Citation: *G. R. v. Minister of Employment and Social Development*, 2015 SSTAD 1265

Appeal No. AD-15-1017

BETWEEN:

G. 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 28, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated June 15, 2015. The General Division conducted a videoconference hearing on June 3, 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 hers minimum qualifying period of December 31, 2005. The Applicant filed an application requesting leave to appeal on September 16, 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] The Applicant submits that the General Division erred in law in making its decision and that it based its decision on an erroneous finding of fact without regard for the material before it. In particular, she submits that the General Division ignored a material factor which deserved significant weight; she submits that this constitutes an error of law and is an abuse of the General Division's discretion. The Applicant further submits that the General Division made a number of contradictory statements, though fell short of identifying them.

[4] The Applicant submits that the evidence overwhelmingly showed that depression and anxiety – which have "intensified greatly" since 2004 and 2005 – were the primary reasons she is disabled. She suggests that despite this evidence, the General Division focused on her seizures instead. Alternatively, she submits that the General Division should accept that commonly, those with depression or mental health issues often do not seek help early on, or do not continue with therapy.

[5] The Applicant submits that she had been unaware that she could obtain health records from Alberta Health until months ago. She intends to obtain these records and provide them, as she submits that they will further establish her disability under the *Canada Pension Plan.*

[6] The Applicant submits that the General Division ought not to have given any consideration to the Respondent's submissions for the following reasons, that:

(a) she sought help in Alberta and has tried over the past two years to find her records;

(b) Dr. Hartford's report of a high Global Assessment of Functioning score in May 2008 is not indicative of her mental health status, as the score represents how she presented at an isolated point in time. She submits that the General Division ought not to have assigned much weight to the score, particularly when it was given three years after her minimum qualifying period;

(c) her seizures are not what keeps her from working. In other words, the General Division's focus on her seizures was misplaced;

(d) while she did not return to see Dr. Moll between December 2007 and 2012, she understood from him that if she were to experience any more seizures, to refrain from driving;

(e) while she attended college in 2007 and earned a certificate in Business Administration and graduated with honours, the General Division neglected to consider that this was an online course she was able to complete at her own pace.

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

ANALYSIS

[8] 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.

[9] 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.

[10] 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.

i. Mental health issues

[11] The Applicant submits that the General Division ignored a material factor which deserved significant weight; she submits that this constitutes an error of law and is an abuse of the General Division's discretion. She also submits that the General Division made a number of contradictory statements. Yet, she does not identify the material factor which the General Division allegedly ignored, nor does she identify the contradictory statements. I can only presume that she is referring to her further allegation that the General Division focused on her seizures rather than her depression or anxiety. In this regard, I note that the General Division wrote that there were no medical documents at the Applicant's minimum qualifying period to

support her claim that her disability was severe at that time. Indeed, the Applicant appears to confirm this statement when she indicates that she is in the process of obtaining medical records from Alberta for this time period.

[12] Notwithstanding the absence of any medical documentation for 2005, the General Division in fact examined the record regarding the Applicant's mental health issues. At paragraph 42 of its decision, the General Division referred to Dr. Hartford's report that the Applicant had not been assessed by "Mental Health". The General Division also noted the Applicant's testimony that she had yet to see "someone like a psychologist".

[13] While it may well be that the Applicant did not seek help for her mental health issues early on, there would still need to be some evidence to suggest that she had depression or anxiety, whether it be through her family physician's observations or her self-reporting to her physicians.

ii. Respondent's submissions before the General Division

[14] The Applicant submits that that the Respondent's submissions were rebuttable and that the General Division therefore ought not to have given them any or much consideration. In reviewing the decision, it does not appear that the General Division addressed some of the Respondent's submissions, or that it relied on the submissions in coming to its determination as to whether the Applicant could be found disabled. For instance, the General Division said nothing about the Applicant's Global Assessment of Functioning Score, and it did not draw any conclusions about the severity of her disability in connection with the fact that she had "attended" college in 2007.

[15] The Applicant does not dispute the fact that she has done some driving after her minimum qualifying period, or that she did not see Dr. Moll between December 2007 and 2012, but the General Division made no findings in connection with her driving. The General Division appears to have considered the fact that the Applicant did not see Dr. Moll for approximately five years when it assessed the severity of the Applicant's disability from the perspective of her seizures, but the Applicant does not disagree with this finding and in any event, states that the seizures alone do not keep her from working.

[16] The General Division appears to have implicitly accepted the Respondent's first submission, that there is no indication the Applicant sought or was referred to a mental health specialist until long after her minimum qualifying period, but the Applicant does not dispute the accuracy of this. She does however explain why she did not seek out treatment early on. As I have indicated above, while the Applicant may not have sought treatment for a number of reasons, the General Division concluded that the issue before it was whether there was sufficient evidence of the severity of the Applicant's mental health status at or prior to her minimum qualifying period.

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

iii. Alberta health records

[18] The Applicant proposes to provide health records from Alberta, once she receives them. If these qualify as "new facts", any new facts should relate to the grounds of appeal in a leave application. The Applicant has not indicated how these proposed new medical records might fall into or address any of the enumerated grounds of appeal. If she is requesting that we consider these additional facts, re-weigh the evidence and re- assess the claim in the Applicant's favour, I would be unable to do that, given the limitations under subsection 58(1) of the DESDA. Neither the leave application nor the appeal provides any opportunities to re-assess or re-hear the claim to determine whether the Applicant is disabled as defined by the Canada Pension Plan.

[19] If the Applicant intends to file these additional medical records in an effort to rescind or amend the decision of the General Division, she would have to comply with the requirements set out in sections 45 and 46 of the Social Security Tribunal Regulations, and would also have to file an application for rescission or amendment with the same Division that made the decision. There are strict deadlines and requirements under section 66 of the DESDA for rescinding or amending decisions. Subsection 66(2) of the DESDA requires an application to rescind or amend a decision to have been made within one year after the day on which a decision is communicated to a party, while paragraph 66(1)(b) of the DESDA requires an applicant to demonstrate that the new facts are material and could not have been discovered at the time of the hearing with the exercise of reasonable diligence. Under subsection 66(4) of the DESDA, the Appeal Division in

this case has no jurisdiction to rescind or amend a decision based on new facts, as it is only the Division which made the decision which is empowered to do so, which in this case would be the General Division.

CONCLUSION

[20] The Application is dismissed.

Janet Lew
Member, Appeal Division