Citation: *R. K. v. Minister of Employment and Social Development*, 2015 SSTAD 1260

Appeal No. AD-15-1006

BETWEEN:

R. K.

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 25, 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, 2012. 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 submits that the General Division erred in basing its decision on various erroneous findings of fact made without regard for the evidence, as follows:

(a) in finding that "the conditions outlined would not preclude work and highlight difficulties in her home life, more than a severe medical condition". Counsel submits that the General Division relied on irrelevant considerations and confused the concept of causation with impairment. Counsel submits that the General Division failed to consider some of the evidence before it;

(b) in "holding that Dr. Lee and Dr. Mirzaei did not hold that the Applicant was disabled and unable to work". Counsel submits that the General Division had difficulty in interpreting the term "functional impairment" used by Dr. Mirzaei;

(c) in drawing the inference that the Applicant's failure to obtain a volunteer position was unrelated to her medical conditions and impairments; and

(d) in failing to consider the evidence with respect to the Applicant's chronic pain and the impact of the chronic pain on her ability to function.

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

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) Applicant's various medical conditions

[8] Counsel submits that the General Division erred when it came to a finding at paragraph 28 of its decision that the Applicant's conditions "would not preclude work and highlight difficulties in the Applicant's home life, more than a severe medical

condition". Counsel submits that this is unclear and unknown how it relates to a finding of whether the Applicant fell within the definition of disabled under the *Canada Pension Plan.* Counsel submits that if this means that there is some causal link between the Applicant's personal experience and the development of the medical condition, this would not preclude entitlement. Counsel submits that if the General Division meant that the Applicant's impairments were caused by her "home life" as opposed to the diagnosed medical conditions, then the General Division made a conclusion without any evidence upon which to base it. Counsel submits that the evidence clearly establish that the Applicant's impairments relate to the diagnosed medical conditions.

[9] Counsel explains that there is no indication in the decision of the General Division that it considered how the Applicant could function in any substantially gainful occupation with the impairments which have been identified. Counsel identifies these impairments as including "chronic pain, depressed mood, anxiety, fatigue/low energy, concentration difficulties and anhedonia (inability to experience pleasure)". Counsel submits that the General Division confused the concept of causation with impairment. (While counsel may use the word "impairment" interchangeably with different medical conditions, it is clear that the medical reports use the word in the context of the Applicant's functionality and that they do not refer to any medical conditions. For instance, Dr. Mirzaei wrote that the Applicant has functional impairments relating to her ongoing symptomology.)

[10] While the General Division did not list all of the medical conditions in its analysis, it indicated at paragraph 27 that it considered the conditions in their totality. Indeed, the General Division summarized and discussed the Applicant's depression, fibromyalgia and back pain generally in its Analysis section, and made reference to each of these conditions in the Evidence section, in terms of the diagnosis, history, treatment and anticipated prognosis. Hence, it cannot be said that the General Division was not aware of the various medical conditions.

[11] While the General Division may not have referred to some of the evidence in the Analysis section, that does not necessarily mean that it ignored that evidence or that it

failed to consider it. Indeed, the Supreme Court of Canada has determined that it is unnecessary for a decision-maker to write exhaustive reasons addressing all the issues before it. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Supreme Court of Canada remarked that:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion *(Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.,* [1975] 1 S.C.R. 382, at p. 391).

[12] However, I note that the Applicant reportedly left work due to chronic pain, anxiety and depression and that she continued to report having problems with anxiety into 2009. In her Questionnaire accompanying her application for a disability pension, the Applicant listed anxiety as one of the factors preventing her from working. A June 2011 psychological assessment conducted by Dr. Andrea Lee indicates that the Applicant's anxiety was also significantly impacting her functioning. Dr. Gail Webber's office visit notes referred to by the General Division included an entry for February 2012, in which the Applicant reported that she was still experiencing anxiety and that it was a bigger issue now. Both Drs. Lee and Mirzae were of the opinion that the Applicant had a generalized anxiety disorder. By April 2012, Dr. Lee expressed the opinion that while the Applicant had made improvements in her anxiety, she still met the criteria for generalized anxiety disorder. The Applicant's physicians recommended that the Applicant consider a future referral to an anxiety disorder program. In early March 2013, Dr. Mirzaei still considered the Applicant to suffer from symptoms of anxiety. She was started on Seroquel for her anxiety symptoms. Approximately one year later, Dr. Mirzaei noted that the Applicant continued to undergo psychiatric care and psychotherapy. The Applicant had seen some improvement in her mood and anxiety over time, but despite the improvements, continued to demonstrate functional difficulties. Other than for a "significant life stressor", the Applicant felt ready to engage in volunteer work.

[13] I do not refer to this evidence regarding the Applicant's diagnosis of a generalized anxiety disorder to suggest that any reassessment is appropriate nor necessary, but to show that there was relatively extensive evidence of anxiety before the General Division. More significantly, the diagnosis of a generalized anxiety disorder appears to have featured prominently in the Applicant's disability, yet the General Division does not appear to have made any specific reference to it in the analysis. That unto itself might not ultimately or necessarily be fatal to the overall decision, but there is an arguable case to be made out as to how, as counsel submits, the Applicant could function in any substantially gainful occupation, given her anxiety.

[14] Counsel has raised other submissions in this context. He submits that the statement that the Applicant's conditions "would not preclude work and highlight difficulties in the Applicant's home life …" as being unclear. The General Division was simply drawing conclusions as to whether the evidence could support a finding that the Applicant was disabled for the purposes of the *Canada Pension Plan.* I do not see that the General Division drew any causal link between the Applicant's personal experiences and the development of any medical condition and, in any event, the causation of any medical conditions generally is not a relevant consideration in determining severity, unless it somehow addresses other issues such as capacity and long-term prognosis.

[15] While I agree with counsel's submissions that the Applicant's medical conditions establish some degree of impairment, that alone is not conclusive that the Applicant is disabled for the purposes of the *Canada Pension Plan.*

[16] While I am unprepared to accept some of counsel's submissions on this matter, I am satisfied that he has raised an arguable case and that the appeal has a reasonable chance of success.

(b) Medical opinions

[17] Counsel submits that the General Division based its decision on an erroneous finding of fact "in holding that Dr. Lee and Dr. Mirzaei did not hold that [the Applicant] was disabled and unable to work".

[18] At paragraph 30, the General Division wrote, in part:

> [30] . . . Drs. Lee and Mirzaei report an increase in the [Applicant's] GAF scores from 2011 to 2012, and a reduction in the severity of her depression diagnosis. While Drs. Lee and Mirzaei differ on the GAF scores and severity of the diagnosis, nonetheless in the spring of 2012 they both report improvement in her condition. Dr. Mirzaei in March 2013, three months post-MQP, reports that the [Applicant] has "functional impairment" but such a vague finding is not indicative of a severe disability.

[19] Counsel suggests that if a practitioner found the Applicant disabled, that the General Division ought to accept that opinion uncritically in determining whether an applicant is disabled for the purposes of the *Canada Pension Plan.* Had Dr. Lee or Dr. Mirzaei held that the Applicant was disabled and unable to work, this would have usurped the role of the trier of fact. The determination as to whether an applicant is disabled for the purposes of the *Canada Pension Plan* is reserved for the trier of fact. It was for the General Division alone to assess whether any observations made by the medical practitioners and their respective expert opinions addressed the issues or could support a legal finding that the Applicant's disability could be found severe and prolonged under the *Canada Pension Plan.* It would have been inappropriate for the General Division to accept any opinion from a medical practitioner, or anyone else for that matter, that the Applicant is disabled for the purposes of the *Canada Pension Plan,* without subjecting that evidence and determining whether it, along with the balance of the evidence, met the test for disability.

[20] Counsel further submits that the General Division had difficulty in interpreting the term "functional impairment" used by Dr. Mirzaei. I do not see anywhere within the decision where the General Division purported to interpret the term "functional impairment". While certainly the General Division used the term, it was in direct quotation from the opinions of Dr. Mirzaei.

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

(c) Volunteer work

[22] Counsel submits that the General Division based its decision on an erroneous finding of fact in drawing the inference that the Applicant's failure to obtain a volunteer position was unrelated to her medical conditions and impairments.

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

> [31] Both doctors advised her to pursue a volunteer work placement program. The Tribunal notes that the Appellant has been unable to do so, not due to health reasons, but due to what Dr. Mirzaei called "a life stressor". The Tribunal acknowledges that volunteer work is not the same as substantially gainful work; however, it was identified by her medical practitioners as a path for the Appellant to pursue in order to reintegrate into the workforce and she has failed to do so.

[24] In their joint medical report dated March 19, 2014, Dr. Mirzaei and Ms. Lidstone, an occupational therapist, wrote:

> In spite of these difficulties [the Applicant] felt ready to engage in volunteer work and secured volunteer work at a retirement home in the fall of 2013. A significant life stressor occurred however with accompanying distress and relapse of symptoms which prevented her from following through with volunteer work.

[25] There was an evidentiary basis upon which the General Division could find that the Applicant was unable to pursue a volunteer work placement due to a "life stressor", however, the General Division did not refer to the accompanying distress and relapse of symptoms. The report of Dr. Mirzaei and Ms. Lidstone suggest that it was a combination of both factors – the "significant life stressor" and the accompanying distress and relapse of symptoms which prevented the Applicant from pursuing volunteer work.

[26] While the General Division may not have referred to the accompanying distress and relapse of symptoms as factors which prevented the Applicant from pursuing volunteer work, that alone would not have been determinative in the overall consideration as to whether the Applicant could be found disabled for the purposes of the *Canada Pension Plan.* However, the General Division closely tied the Applicant's efforts at integration into the workforce with her pursuit of a volunteer work placement program, when it wrote that

it was identified by the Applicant's medical practitioners as a path for the Appellant to pursue in order for the reintegration. The inference that the Applicant's failure to obtain a volunteer position was unrelated to her medical conditions and impairments raises an arguable ground as to whether this might have had any impact on the Applicant's overall capacity regularly of pursuing any substantially gainful occupation. I am satisfied that the appeal has a reasonable chance of success on this ground.

(d) Chronic pain

[27] Counsel submits that the General Division failed to consider the evidence with respect to the Applicant's chronic pain and the impact of the chronic pain on her ability to function. To some extent, this submission overlaps with the submission in (a) above.

[28] As I have indicated, a decision-maker need not exhaustively refer to all of the evidence before it, other than to provide a sufficient basis upon which to enable a reviewing or appellate body to make an assessment on the material issues. Similar to the Applicant's anxiety issues, the General Division summarized the evidence regarding the Applicant's chronic pain issues, but does not appear to have referenced or discussed it in its analysis. Dr. Mirzaei considered the Applicant's chronic pain to be a contributory factor in perpetuating the Applicant's symptoms on an overall basis, but it is also allegedly a prominent feature in her disability. Accordingly, I find that there is an arguable case to be made out as to how, as counsel submits, the Applicant could function in any substantially gainful occupation, given her chronic pain issues. I am satisfied that the appeal has a reasonable chance of success on this ground.

APPEAL

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

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

ii. Based on the grounds 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?

iii. Based on the grounds upon which leave has been granted, what is the applicable standard of review and what is/are the appropriate remedy/ies, if any?

[30] 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

[31] The Application is granted.

[32] 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