Citation: *R. P. v. Minister of Employment and Social Development*, 2015 SSTAD 1422

Appeal No. AD-15-1113

BETWEEN:

R. P.

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 11, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated July 30, 2015. The General Division conducted an in-person hearing on June 30, 2015. The General Division 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, 2011. The Applicant filed an Application Requesting Leave to Appeal to the Appeal Division on October 13, 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 made numerous erroneous findings of fact and errors of law. He identified them directly in handwritten notations on a copy of the decision of the leave application. Some of these notations appear in the Evidence section and in the submissions of the Respondent. The Applicant provided corrections in the margins of the decision. He also provided additional information from Dr. Takhar, in the form of a letter dated September 30, 2015 attaching a signed questionnaire that was completed on February 18, 2015. The questionnaire formed part of the hearing file before the General Division.

[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* (DESDA) sets out the grounds of appeal as being limited to 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) Erroneous findings of fact

[8] The Applicant has identified a number of errors in the Evidence section. Even if the General Division misstated the evidence, it may not necessarily qualify as an erroneous finding of fact that falls within subsection 58(1) of the DESDA, unless the General Division accepted that evidence and made findings of fact based on that evidence which is alleged to be incorrect. And, more significantly, those findings of fact had to have been a factor upon which the General Division made its decision, and it had to have been made in a perverse or capricious manner or without regard for the material before it. An applicant must do more than simply point to the alleged errors in the evidence. He must also be able to refer to the evidence that was before the General Division, whether it was documentary evidence or his own testimony.

[9] The Applicant submits that the General Division erred at paragraphs 12 and 13, where it cited incorrect dates. For instance, the General Division indicated that the Applicant saw his then family physician in October 2010 and that the Applicant hurt himself

doing exercises in 2011. The Applicant submits that he actually saw his physician in August 2010 and that he hurt himself in July 2010, and that he was doing physiotherapy (exercises) which he obtained from the internet. Otherwise, the Applicant does not dispute that when he saw his family physician in 2010, that he was advised that surgery would not help the condition of his shoulder.

[10] At paragraph 34 in its analysis, the General Division referred to some of this evidence, in the context of determining whether there was any medical evidence that the Applicant's rotator cuff injury was severe. The General Division wrote "there is no confirmation in the medical reports that the [Applicant] injured himself while doing home exercises in 2011". The Applicant again points out that this is incorrect, as he sustained the injury in 2010. For the purposes of this leave application, if I should accept that indeed the injury occurred in 2010, then possibly the General Division may have based its decision on an erroneous finding of fact that it made without regard for the material before it. This is so as the General Division may have misdirected itself on the evidence; it may not have focused on the Applicant's 2010 medical records which might have given some indication as to the significance of the injury. That having been said, I have reviewed the hearing file (documents GT1 to GT8 inclusive) and do not see any medical records for this time frame nor any references in the documentary records that the Applicant had an injury in or about 2010. I am therefore not satisfied that the appeal has a reasonable chance of success on this ground.

[11] The Applicant submits that the General Division erred when it wrote that the file contains an incomplete questionnaire from the Disability Tax Credit Unit and that the signature on the questionnaire is illegible. The Applicant submits that this is false as he has been fully approved for a disability tax credit, retroactive for 10 years. He also submits that the signature on the questionnaire is that of Dr. Speight. Nothing turns on the fact that the General Division was unable to determine the signature on the questionnaire. And, as the General Division made no findings or any determination as to whether the applicant had been approved at any time for a disability tax credit, I am not satisfied that the appeal has a reasonable chance of success on these grounds.

[12] At paragraph 17 in its Evidence section, the General Division wrote that the Applicant had declined to see an orthopaedic surgeon to repair a partial tear of his supraspinatus tendon in his left shoulder. The General Division cited document GT1-55 to 56, which states "pt. declines to see an ortho re: getting it fixed". So, there was an evidentiary basis upon which the General Division could make this finding of fact that the Applicant had declined to see an orthopaedic surgeon. Indeed, it is not a fact which the Applicant appears to dispute.

[13] However, at paragraph 35 in the Analysis section, the General Division proceeded to make findings in connection with this evidence that the Applicant had declined to see an orthopaedic surgeon. It found that the Applicant's "refusal to follow treatment recommendations is a factor to be considered along with others in assessing his disability status". Clearly, the General Division based its decision in part on the evidence regarding any treatment recommendations the Applicant might have received.

[14] The Applicant submits that one of his physicians had recommended against surgical intervention. On the face of it, the General Division could have based its decision on an erroneous finding of fact without regard for the material before it, if it determined that the Applicant had declined surgery, without considering any explanations why he might have done so. The Applicant did not point to any documentary evidence of his physician's recommendations against surgery, but this evidence had been before the General Division. The General Division was aware that the Applicant had refused to consider surgery because Dr. Gartner had allegedly advised against it. At paragraph 12, the General Division wrote that the Applicant saw his family physician "who told him that surgery would not help the condition of his shoulder". The General Division accepted that the Applicant had allegedly received this advice, but ultimately, it found that it was unreasonable for the Applicant to have preferred the recommendation of this particular physician, as he was a general practitioner. So, it cannot be said that the General Division based its decision on an erroneous finding of fact without regard for the material before it on this point.

[15] At paragraph 19 in its Evidence section, the General Division wrote that the Applicant was taking Naproxen for the pain. The Applicant submits that this is false, but

did not elaborate on the perceived falsehood. The General Division referred to document GT1-63 ff (in fact, GT1-68). This is the Questionnaire completed by the Applicant in November 2011 for his application for a Canada Pension Plan disability pension. The Applicant indicated in the Questionnaire that he was taking Teva-Naproxen 375 mg twice daily at the time. So, there was an evidentiary basis upon which the General Division could say that the Applicant was taking Naproxen at that time for his pain. Apart from the fact that the Questionnaire suggests that the Applicant was taking Naproxen for his pain in 2011, it does not appear that anything turns on this point. I am not satisfied that the appeal has a reasonable chance of success on this ground.

[16] At paragraph 24, the General Division summarized a document described as "Feb 26, 2015 Waterloo Region Legal Services requesting medical opinion". The General Division determined that the response to this request likely came from Dr. Speight. The Applicant however suggests that this assumption is incorrect, as Dr. Speight had left his practice. I do not find that anything turns on fact of who might have authored the document, particularly as the General Division did not place much weight on it as it was unsigned and incomplete. I am not satisfied that the appeal has a reasonable chance of success on this ground.

[17] At paragraph 26, the General Division set out the Applicant's testimony regarding treatment recommendations. The General Division noted that the Applicant did not want to take Naproxen at that time as he was afraid of the side effects and as it could not be used concurrently with his medication for eczema. The Applicant explains that one of the side effects he could have faced with taking Naproxen was having a stroke, and that taking it concurrently with other medication was contraindicated. The Applicant appears to be in agreement with the evidence set out by the General Division that the Applicant was no longer taking Naproxen and, from that perspective, it cannot be said that there are any erroneous findings of fact on this specific point. While the Applicant may have explained why he was not interested in taking Naproxen, the explanations do not indicate that the General Division made erroneous findings on these points. I am not satisfied that the appeal has a reasonable chance of success on this ground.

[18] The Applicant submits that the General Division erred at paragraphs 30 and 31 in is decision. These paragraphs however represent the submissions of the Respondent and do not form any findings of fact. I am not satisfied that the appeal has a reasonable chance of success on these grounds.

[19] At paragraph 34, the General Division indicated that there was no medical evidence before it supporting the Applicant's claim that his shoulder had deteriorated over time. The Applicant submits that the General Division erred, as his responses to the questionnaire of February 26, 2015 represented some evidence of his deterioration. While the Applicant is correct that the responses would represent some evidence, the General Division was aware of this report or questionnaire, but however rejected it as it was unsigned and apparently incomplete.

[20] The Applicant produced a copy of the response to the Questionnaire, in support of his application requesting leave to appeal. In his letter dated September 30, 2015, Dr. Takhar explains that the questionnaire had been completed on February 18, 2015. Presumably he had signed the questionnaire, although he does not actually indicate this.

[21] Setting aside the issue as to the appropriateness of reviewing any new records in the form of Dr. Takhar's letter of September 30, 2015, even had the General Division assigned more weight to the document, I do not see that it addresses the question as to whether the Applicant's left shoulder deteriorated over time. Unless there is any other evidence in the hearing file that was before the General Division which the Applicant has not directed me to, there was a basis upon which the General Division could conclude that there was no medical evidence before it to support the Applicant's claim that his shoulder had deteriorated over time.

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

[23] To summarize, if an applicant is going to allege that the General Division based its decision on erroneous findings of fact without regard for the material before it, he should support his allegations by pointing to the evidence that was before the hearing, including the

documentary evidence (i.e. the medical records) and any testimony he might have given. This would likely require an Applicant to obtain a copy of the recording of the hearing and for him to pinpoint where in the recording any supporting testimony might have been given. Otherwise, if an applicant is unable to point to any of the supporting evidence, then he will have fallen short of establishing that the General Division based its decision on erroneous findings of fact without regard for the material before it. For instance, in this particular case, had the General Division not considered the Applicant's evidence that his family physician had recommended against surgery, the Applicant would have been required to show that there was evidence before the General Division that his family physician had recommended against surgery, otherwise the document at page GT1-56 could have been compelling that surgery had been indicated.

(b) Weight of evidence

[24] The Applicant submits that the General Division erred when it did not place much weight on the report of February 26, 2015. The General Division cited the fact that the report was unsigned and apparently incomplete. The Applicant submits that all the questions in fact had been completed by him and Dr. Takhar and that accordingly, the document should have been assigned greater weight.

[25] In *Simpson v. Canada (Attorney General),* 2012 FCA 82, the Federal Court of Appeal refused to interfere with the decision-maker's assignment of weight to the evidence, holding that that properly was a matter for "the province of the trier of fact". This does not raise an arguable case and I am not satisfied that the appeal has a reasonable chance of success on this ground.

(c) Mitigation

[26] At paragraph 35, the General Division examined whether the Applicant's non-compliance with various treatment recommendations was reasonable. The Applicant submits that it was reasonable for him to have refused to take Naproxen as he experiences side effects. He submits that it was also reasonable for him to have refused surgery, given the advice he received from a former family physician and further, it was reasonable for him not

to continue physiotherapy. The Applicant added that his family physician had consulted with an orthopaedic surgeon before forming an opinion that the Applicant should not consider surgery for his left shoulder. In other words, the Applicant submits that the General Division failed to consider the reasonableness of his non- compliance with any treatment recommendations.

[27] The General Division considered these explanations, but rejected them, for various reasons. For instance, the General Division saw no documented medical opinion that Naproxen could not be taken with his medication for eczema. The General Division also considered it unreasonable for the Applicant not to consider surgery, despite the advice from his former family physician, as Dr. Speight offered to refer him to an orthopaedic surgeon. Finally, while the General Division found that the Applicant's non- compliance was unreasonable in respect of some of the treatment recommendation.

[28] As for physiotherapy, in fact the General Division accepted that it was reasonable for the Applicant not to take physiotherapy because of financial constraints, so it did not err in its findings of fact regarding physiotherapy.

[29] Essentially the Applicant is seeking a reassessment on the issue of the reasonableness of his non-compliance with some of the treatment recommendations. As the Federal Court recently held in *Tracey v. Canada (Attorney General),* 2015 FC 1300, it is not the role of the Appeal Division to reassess the evidence or reweigh the factors considered by the General Division when determining whether leave should be granted or denied. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(d) Job search efforts

[30] At paragraph 36, the General Division indicated that although the Applicant testified that he had looked for work in 2008 and 2009, there was no supporting documentation for this. The Applicant explains that he was unable to work at any job and in any event, was never asked to provide copies of his job search efforts.

[31] In the context of the decision, overall this fact was not a factor upon which the General Division determined whether the Applicant's disability could be considered severe.

The General Division looked at the Applicant's status in 2010 and determined that although the Applicant stated he could not return to work, found that this was not supported by any health professionals. While certainly the Applicant could not return to his former physically demanding work, the General Division determined that the issue was whether, in a real world context, the Applicant had the capacity regularly of pursuing substantially gainful occupation. The General Division found that there was nothing in the "real world" that would have prevented the Applicant from looking for an alternative to his old job. I am not satisfied that the appeal has a reasonable chance of success on this ground. It would have been moot whether there were any documents to show that the Applicant had looked for work in 2008 and 2009, in light of the General Division's conclusions regarding his capacity in 2010.

CONCLUSION

[32] The application for leave to appeal is denied.

Janet Lew
Member, Appeal Division