Citation: *N. A. v. Minister of Employment and Social Development*, 2015 SSTAD 1414

Appeal No. AD-15-1237

BETWEEN:

N. A.

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: December 10, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated August 20, 2015. The General Division conducted a videoconference hearing on August 10, 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, 2009. The Applicant filed an application requesting leave to appeal on November 13, 2015. The Applicant alleges that the General Division made a number of errors. 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 as follows:

(a) in law, whether or not the error appears on the face of the record, in not ensuring adequate language interpretation, resulting in mistakes. The Applicant examined the translations made by the translator. The Applicant submits that the translator made many "major mistake" (*sic*) that resulted in erroneous findings of fact. The Applicant also alleges that she was not able to effectively communicate with the interpreter because her Spanish was different from hers; this resulted, for instance, in the translator providing different meaning to words and misinterpreted notions. The Applicant also alleges that the statements regarding Mary Kay were not interpreted correctly and that the translator erred with the meaning; and

(b) in basing its decision on an erroneous finding of fact that it made in a perverse or capricious manner and without regard for the material before it. The Applicant also alleges that the interpretation resulted in the General Division

confusing her first illness (a 1997 accident involving her knee) with a second illness (retinol detachment problem which occurred in 2007). The Applicant alleges that the decision of the General Division was made without regard for the material before it.

[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) Error of law / Breach of natural justice

[8] The Applicant alleges that there was inadequate language interpretation. (She refers to this as translation, but I understand that she is referring to the interpretation, as

there was an interpreter at the hearing before the General Division.) Rather than characterizing this as an error of law, I might have characterized this allegation of inadequate language interpretation as a failure to observe a principle of natural justice, if the Applicant was not afforded a fair hearing due to language issues.

[9] At the outset of the hearing before the General Division, the Applicant's counsel advised that he had spoken with the Applicant on one prior occasion and found that she has "some command of English". He advised that he anticipated that the Applicant might have problems with any questions, particularly those involving hypothetical situations, such as whether at the time of 2009, she able to work light duties, if a job had been available? He advised that he had also explained this to the interpreter prior to the hearing having commenced.

[10] Counsel advised that the Applicant did not understand some of these types of hypothetical questions, as he suspected that it had to do with a combination of verb tense and the hypothetical. Counsel suggested that, subject to his client's comfort, that the hearing proceed, as much as possible, without interpretation, simply because it would be more efficient, and then use the interpreter, as needed. And, if the Applicant did not understand the questions or had any difficulty explaining any answers, then they would rely on the interpreter. The Applicant advised that while she has some understanding and is able to speak some English, she preferred to use the interpreter. Indeed, the Applicant was able to understand many questions in English and was able to give much of her evidence in English.

[11] The first part of the hearing was predominantly in English.

[12] At about 2:28 of the second part of the recording, questions arose about the Applicant's work status prior to her minimum qualifying period. This is where the evidence concerning the Applicant's work with Mary Kay arose. The Applicant's counsel asked the Applicant questions in English and the Applicant responded in English. However, neither the Applicant's counsel nor the General Division fully understood the Applicant, and the Applicant then proceeded to explain her response in Spanish. From approximately the 3:00 mark until the 4:00 mark of the recording, the Applicant gave evidence in Spanish and the interpreter then interpreted from Spanish to English. Following this, there were no

objections taken by either the Applicant or her counsel of the interpretation. There was no indication then that there were any difficulties or problems with the interpretation.

[13] At about 6:20 to 6:40 of the second part of the recording, counsel asked the Applicant why she did not pursue full-time work with Mary Kay and give up her long-term benefits (with her disability insurer). The interpreter proceeded to interpret this question to Spanish (from 6:40 to 6:55). The Applicant responded in Spanish and then without any assistance from the interpreter, began responding directly in English, for a considerably lengthier time, from approximately 7:00 until approximately 8:26 of the recording, where she then spoke in Spanish for about four seconds. At this point, the interpreter spoke in Spanish for less than three seconds as well, but did not provide any interpretation to English before the Applicant's counsel moved to his next question. The Applicant immediately responded in Spanish, followed by the interpreter in Spanish, more English by the Applicant, some mixed Spanish and English from the Applicant and then English interpretation from the interpreter. There was no explanation from the interpreter why she immediately responded in Spanish after the Applicant had given evidence in Spanish (nor was there any instruction from the General Division that the interpreter fully interpret what might have been said).

[14] There was another question in English, this time from the General Division. Initially the interpreter began to interpret in Spanish, but the Applicant also began to respond, in English.

[15] The Applicant's counsel asked another question about whether the Applicant looked for any other type of work that would have paid her $2,000 per month. The Applicant and interpreter both began to respond simultaneously, though the Applicant stopped and allowed the interpreter to interpret in Spanish. After the interpreter finished, the Applicant responded directly in English. She was able to respond (at 10:44 to 13:15 of recording) without interruption or need for any assistance with interpretation, before her counsel moved to another question. Counsel asked the interpreter to interpret the question into Spanish, which she did. The Applicant responded in both Spanish and English (at 14:34 to 14:40 in

Spanish and then from 14:40 to15:13 in English). There was no interpretation from the interpreter from Spanish to English during this exchange of questioning.

[16] This was followed by a question in English from the General Division (from 15:19 to 15:35). There was no interpretation and the Applicant responded directly in English (from 15:36 to 15:55). The General Division posed a supplementary question, again in English without interpretation (from 15:57 to 16:08). Again, the Applicant immediately responded in English without the assistance of an interpreter (from 16:08 to 17:25).

[17] Counsel questioned the Applicant regarding her functional limitations (from 17:26 to 18:00) and she responded again in English, without the assistance of an interpreter (from 18:01 to 18:34). The interpreter provided limited assistance during questioning on this point (at about 18:49), to interpret "vacuum cleaner", but otherwise the Applicant responded to questions about the extent to which she did any housekeeping or grocery shopping without the assistance of an interpreter.

[18] While the General Division ought to have intervened to remind the interpreter that she was under a duty to interpret <u>everything</u> from Spanish to English, it is not altogether apparent that there were any problems with the language interpretation.

[19] The recording of the hearing indicates that the Applicant appeared to have largely directly responded in English, bypassing the interpreter altogether. For the most part, she did not resort to relying on a Spanish interpretation of English, nor in providing her responses in Spanish, to be interpreted into English. While there may have been limited reliance on the interpreter, ostensibly any issues do not appear to relate to any concerns with the quality of interpretation.

[20] It is unclear how the Applicant is able to determine that there was inadequate language interpretation, as she does not appear to rely on any opinions of any court-certified or licensed interpreters, but rather, has formed her own personal opinion based on her own reading of the decision. It is uncertain also whether the Applicant obtained and listened to a recording of the hearing before the General Division and then compared her testimony to the summary of the evidence set out by the General Division.

[21] I note that the Applicant was represented by counsel at the hearing before the General Division (although he was at a different videoconference location from the Applicant). Had there been any language issues, surely they would have been evident and surely the Applicant's counsel would have been quick to voice any objections.

[22] The Applicant alleges that the General Division failed to provide her with a fair hearing in ensuring that there were adequate interpretation services. This is the first instance of which I am aware in which this allegation has arisen, and there is no indication that the General Division was aware of this allegation. Had the Applicant encountered any difficulties or errors with understanding the interpretation, and had the General Division been made aware of the Applicant's concerns over the purported inadequate interpretation, this might have been an appropriate ground of appeal, but this allegation comes late and was not made at the earliest opportunity, during the hearing when the Applicant was giving evidence.

[23] The courts have consistently held that the failure to raise any objections at the earliest opportunity amounts to an implied waiver of any perceived breach of procedural fairness or natural justice that may have occurred. In *Quiroa v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 271 at paragraph 14, the Federal Court wrote:

> **14** The Court also held that complaints about the quality of interpretation must be made at the first reasonable opportunity. In instances where the applicant is aware that there is a difficulty with the interpreter, it is reasonable to expect the applicant to object immediately. In *Mohammadian*, at trial, 2000 CanLII 17118 (FC), [2000] 3 F.C. 371, Pelletier J. (as he then was) held at paragraph 28:
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> > 28. It will be a question of fact in each case whether it is reasonable to expect a complaint to be made. If the interpreter is having difficulty speaking the applicant's own language and being understood by him, this is clearly a matter which should be raised at the first opportunity. On the other hand, if the errors are in the language of the hearing, which the applicant does not understand, then prior complaint may not be a reasonable expectation.
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> This was affirmed by the Federal Court of Appeal in *Mohammadian*, *supra*, at paragraph 19:

> ... in my view, therefore, Pelletier J. did not err in determining that the applicant has waived his right under section 14 of the Charter by failing to object to the quality of the interpretation at the first opportunity during the hearing into his claim for refugee status.

[24] The Applicant was under an obligation to object to the quality of the interpretation at the first reasonable opportunity, but the Applicant did not do so until the leave application. As it is, it appears that, on the few occasions when interpretation was used in the portions of the recording which have either been identified or to which I have listened, the Applicant did not express any difficulties or problems. It is incumbent upon the Applicant to show that she objected at the first opportunity, but she bypassed this opportunity. Given the facts which I have set out, I am not satisfied that the appeal has a reasonable chance of success on this ground.

(b) Erroneous finding of fact

[25] The Applicant submits that the General Division based its decision on erroneous findings of fact without regard for the material before it. The Applicant submits that these erroneous findings of fact stem from the quality of the interpretation. The Applicant submits that the General Division confused her first illness (knee accident which occurred in 1997) with her second illness (a retinol detachment problem which occurred in 2007). It is not altogether evident what the alleged erroneous finding of fact is upon which the General Division is purported to have based its decision. Setting aside the submission that the erroneous finding of fact stems from the quality of interpretation, an applicant should point to the specific finding of fact which is alleged to be erroneous, so that a review of the evidence might be undertaken.

[26] If the Applicant is suggesting that the General Division confused the dates of onset of the knee injury and the retinol detachment problem, I see that there was documentary evidence upon which the General Division was able to base its decision. In any event, nothing turns on the date of onset, where both conditions developed prior to the minimum qualifying period.

[27] I am not satisfied that the appeal has a reasonable chance of success that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it.

CONCLUSION

[28] Given the considerations above, the Application is dismissed.

Janet Lew
Member, Appeal Division