Citation: *C. G. v. Minister of Employment and Social Development*, 2015 SSTAD 1264

Appeal No: AD-15-1008

BETWEEN:

C. G.

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 28, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated May 16, 2015. The General Division conducted an in-person hearing on February 4, 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, 2011. Counsel for the Applicant filed an application requesting leave to appeal on September 14, 2015, seemingly past the 90 day deadline by which to file an application requesting leave to appeal. To succeed on this application, I must be satisfied that the leave application was either filed on time or that there is a basis for me to extend the time for filing and that the appeal has a reasonable chance of success.

ISSUES

[2] The following issues are before me:

(a) Was the application requesting leave to appeal filed on time and if not, should I exercise my discretion and extend the time for filing of the leave application?

(b) Does the appeal have a reasonable chance of success?

HISTORY OF PROCEEDINGS

[3] The Applicant applied for a Canada Pension Plan disability pension on March 23, 2011 (GT1-19 to GT1-22). 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 in early 2012.

[4] Under section 257 of the *Jobs, Growth and Long-term Prosperity Act* (JGLPA), 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 of the JGLPA, is deemed to

have been filed with the General Division of the Social Security Tribunal on April 1, 2013. On April 1, 2013, the Office of the Commissioner of Review Tribunals transferred the Applicant's appeal of the reconsideration decision to the Social Security Tribunal.

[5] In or about September 2013, the Respondent filed a Notice of Readiness. On Mach 24, 2014, counsel filed a Notice of Readiness – Appellant on behalf of the Applicant, and on April 30, 2014, a Hearing Information Form. On September 23, 2014, the Social Security Tribunal advised the parties that the General Division Member intended to proceed by way of an in-person hearing. The Social Security Tribunal notified the parties that they had until December 5, 2015 to file additional documents or submissions and until January 6, 2015 to file any response materials.

[6] The General Division conducted a hearing on February 4, 2015 and rendered its decision on May 16, 2015. The General Division provided a comprehensive summary of the medical evidence up to the end of 2008. The General Division noted the Applicant's multiple symptoms associated with her chemical sensitivities. The General Division relied on a medical report dated August 27, 2008 of Dr. Mah, in which he reportedly expressed an opinion that the Applicant could work at a sedentary level in a workplace that does not expose her to factors that cause her sensitivities. The General Division found that the Applicant exhibited residual work capacity and found that while she had tried modified duties at her former place of employment, did not make efforts to obtain work elsewhere in a fragrance-free environment. The General Division also found that the Applicant had not consented to a vocational rehabilitation assessment.

SUBMISSIONS

[7] Counsel for the Applicant submits that the General Division erred in law in making its decision and also based its decision on an erroneous finding of fact that it made without regard to the material and testimony before it. In particular, he submits that the General Division erred in the application of *Inclima v. Canada {Attorney General),* 2003 FCA 117, and *Klabouch v. Minister of Social Development,* 2008 FCA 33, firstly, in determining that the Applicant had work capacity in the first place and secondly, in finding that the Applicant

had been unsuccessful in showing any efforts at obtaining and maintaining employment, in light of the evidence before it.

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

ANALYSIS

(a) Was the leave application filed in a timely manner and if not, is there a basis for the Appeal Division to extend the time for filing?

[9] The decision is dated May 16, 2015 but the letter of the Social Security Tribunal accompanying the decision is dated June 8, 2015. The Applicant advises that the decision of the General Division was communicated to her on June 15, 2015. The application requesting leave to appeal was filed on September 14, 2015, within 90 days after the date on which the decision had been communicated to her. I find that the leave application was filed within the time permitted under paragraph 57(1)(b) of the *Department of Employment and Social Development Act* (DESDA). I therefore do not need to consider whether to exercise my discretion and extend the time for filing of the leave application.

(b) Does the appeal have a reasonable chance of success?

[10] 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.

[11] Subsection 58(1) of the 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.

[12] 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.

[13] Counsel for the Applicant submits that the General Division erred in law in making its decision and also based its decision on an erroneous finding of fact that it made without regard to the material and testimony before it. In particular, he submits that the General Division erred in the application of *Inclima* and of *Klabouch* in determining that the Applicant had work capacity in the first place.

[14] Counsel submits that once one gets to the analysis undertaken by the General Division, that there seems to be a disconnect between the evidence and the logic. The General Division listed multiple symptoms which the Applicant experiences once exposed to various chemicals. In terms of the Applicant's work capacity, the General Division placed great weight on the report dated August 27, 2008 of Dr. Mah, in which he stated that the Applicant was never going to return to the work capacity she had prior to the diagnosis of chemical sensitivity. He was however of the opinion that she could work at a sedentary level in a workplace that does not expose her to factors that cause her sensitivities.

[15] Counsel reviewed the extensive evidence before the General Division – both documentary and *viva voce*, and submits that from it, there was no other conclusion which could have been drawn other than that the Applicant does not have any residual work capacity. Essentially this calls 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 basis.

[16] Counsel notes that it is interesting that the General Division repeated a "misrepresentation" made by the Respondent that there were no more recent assessments with an allergist or respirologist after 2008, although does not allege that the General Division erred in doing so. Counsel notes that the Applicant saw Dr. van Olm, a respirologist, in 2011. Counsel notes that Dr. van Olm's report of July 14, 2011 was before the General Division (GT3-29 to GT3-30).

[17] The fact that the General Division repeated a "misrepresentation" made by the Respondent does not mean that it erred, when it was simply setting out what it perceived to be the submissions of the Respondent. The General Division did not address this submission directly, but that too does not represent an error necessarily.

[18] However, the General Division made no reference to Dr. van Olm's 2011 report or to the opinions set out in his report, nor for that matter, any of the clinical records which appear to be from The Parsons Clinic. These records appear to cover the period from January 6, 2010 to March 2, 2011. While there is no duty on a decision-maker to exhaustively list and analyze all of the evidence before it, given that the Applicant's minimum qualifying period is December 31, 2011, it strikes me that the General Division may not have considered any of the material records after 2008. After all, it did provide a very comprehensive summary of the records up to 2008. Counsel submits that its apparent failure to consider all of the medical documentation – particularly those closer in time to the minimum qualifying period – may have materially impacted the outcome. I am satisfied on this basis that the appeal has a reasonable chance of success.

[19] Counsel further submits that the General Division erred as it based its decision on an erroneous finding of fact without regard for the material before it. In particular, counsel submits that the General Division erred in finding that the Applicant had been unsuccessful in showing any efforts at obtaining and maintaining employment, in light of the evidence before it. Counsel notes that there was evidence that the Applicant had in fact tried different jobs with her former employer, and had also worked with the Workers Compensation Board.

[20] In fact, the General Division noted the Applicant's efforts in this regard. At paragraph 49 of its decision, the General Division found that the Applicant had tried modified duties with her employer (though does not specify in what areas) and at paragraph 27 in its summary of the evidence, that sometime in 2007, the Applicant requested some time to consider her situation before beginning any back to work services available through the Workers Compensation Board. And, at paragraph 35, the General Division referred to a return to work assessment form completed by the Workers Compensation Board in August 2008. The Applicant had been assessed then that she was fit to work with modified duties and permanent restrictions to avoid fragrances. Certainly the General Division accepted the evidence that the Applicant had worked with the Workers Compensation Board.

[21] The General Division was aware of this evidence but also found that the Applicant had not made any efforts to obtain work outside of her former place of employment in a fragrance-free environment. Counsel has not pointed to any evidence to the contrary and from this, it appears that there was an evidentiary foundation upon which the General Division could base its findings. I am not satisfied that the appeal has a reasonable chance of success on this particular ground.

[22] Finally, counsel submits that the General Division erred in placing weight on the fact that the Applicant refused to undergo a vocational rehabilitation assessment. Counsel submits that the decision of the General Division in this regard was unreasonable, given that the Applicant had already attended therapeutic rehabilitation at Canadian Back Institute, which did not go well. Apart from the fact that therapeutic rehabilitation at the Canadian Back Institute may offer different services in addition to a vocational rehabilitation assessment, essentially counsel is requesting that I assess the reasonableness of this finding, in light of the evidence. As I have indicated above, a reassessment is beyond the scope of a leave application. In any event, I note that the General Division seems to have addressed this point, when it referred to the medical opinion dated August 27, 2008 of Dr. Mah, who was of the opinion that the Applicant could work at a sedentary level in a workplace that does not expose her to factors that cause her sensitivities. The General Division also addressed the Applicant's concerns over how realistic this might be. Overall, I am not satisfied that the appeal has a reasonable chance of success on this ground.

APPEAL

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

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

(b) Based on the ground upon which leave has been granted, did the General Division err in law or base its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it?

(c) If so, what is the applicable standard of review and what is/are the appropriate remedy/ies, if any?

[24] 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

[25] The Application is granted.

[26] 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