Citation: *M. R. v. Minister of Employment and Social Development*, 2015 SSTAD 1259

Appeal No. AD-15-1005

BETWEEN:

M. R.

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 27, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated June 16, 2015. The General Division conducted an in-person hearing on May 11, 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, 2013. Counsel for the Applicant filed an application requesting leave to appeal on September 15, 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 for the Applicant submits that the General Division erred in law in making its decision and/or based its decision on an erroneous finding of fact made without regard for the material before it, in that it failed to apprehend the significance of, or give any weight to, the opinion of the psychiatrist Dr. Cooper contained in his report dated October 23, 2013. Counsel submits that the report addressed the factors which the Tribunal was required to consider in its decision, however the General Division referred to it only in passing, at paragraph 66 of its decision. Counsel submits that the General Division failed to acknowledge or quote the psychiatrist's opinion in any depth. Counsel submits that this failure led to an erroneous finding regarding the nature of the disability not being severe.

[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* 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.

[8] The General Division referred to and summarized the medical report dated October 23, 2013 of Dr. Cooper, at paragraph 48, where it wrote:

> [48] In a medical report dated October 23, 2013, Dr. J. Cooper, a psychiatrist, states that he first examined the Appellant on June 11, 2012. He describes her as still depressed and ingesting Ciprolex 20 mgs per day. He points out that she is tired, exhausted, continues to be pain focused and had problems sleeping because of the pain. He also points out that "her pains get worse during the cold damp weather and whenever the weather changes".

[9] In its analysis and findings regarding the Applicant's capacity to work, the General Division wrote, "[Dr. Cooper] simply prescribes her Cymbalta for her panic attacks, stress-related issues and depression", and "Dr. Cooper found that [the Applicant] is depressed, tired, exhausted, continues to be pain focused and has sleep disturbance".

[10] Dr. Cooper reviewed the Applicant's medical history. He had conducted a medical examination of the Applicant on June 11, 2012, when he first saw her. He also noted that he last saw her on October 17, 2013. Her affect appeared depressed even though she had been put on Cipralex 20 mg once a day when he saw her on August 28, 2013. Dr. Cooper diagnosed her as having chronic pain syndrome, major depressive disorder – reactive depression and aspects of a generalized anxiety disorder. He was also of the opinion that she was going through a chronic adjustment disorder and had sustained soft tissue injuries as a result of a slip and fall accident that occurred on November 3, 2011, which in turn caused a pain syndrome which had now developed into chronic pain syndrome. He assessed her global assessment of functioning at between 45 to 50%. He concluded that the Applicant "has been adversely affected vocationally, domestically and socially".

[11] Counsel submits that the General Division failed to apprehend the significance of or give any weight to the opinion of the psychiatrist Dr. Cooper. He submits that the report addresses the factors which the Tribunal must consider in its decision. Counsel submits that the General Division should have acknowledged or quoted from the opinion at greater depth. It is unclear what passage(s) counsel submits the General Division overlooked, or what factors the General Division should have considered.

[12] If this were simply an issue of the assignment of weight, I would readily dismiss this application. The Federal Court of Appeal has previously addressed this submission in other cases that a decision-maker 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 Applicant's counsel 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 refused to interfere with the decision-maker's assignment of weight to the evidence, holding that that properly was a matter for "the province of the trier of fact". I am not satisfied that this issue raises an arguable case or that the appeal has a reasonable chance of success on this ground.

[13] However, upon reviewing the decision of the General Division, I note that it made no mention of the diagnoses made by Dr. Cooper, nor his assessment on her global assessment of functioning. While a diagnosis alone does not establish the severity of a condition, there was little, if any, analysis by the General Division regarding the Applicant's mental state which might be tied to these diagnosed conditions. Ultimately, the General Division might have found that Dr. Cooper's opinion would have had no impact on the ultimate outcome, and might have continued to have found that her psychiatric issues are manageable, but that is speculative. There was relatively little in the way of medical documentation before the General Division and Dr. Cooper was the only medical specialist whose report formed part of the evidence. It would seem therefore that the General Division could have failed to apprehend the significance of Dr. Cooper's opinion regarding the Applicant's diagnoses and the impact of her disabilities on her overall capacity. I am satisfied that this raises an arguable case and that the appeal has a reasonable chance of success.

[2] **APPEAL**

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

i. whether the appeal can proceed on the record, or whether a further hearing is necessary;

ii. did the General Division err in law or base its decision on an erroneous finding of fact made without regard for the material before it?

iii. if so, what is the applicable standard of review and what is/are the appropriate remedy/ies, if any?

[15] 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

[16] The Application is granted.

[17] 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