Citation: *J. S. v. Minister of Employment and Social Development*, 2015 SSTAD 1366

Appeal No. AD-15-835

BETWEEN:

J. 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: November 27, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated April 23, 2015. The General Division conducted the hearing by way of written questions and answers and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that his disability was not "severe" at his minimum qualifying period of December 31, 2006. The Applicant filed an application requesting leave to appeal, on July 28, 2015. He raises a number of grounds. 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 leave ought to be granted, as 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; or 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. In particular, the Applicant submits that the General Division erred as follows, in:

a) focusing on his age at his minimum qualifying period and failing to consider that he worked for many years with pain until he could no longer do so. The Applicant explains that he has limited education and work experience; and

b) failing to consider that he suffered from depression and anxiety long before he saw a psychiatrist and well before his minimum qualifying period. He submits that the General Division erred in finding that as he did not see a psychiatrist until after the minimum qualifying period, his depression and anxiety therefore could not have been severe.

[4] The Applicant submits that taking into account both his physical limitations and his depression and anxiety, he meets the definition of severe and prolonged under the *Canada Pension Plan.*

[5] The Respondent did not file any written submissions.

ANALYSIS

[6] 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.

[7] 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.

[8] 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. Age, medical considerations and work history

[9] The Applicant submits that the General Division erred when it focused on his age at his minimum qualifying period, without considering his past work history. The Applicant explains that he began working at 16 years of age and continued to work until 2004,

although this may not be fully reflected in the earnings history. The Applicant also submits that he has limited work education and work experience in physical labour.

[10] The General Division considered the Applicant's past work history, when assessing the Applicant's personal characteristics in a real world context, when applying *Villani v. Canada (Attorney General)*, 2001 FCA 248. The General Division noted that the Applicant has a limited education and has worked only in jobs requiring physical labour. The fact that the General Division referred to the Applicant's age at his minimum qualifying period was a fact it could not ignore under the *Villani* assessment of personal characteristics. Under *Villani*, it may well have been appropriate for the General Division to focus on the Applicant's age, if it did, to the extent that it, or any other personal characteristic, was a significant factor in a "real world context" in assessing the severity of one's disability.

[11] Essentially the Applicant's submissions call for a reassessment of the evidence, but as they do not speak to any of the enumerated grounds of appeal under subsection 58(1) of the DESDA, I am not satisfied that the submissions raise an arguable case or that the appeal has a reasonable chance of success on this ground.

b. Onset of depression and anxiety

[12] The Applicant submits that the General Division erred in finding that as he did not see a psychiatrist until after the minimum qualifying period, his depression and anxiety therefore could not have been severe. As a general proposition, this would qualify as an error of law, if the trier of fact were to routinely determine that an applicant could not be disabled if he or she did not seek out certain medical treatment, but there must be some evidence – whether documentary or otherwise – to support a finding of disability prior to the minimum qualifying period. The General Division did not indicate in its decision whether the Applicant had exhibited any symptoms of depression or anxiety prior to the minimum qualifying period or that if he did exhibit any symptoms, what impact they might have had upon him. Similarly, the Applicant has not pointed to any evidence in the documentary record to support this submission. I am not satisfied that the appeal has a reasonable chance of success on this ground.

c. Error of law on the face of the record

[13] If I were to restrict myself on this leave application to considering only those grounds alleged by the Applicant, I would readily dismiss the application, as he has not satisfied me that the appeal has a reasonable chance of success on the grounds which he has set out. However, that does not conclude the matter, as I may find that the General Division might have erred in law, whether or not the error appears on the face of the record.

[14] In addressing the medical evidence before it, the General Division wrote that the medical evidence on file "leaves some doubt as to the severity of his symptoms as of the MQP". This suggests that the General Division might have erred and applied a stricter standard of proof when it indicated that it was left with "some doubt" as to the severity of the Applicant's symptoms. Yet, at the same time, the General Division also wrote at paragraph 22 that the Applicant must prove "on a balance of probabilities" that he had a severe and prolonged disability and at paragraph 26:

> [39] Having considered the totality of the evidence and the cumulative effect of the Appellant's medical conditions, the Tribunal **is not satisfied on the balance of probabilities** that the Appellant suffered from a severe disability as of the MQP. (My emphasis)

[15] Had the General Division not set out the legal standard of proof which the Applicant was required to meet and also referred to this standard when it summarized its findings, I might have been prepared to find an arguable case. It seems that the General Division was alive to the standard of proof which the Applicant was required to meet, and that its expression "some doubt" was an unfortunate slip.

[16] As the Applicant's reasons for appeal effectively disclose no grounds of appeal for me to consider, and as the Applicant has not identified with sufficient specificity any errors which the General Division may have made in its decision, I am not satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[17] The application for leave to appeal is dismissed.

Janet Lew
Member, Appeal Division