

Citation: *O. D. v. Minister of Employment and Social Development*, 2015 SSTAD 1339

Appeal No. AD-15-1058

BETWEEN:

O. D.

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: November 19, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated July 14, 2015. The General Division conducted a teleconference hearing on June 24, 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, 2010. The Applicant’s representative, a paralegal, filed an application requesting leave to appeal on September 24, 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’s representative submits that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; erred in law in making its decision, whether or not the error appears on the face of the record; and 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. The Applicant’s representative made numerous submissions falling within each of these grounds.

ANALYSIS

[4] 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.

[5] 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.

[6] 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. Cake business

[7] At paragraph 35 of its decision, the General Division wrote that Dr. Basile, a neurologist, indicated that the Applicant was not working and had “started a cake business and cake making at home a couple of years earlier”. The Applicant’s representative submits that this was in error and that in fact Dr. Basile wrote, “Previously worked in an administrative role and a couple of years ago she started a business and cake making business”. The Applicant denies that she started a cake making business and that her statements to Dr. Basile were misunderstood. The representative submits that the Applicant clearly testified that she never did any baking, other than for a couple of times a year, with the assistance of her mother, for her immediate family. The representative submits that the Applicant also explained why she purchases flour from a distributor, and as the flour is not sold to the general public, she had to provide a company name. The representative submits that the Applicant provided documentation which proves that she did not run a business or conduct any transactions to suggest that she derived any income from a baking business. The representative provided pictures of the Applicant’s kitchen, which he submits indicates that it is not equipped for a money-making business. The representative submits that the evidence proves that the Applicant is not running a business.

[8] The reference to Dr. Basile's report forms part of the evidence, rather than the factual findings of the General Division. Notwithstanding its reference to Dr. Basile's report, the General Division did not rely upon it and concluded at paragraph 140 that, "Based on the evidence, on balance, the Tribunal is unable to conclude the Appellant ran and operated a home business on or after the MQP..." In other words, the General Division did not base its decision on Dr. Basile's report that the Applicant ran a home-based cake making business. I am not satisfied that the appeal has a reasonable chance of success on this ground.

b. Psychological state

[9] The representative submits that the General Division did not take all the information into consideration. The representative points to paragraph 64 of the decision, in which the General Division wrote, "[The Applicant] did not describe her psychological state in the Questionnaire". The representative submits that the Applicant completed the Questionnaire as best as she could but did not know how to complete it. He further submits that, despite the fact that the Applicant did not describe her psychological state, the questionnaire indicates that she was treated for depression and anxiety attacks. The representative provided information on an anti-depressant, as part of the leave materials.

[10] It seems from these submissions that the representative is suggesting that because the Applicant may not have described her psychological state, that the General Division somehow found that she could not have been suffering from a mental disability.

[11] There is no credible basis to what I have understood to be the representative's submissions. In fact, the General Division was setting out the Applicant's evidence before it. She testified that she did not describe her psychological state in the Questionnaire, that no one told her how to complete it and that she completed it to the best of her ability. On top of that, the General Division accepted that the Applicant had a psychological disability, although it was unprepared to find that it was prolonged. I am not satisfied that the appeal has a reasonable chance of success on this ground.

c. Attempts at work

[12] The representative submits that the General Division erred when it stated at subparagraph 107 a) that the Applicant's doctor advised her that she could return to part-time work and that she planned to do so in May 2010, or that she made no attempts to find alternate work due to her medical conditions. The representative submits that there is evidence to rebut this; he points to the Applicant's evidence that she had "conducted many interviews" (at paragraph 84). The representative submits that the Applicant has limited skills and even working from home is not viable, given the nature of her disabilities and the need for medication, which has adverse side-effects and forces her to lie down for a full day.

[13] Subparagraph 107 a) does not represent any findings which might have been made by the General Division. The paragraph represents the submissions of the Respondent. I am not satisfied that the appeal has a reasonable chance of success on this ground.

d. Current job search

[14] The representative submits that the General Division erred when it stated at subparagraph 107 i) that the Applicant is currently looking for work. The representative lists a number of points against this purported finding of fact.

[15] This subparagraph too represents the submissions of the Respondent, rather than any findings of fact which might have been made by the General Division. I am not satisfied that the appeal has a reasonable chance of success on this ground.

e. Finding by the General Division that the Applicant's disability is not severe

[16] The representative submits that the General Division erred at paragraph 158 of its decision when it concluded that the Applicant's disability is not severe, by failing to properly consider a number of medical opinions. He submits that all of the medical reports are conclusive that the Applicant has severe allergies. He submits that the Applicant takes medication daily to avoid choking, fainting or falling into a coma.

[17] The representative has not identified which of these reports the General Division allegedly failed to properly consider, but even so, from what I understand, he suggests essentially that the General Division failed to accept the opinions that the Applicant has severe allergies. In fact, the General Division accepted that the Applicant does indeed have severe allergies, as can be seen at paragraph 129 of its decision, where it wrote:

[2] As a starting point, the Tribunal is satisfied that the Appellant is incapable regularly of pursuing any substantially gainful occupation where she is exposed to certain environmental triggers such [sic] dust or perfumes or specific food odours due to her food allergies as described in the medical record.

[18] The General Division found that the Applicant's severe allergies alone were insufficient in this case and not determinative that she could be found severely disabled, particularly if she avoided any triggers of her environmental allergies.

[19] If the representative is suggesting that the General Division based its decision on an erroneous finding of fact that it made without regard to the evidence, and that it erroneously found that the Applicant's disability is not severe, this in fact goes to the ultimate question and is not a finding of fact *per se*.

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

f. Investigations

[21] The representative submits that the General Division erred when it stated at subparagraph 107 f) that investigations have not identified any serious pathology that would prevent the Applicant from pursuing work suitable to her limitations in a different workplace. The representative lists a number of points against this purported finding of fact.

[22] This subparagraph too represents the submissions of the Respondent, rather than any findings of fact which might have been made by the General Division. I am not satisfied that the appeal has a reasonable chance of success on this ground.

g. Medical reports

[23] The representative submits that the medical reports confirm the severity of the Applicant's disabilities. He submits that her physical limitations are severe and that she is "basically homebound". He submits that the Applicant's depression and psychological conditions are severe, and that she cannot focus, remember or concentrate. He notes that she has lost her appetite and is always fatigued. The representative reviewed the various medical reports.

[24] In regards to the Applicant's allergies and environmental sensitivities, the representative relies on the report of Dr. Brown, dated November 10, 2008 (GT1-56 to GT1-57). Dr. Brown suggested that the Applicant return to a stress free, clean, dry environment, free of perfumes, ongoing drywall work, dust or mold. The representative questioned whether this recommendation is at all practical.

[25] The representative also relies on the following records:

- i. reports of Dr. Brown, dated January 26, 2009 (GT1-62), May 7, 2010 (GT1-43) and December 12, 2012;
- ii. report of Dr. Howard Langer, dated December 30, 2008 (GT1-60);
- iii. report of Kenneth R. Keeling, registered psychologist, dated August 18, 2010 (GT6-2 to GT6-16). The Applicant notes that the psychologist recorded a global assessment of functioning (GAF) score of 55 and questioned how this alone does not qualify as severe;
- iv. report of St. Michael's, dated January 11, 2012 (GT10-11 to GT10-14); and,
- v. Questionnaire completed by Applicant on May 21, 2010 (GT1-35).

[26] I will address a couple of points which have been raised by the representative. The representative relies upon a GAF score of 55 as evidencing severity. While it can serve as a useful tool, the score can only represent how the Applicant presented on the occasion when

the assessment was undertaken. Had there been a series of GAF scores over a period of time, that might have been a more reliable indicator of the Applicant's disability.

[27] The representative also questions whether Dr. Brown's recommendation is at all practical. The General Division addressed this at paragraph 153 of its decision.

[28] Essentially, the Applicant's representative is asking for a reassessment of the evidence which had been before the General Division. Subsection 58(1) of the DESDA is very specific as to what grounds of appeal are permitted on appeal; a reassessment of the evidence falls beyond the scope of an appeal and does not qualify as a permitted ground of appeal. I am not satisfied that the appeal has a reasonable chance of success on this ground.

[29] Similarly, in the Conclusions section of the representative's submissions, while he submits that the General Division did not take into consideration "severe major facts", his review of the evidence amounts to a request for a reassessment.

CONCLUSION

[30] Given the considerations above, the application for leave to appeal is dismissed.

Janet Lew

Member, Appeal Division