:

(a) did not provide sufficient reasons in concluding that the Applicant has work capacity;

(b) in finding that the Applicant had not shown that she had made an attempt at a job within her limitations;

(c) incorrectly or inadequately applying the test from *Villani v. Canada (Attorney General)*, 2001 FCA 248; and

(d) in finding that the Applicant's efforts at mitigation were insufficient because she opted for mostly alternative medical treatments.

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

ANALYSIS

[5] 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.

[6] 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.

[7] 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) Sufficiency of reasons

[8] Counsel submits that the General Division did not provide sufficient reasons in concluding that the Applicant has work capacity. Counsel relies on *Canada (Minister of Human Resources Development) v. Quesnelle,* 2003 FCA 92, for the proposition that failing to provide an analysis or reasons for a finding is an error on which a decision may be overturned. There, the Federal Court of Appeal held that, "in the absence of any indication in the Board's reasons that it engaged in a meaningful analysis of the evidence, its decision cannot stand".

[9] The Supreme Court of Canada has held that the failure of the trier of fact to deliver meaningful reasons for his decision to enable a reviewing body to make an assessment constitutes an error of law: *R. v. Sheppard*, [2002] SCC 26.

[10] The analysis undertaken by the General Division in assessing the severity of the Applicant's disability consists of four paragraphs: the first paragraph deals with *Villani;* the second paragraph deals with the Applicant's efforts to obtain and maintain employment; the third paragraph deals with the Applicant's efforts to mitigate her condition by seeking treatment; and the fourth and final paragraph deals with the General Division's findings as to whether the Applicant met the burden of proof in showing that she meets the criteria of a severe disability on or before her minimum qualifying period. Of these, only the second paragraph addressed the issue of the Applicant's work capacity.

[11] In the second paragraph of its analysis, the General Division wrote, "where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment", and then proceeded to determine whether the Applicant had made any efforts to attempt a job within her limitations. By proceeding with this determination, I infer that the General Division concluded that the Applicant had some work capacity. However, the General Division did not undertake any analysis of the medical records or of the evidence to show how it might have come to this finding that the Applicant had some work capacity. As counsel submits, no discussion was presented on the issue of the Applicant's work capacity and from it, we cannot know whether the General Division made an assessment of the evidence or applied the legal test incorrectly.

[12] On this basis, I am satisfied that there is an arguable case that the General Division did not provide sufficient reasons in concluding that the Applicant has work capacity. I am satisfied that the appeal has a reasonable chance of success on this ground.

(b) Job search efforts

[13] Counsel submits that the General Division erred in law in finding that the Applicant had not shown that she had made an attempt at a job within her limitations.

[14] At paragraph 30 of its decision, the General Division wrote:

> [30] Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117). The Appellant has not made any effort to attempt a job within her limitations. She was working at two jobs when she stopped working and they were both physically demanding. She stopped work due to her fear of reinjuring her back. After stopping work she continued to do volunteer work for her church and she was able to attend regularly for her scheduled commitments.

[15] Counsel submits that the General Division placed too high a standard on the Applicant by requiring that she should be able to find and maintain gainful employment with a benevolent employer who will afford the Applicant the same leniency she is permitted at home and at church. Counsel further submits that:

> The [General Division] suggests that because [the Applicant] is able to perform some household chores and occasional volunteer work, both with assistance and frequent and lengthy breaks, that she is, despite the medical evidence to the contrary, able to pursue regular, gainful employment, but what the [General Division] is requiring of [the Applicant], incorrectly, is that she find an employer who is willing to accommodate the infrequent, irregular, and inconsistent amount or quality of work that [the Applicant] can carry out.

[16] Counsel submits that this is unreasonable and a legal error.

[17] Short of undertaking a reassessment of the evidence, I do not see any indication in the decision of the General Division that it required the Applicant to seek out any employment with a benevolent employer who would provide accommodations to the Applicant. The General Division found that the Applicant had been engaged in physically demanding work. It seems that the General Division found the Applicant had sufficient capacity for less physically demanding work, and hence required her to at least make an effort to obtain and maintain employment within this set of limitations.

[18] Counsel refers to a number of legal authorities and compares them to the Applicant's circumstances. He submits that the medical evidence shows that the Applicant lacks the requisite capacity for a substantially gainful occupation, much like the claimants in the various legal authorities. The reasonableness of a decision unto itself is not a sufficient ground under subsection 58(1) of the DESDA. Essentially counsel's submissions on this point call for a

reassessment, which is beyond the scope of a leave application. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(c) Villani

[19] Counsel submits that the General Division incorrectly or inadequately applied the test from *Villani*. Although the General Division cited *Villani*, counsel submits that the only factors it considered in assessing severity were the Applicant's age, education, language proficiency and past work and life experience. Counsel submits that the Applicant's personal characteristics were not limited to these considerations, but should also include her medical condition. Counsel referred to paragraph 32 of the *Villani* decision, where the Federal Court of Appeal held:

> This approach requires the Board to determine whether an applicant, in the circumstances of his or her background and medical condition, is capable regularly of pursuing any substantially gainful occupation. (counsel's emphasis)

[20] Counsel submits that even if the Applicant's education, age, language and work experience make her a candidate for gainful employment, her medical condition does not. Counsel submits that the General Division applied *Villani* too narrowly.

[21] The Applicant's counsel has lumped medical conditions into the mix of personal characteristics. I do not see that the Federal Court of Appeal contemplated that a claimant's medical conditions were to be assessed as part of his or her personal characteristics, but it is clear that a decision-maker must also consider the medical evidence in assessing the severity of one's disability. I am satisfied that there is an arguable case on the issue as to whether the General Division assessed the medical evidence before it. I am satisfied that the appeal has a reasonable chance of success on this ground.

(d) Efforts at mitigation

[22] Counsel submits that the General Division erred in law as it found that the Applicant's efforts at mitigation were insufficient because she opted for mostly alternative medical treatments.

[23] At paragraph 31, the General Division wrote:

> [31] In assessing whether the Appellant has met the burden of proof in showing that she suffers from a severe disability her efforts to mitigate her condition must be considered. The Appellant did not see her family doctor from August 15, 2008 until February 28, 2012, a period of three and a half years and for two full years past the time she last worked. When she stopped work in 2010 she was no longer under the restrictions she understood were placed upon her by Work Safe BC following each of her two initial work related injuries of only a single practitioner but she did not pursue any medical intervention to perform diagnostic investigations, referrals to specialists or pharmaceutical pain medication. The Appellant did seek treatment with her naturopath, chiropractor and physiotherapist in 2011 but this was more than a year after she stopped work. She experienced no benefit from the therapies provided yet still did not go to a medical doctor. The Appellant does not take any medications for her pain. These factors are not consistent with a condition of such severity as to have prevented all work.

[24] From this, I do not see that the General Division held that the Applicant's efforts at mitigation were insufficient because she opted for mostly alternative medical treatments. If anything, the General Division found that the Applicant did not experience any benefit from them. It was only after coming to this finding that the Applicant was not experiencing any benefit, that the General Division held that she should seek out other forms of treatment, such as seeing a medical doctor.

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

APPEAL

[26] Some of the grounds on which I have granted leave would seem to be a sufficiently compelling basis for me to render a decision on the appeal without a further hearing of the matter. If the parties intend to file submissions, the parties may wish to consider addressing the following issues:

i. Whether a further hearing is necessary, in light of the strengths of some of the grounds advanced by the Applicant;

ii. Based on the grounds upon which leave has been granted, did the General Division err in law or base its decision on erroneous findings of fact made in a perverse or capricious manner or without regard for the material before it?

iii. Based on the grounds upon which leave has been granted, what is the applicable standard of review (for each) and what are the appropriate remedies, if any?

[27] 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

[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