Citation: *A. S. v. Minister of Employment and Social Development*, 2015 SSTAD 1247

Appeal No: AD-15-833

BETWEEN:

A. S.

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 22, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated June 22, 2015. The General Division conducted a videoconference hearing on June 16, 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, 2013. Counsel for the Applicant filed an application requesting leave to appeal on July 22, 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 made the following errors, that it:

(a) contradicted itself; and

(b) did not consider all of the evidence, both documentary and oral, in making the decision.

[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.

(a) Prolonged criteria

[8] Counsel submits that at paragraph 53 of its decision, the General Division declined to make a finding on the prolonged criteria, notwithstanding the fact that during the hearing, the General Division indicated that the medical evidence on file shows that the Applicant's disability was prolonged, and despite indicating in paragraph 10 of its decision that the medical evidence on file shows that the disability was prolonged.

[9] Paragraph 10 of the decision largely deals with counsel's request to admit additional documents. The General Division wrote that, "there [was] medical evidence on file dated February 20, 2015, which shows the Appellant's disability is prolonged", and at paragraph 53, it wrote that as it had found the disability was not severe, it was unnecessary for it to make a finding on the prolonged criterion. Counsel submits that the General Division contradicted itself.

[10] It may be that the General Division contradicted itself when, in the context of determining the admissibility of a number of documents, it seemingly found that the medical evidence showed the Applicant's disability to be prolonged, and then in its conclusions on the merits of the appeal, declined to make any findings at all on the prolonged criterion.

[11] However, the test for disability is two-part under paragraph 42(2)(a) of the *Canada Pension Plan* and if an applicant does not meet one aspect of this two-part test, then he or she does not meet the disability requirements under the legislation. In *Klabouch v. Canada (Minister of Social Development),* 2008 FCA 33, the Federal Court of Appeal stated that:

> [10] The fact that the Board primarily concentrated on the "severe" part of the test and that it did not make any finding regarding the "prolonged" part of the test does not constitute an error. The two requirements of paragraph 42(2)(a) of the CPP are cumulative, so that if an applicant does not meet one or the other condition, his application for a disability pension under the CPP fails.

[12] The General Division either found the Applicant's disability to be prolonged, or had declined to make a finding on the prolonged criteria. Ultimately however it found that the disability was not severe. Thus, her application would have necessarily failed. Notwithstanding the fact that the General Division seemingly contradicted itself on the prolonged issue, on the basis that the application would have necessarily failed given that the General Division was not satisfied that the Applicant's disability could be considered severe, I am not satisfied that the appeal has a reasonable chance of success.

(b) Consideration of the evidence

[13] Counsel submits that the General Division failed to consider the evidence, both documentary and oral, in coming to its decision. Counsel points to the following examples:

i. the General Division summarized the contents from the Applicant's Questionnaire which accompanied her application for a Canada Pension Plan disability pension, but it did not include any information that the Applicant had tried numerous therapies and was not seeing any improvement in her pain (GT1-42 to GT1-48). Counsel submits that the General Division failed to show that the Applicant has severe limitations with respect to activities of daily living, due to her right shoulder pain, and that she is dependent on others to complete these activities;

ii. at the hearing, the Applicant testified that when she returned to her workplace, her employer provided accommodations for her by creating a position whereby she could do light, sedentary work. The Applicant questioned the existence of such a "light job" (i.e. sitting and joining wires) in the real world;

iii. at the hearing, the Applicant also testified that she relies on others with regards to her personal care and function at home and in the community, due to severe pain in her right shoulder. She testified that she was not medically fit to return to school or work; and,

iv. at the hearing, the Applicant also testified that she does not take public transit as she would not be able to use her right arm to hold onto the bars. The General Division then asked the Applicant if she would be able to take public transit if she were to request and get a seat from the driver and the Applicant responded positively. Counsel submits that the General Division Member misrepresented the evidence at paragraph 19 of the decision.

[14] At paragraph 19 in the Evidence section of the decision, the General Division wrote:

> [19] The Appellant stated that she is able to take public transportation at her MQP if she requests the driver of the bus to make sure that she gets a seat that is designated for people with disabilities. She stated that when she took public transportation she did let the bus driver know that she needed seating reserved for people with disabilities.

[15] This evidence which the General Division purportedly failed to consider largely addresses the Applicant's alleged limitations involving her right shoulder and arm.

[16] In reviewing the decision, the General Division appears to have considered the Applicant's functional limitations, where her right arm and shoulder were concerned. The General Division focused on the opinions of Drs. Elmaraghy and Murthy. The General Division discussed the limitations at paragraph 49 of its analysis.

[17] While the General Division may not have provided a comprehensive review and analysis of the evidence, and did not mention some of the testimony or the Applicant's Questionnaire, that does not mean that the General Division failed to consider that evidence. I note that the Federal Court of Appeal has held that there is no obligation for a decision-maker to exhaustively list all of the evidence before it, as there is a general presumption that it considered it all. 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". I note to the words of Stratas J.A. in *Canada v. South Yukon Forest Corporation and Liard Plywood and Lumber Manufacturing Inc*., 2012 FCA 165 in this regard. Stratas J.A. wrote:

> … trial judges are not trying to draft an encyclopedia memorializing every last morsel of factual minutiae, nor can they. They distill and synthesize masses of information, separating the wheat from the chaff and, in the end, expressing only the most important factual findings and justifications for them.

[18] Counsel submits that the General Division misstated the evidence regarding the Applicant's use of public transit. Essentially counsel says that the General Division based its decision on an erroneous finding of fact that it made without regard for the evidence before it. Although counsel has not presented any transcripts of the hearing or pinpointed any particular portions of the recording of the hearing, I will accept counsel's submissions on this point for the purposes of assessing this ground.

[19] Though there was evidence before it, I do not see anywhere that the General Division referred to or relied upon any of the evidence regarding the Applicant's use of public transit in the Analysis section, and hence, it cannot be said that the General Division based its decision on this evidence. I am not satisfied that the appeal has a reasonable chance of success on this ground.

CONCLUSION

[20] The Application is dismissed.

Janet Lew

Member, Appeal Division