Citation: *G. M. v. Minister of Employment and Social Development*, 2015 SSTAD 1442

Appeal No: AD-15-841

BETWEEN:

G. M.

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 15, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated May 28, 2015. The General Division conducted the hearing by way of written questions and answers. The General Division was not satisfied on a balance of probabilities that the Applicant had a severe disability at his minimum qualifying period of December 31, 2011, and therefore found that he was not eligible for a disability pension under the *Canada Pension Plan.* The Applicant filed an Application Requesting Leave to Appeal to the Appeal Division on July 28, 2015. He filed additional submissions on November 10, 2015, in response to a request for clarification from the Appeal Division. 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] In his leave application filed on July 28 2015, the Applicant submitted that the General Division failed to address the prolonged nature of his disability. He submitted that had the General Division done so, it would have necessarily concluded that his disability is also severe, as defined by the *Canada Pension Plan.*

[4] The Applicant further submitted that the General Division erred in finding that his disability could not be prolonged, if it is not severe, given the documentary evidence. He wrote:

> My complete medical history shows consistency and continuity in everything Prolonged and I submit you can't be this way WITHOUT being severe.

[5] The Applicant further submitted that additional and updated medical information would substantiate the severity of his disability. He advised that he was currently waiting for reports and opinions from various medical practitioners, including specialists.

[6] The Applicant also relied on a letter of support dated July 15, 2015, from his Member of Parliament. The letter indicated that the Applicant would be seeing his specialist within two to three months and would be sending additional medical information.

[7] On August 19, 2015, the Social Security Tribunal wrote to the Applicant. The letter of August 19, 2015 reads in part:

> On July 28, 2015, you filed an Application Requesting Leave to Appeal to the Appeal Division. In the attachment addressed "To whom it may concern", you indicated that you were waiting for various medical reports.
>
> Any new records or reports should fall into or relate to one of the grounds of appeal set out under subsection 58(1) of the *Department of Employment and Social Development Act,* namely that:
>
> (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.
>
> If you intend to file and rely upon any additional reports, they should relate to the grounds of appeal under subsection 58(1) of the *Department of Employment and Social Act,* otherwise they will not be considered for the purposes of a leave to appeal application with the Appeal Division.
>
> In other words, how will each of the reports support any claim that the General Division either failed to observe a principle of natural justice, or that it made an error of law or an erroneous finding of fact?

[8] The Tribunal requested any additional information that addressed the grounds set out in subsection 58(1) of the DESDA, by no later than November 20, 2015, or the Applicant could otherwise request an extension of time, if required.

[9] The Applicant provided additional submissions on November 2, 2015 (AD1A-1 and AD1A-4 to AD1A-5). He clarified his earlier submissions. He submitted that that the General Division failed to observe the principles of natural justice in two ways:

(i) by improperly adjudicating the severe and prolonged aspects of his disability, by "not recognizing the seriousness of [his] medical issues based on the extensive medical file" and the prolonged aspect has shown that "[his] medical and conditions and history has changed to the serious state it is today"; and

(ii) failing to recognize that additional information is generated as one's health deteriorates and after doctors form an opinion regarding prognosis and treatment. The Applicant is being followed by numerous health caregivers and undergoing numerous diagnostic examinations. He advised that he has no control over appointments and when records might be produced.

[10] The Applicant advised that his physical history is constantly changing "for the worse and getting worse literally each and every day". He advised that new medical records attached to his submissions confirm his deterioration. These records include the following:

a. letter dated February 12, 2014 from Dr. G.F. Garrioch advising that the patient would not be able to work as of January 31, 2014 due to severe arthritis (AD1A-6);

b. letter dated July 9, 2015 from a registered social worker (AD1A-7 to AD1A-8);

c. letter dated November 2, 2015 from an orthopaedic surgeon confirming the diagnosis of osteoarthritis and neuropathy, for which there is no cure, and which affects the Applicant's fine motor skills and his mobility (AD1A-9);

d. letter dated October 7, 2015 from University Health Network confirming MRI (AD1A-10); and,

e. x-ray of pelvis and both hips performed on June 15, 2015 (AD1A-11).

[11] The General Division did not have copies of these records before it.

[12] The Applicant advised that he had an MRI scheduled for November 29, 2015, in regards to his neuropathy for the pains on his left side and neck. He advised that the neuropathy severely affects his hands and feet. He provided the names of some of his health caregivers.

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

ANALYSIS

[14] Subsection 58(1) of the *Department of Employment and Social Development Act* 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.

[15] 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. The Federal Court of Canada recently affirmed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

(a) Breach of Natural Justice / Error of Law

[16] The Applicant submits that the General Division failed to address the prolonged nature of his disability.

[17] At the outset of its analysis, the General Division identified the legal test which the Applicant was required to meet under paragraph 42(2)(a) of the *Canada Pension Plan*, in determining whether he was eligible for a disability pension. The General Division then undertook an analysis of the severe criterion. While it is true that the General Division did not consider the prolonged criterion, the test for disability is two- part and if an applicant does not meet one aspect of this two-part test, then he will not meet the disability requirements under the legislation. As the General Division correctly indicated, it was unnecessary under those circumstances to undertake an analysis on the prolonged criterion. In *Klabouch v. Canada (Minister of Social Development),* 2008 FCA 33, the Federal Court of Appeal stated that:

> [10] The fact that the Board primarily concentrated on the "severe" part of the test and that it did not make any finding regarding the "prolonged" part of the test does not constitute an error. The two requirements of paragraph 42(2)(a) of the [*Canada Pension Plan*] are cumulative, so that if an applicant does not meet one or the other condition, his application for a disability pension under the [*Canada Pension Plan*] fails.

[18] I am not satisfied that the appeal has a reasonable chance of success on the ground that the General Division failed to consider the prolonged nature of his disability.

[19] The Applicant submits that the General Division failed to recognize that his disability is deteriorating over time. Even so, the General Division was nonetheless required to determine whether the Applicant could be found disabled by his minimum qualifying period of December 31, 2011. After a consideration of the medical and other evidence before it – including the fact that the Applicant had earnings beyond his minimum qualifying period in both 2012 and 2012, which it found reflected he was engaged in substantially gainful employment – the General Division determined that the Applicant could not be found severely disabled by his minimum qualifying period. As such, it is

irrelevant whether the Applicant's disability has deteriorated since his minimum qualifying period.

[20] The Applicant's submissions essentially call for a reassessment and re-weighing of the evidence, which is beyond the scope of a leave application. The role of the Appeal Division is to determine if the General Division committed a reviewable error under subsection 58(1) of the DESDA, and if so, to provide a remedy for that error. The Appeal Division has no jurisdiction to intervene otherwise or to hear the appeal on a *de novo* basis.

(b) New Records

[21] The Applicant has filed additional medical opinions and records. In a leave application, any new facts should relate to the grounds of appeal. The Applicant has not indicated how the additional opinions and records might fall into or address any of the enumerated grounds of appeal. If he is requesting that we consider these additional facts, re-weigh the evidence and re-assess the claim in her favour, I am unable to do so at this juncture, given the constraints of 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.*

[22] In *Tracey*, the Federal Court determined that there is no obligation to consider any new evidence. Indeed, Roussel J. wrote:

> Under the current legislative framework however, the introduction of new evidence is no longer an independent ground of appeal (*Belo-Alves v. Canada (Attorney General),* 2014 FC 1100, at para 108).

[23] If the Applicant has provided these additional records in an effort to rescind or amend the decision of the General Division, he must now comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations*, and must also 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 is the General Division.

[24] The new facts as presented by the Applicant do not raise nor relate to any grounds of appeal and I am therefore unable to consider them for the purposes of a leave application.

CONCLUSION

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

Janet Lew
Member, Appeal Division