Citation: *M. S. v. Minister of Employment and Social Development*, 2015 SSTAD 1480

Appeal No. AD-15-1269

BETWEEN:

M. 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: December 30, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated August 27, 2015. The General Division conducted a teleconference hearing on August 27, 2015 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, 2009. The representative for the Applicant filed an application requesting leave to appeal on November 26, 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 representative submits that the General Division made a number of errors, as follows:

(a) failed to observe a principle of natural justice in failing to inform the Applicant whether or not the Reply of August 5, 2015 to the Respondent Minister's submissions would be included or not for the purposes of the hearing;

(b) based its decision on various erroneous findings of fact without regard for the evidence before it:

i) at paragraphs 19, 31 and 33, when it did not take into account the "specifics of the term 'employable' … with a possible requirement for a sympathetic employer, modified work hours or environmental/ergonomic intervention". The representative submits that the Applicant was not considered "competitive" in terms his employability. The representative submits that the General Division

erred in finding that the Applicant had the capacity regularly of pursuing substantially gainful occupation, without considering that the Applicant would require a benevolent employer;

ii) at paragraph 16, where the General Division indicated that the Applicant has not had psychological counselling or evaluation by a specialist since 2010, without taking into account the fact that the Applicant has "ongoing impairment in terms of depression, poor sleep and pain that is related to his [post-traumatic stress disorder] condition that Dr. Zoffman had opined could prove resistant to treatment". The representative submits that the Applicant also testified and "provided medical reports to prove ongoing treatment for the impairments related to PTSD including the medications Pristiq for mood stabilization and pain, sleeping pills, and Tylenol 3";

iii) at paragraph 35, where the General Division found that the Applicant demonstrated significant intellectual, physical and psychological capacities by successfully completing the retraining program in Graphic Design in 2014. The Applicant's representative submits that the General Division failed to consider that the Applicant received accommodations, such as being able to extend his graphic design training by two terms. The Applicant's representative submits that the extended timeframe is evidence of the Applicant's "ongoing lack of competitive function in terms of even sedentary employment";

iv) at paragraph 37, where the General Division found that the Applicant had not shown that efforts at obtaining and maintaining employment had been unsuccessful by reason of his health condition. The Applicant's representative submits that the Applicant testified that when looking for work, he found that positions required frequent to continuous standing, so this eliminated numerous potential job

> opportunities. The representative submits that it was unfair for the General Division to cite “lack of evidence of a failed attempt to work" as the Applicant is “already at a disadvantage in terms of lacking any opportunity to try to work in spite of earnest efforts to search for work”.

[4] The Respondent has not filed any written submissions in respect of this leave application.

ANALYSIS

[5] 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.

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

(a) <u>Natural justice</u>

[7] The representative submits that the General Division failed to observe a principle of natural justice in failing to inform the Applicant whether or not the Reply of August 5, 2015 to the Respondent Minister’s submissions would be included for the purposes of the hearing. The Reply is at page AD1-7 and consists of the submission that the Respondent

had previously conceded that the Applicant met the definition of disability prior to his minimum qualifying period. In particular, the Applicant relied on the Respondent's initial decision letter dated June 26, 2012 (GT1-11) and reconsideration decision letter dated November 28, 2012 (GT1-06); both letters indicated that the Respondent recognized that the Applicant had identified limitations resulting from his medical conditions and that it realized that the Applicant could not work in December 2009.

[8] My colleague P. Lafontaine described the principles of natural justice in *D.P. v. Canada Employment Insurance Commission and D.R.A. Holdings Ltd.* (November 23, 2015), currently unreported (AD-15-989). There, he indicated that the principles of natural justice exist to ensure that everyone who falls under the jurisdiction of a judicial or quasi-judicial forum is given adequate notice to appear and is allowed every reasonable opportunity to present his case and the decision given is free of bias or the reasonable apprehension or appearance of bias.

[9] There is no allegation by the representative that the General Division denied the Applicant every reasonable opportunity to present his case, either by refusing the Applicant the chance to give evidence or by refusing the Applicant's representative the chance to make submissions, whether during the course of the appeal or by filing any documents.

[10] The General Division did not specifically refer to the Applicant's submissions which had been filed on August 5, 2015 in its decision, so it is unclear whether the General Division identified all of the documents before it during the hearing of the appeal. The fact that the submissions are paginated and numbered as "GT7-1" suggests that the submissions formed part of the hearing file before the General Division.

[11] The fact that the General Division may not have referred to the submissions of August 5, 2015 either during the hearing of the appeal on August 27, 2015 or in its decision does not sound in a breach of the principles of natural justice. There is a general presumption in law that a decision-maker is presumed to have considered all of the evidence and submissions before it. The Supreme Court of Canada has held that a decision-maker need not include all of the arguments, statutory provisions, jurisprudence or other

details in his or her decision. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 (CanLII), the Supreme Court of Canada held that:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion *(Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.,* 1973 CanLII 191 (SCC), [1975] 1 S.C.R. 382, at p. 391).

[12] The General Division was not required to refer to all the arguments or submissions of the parties.

[13] In any event, I am not satisfied that the Respondent had accepted in either its initial or reconsideration that the Applicant was disabled by his minimum qualifying period. Had the Respondent found the Applicant disabled as defined by the Canada Pension Plan, it likely would not have denied the Applicant's claim for a Canada Pension Plan disability pension.

[14] I am not satisfied that the appeal has a reasonable chance of success on this ground that the General Division failed to observe a principle of natural justice.

(b) <u>Erroneous findings of fact</u>

[15] The representative submits that the General Division based its decision on numerous erroneous findings of fact.

[16] To qualify as an erroneous finding of fact under subsection 58(1) of the DESDA, the General Division had to have based its decision on that erroneous finding of fact, and the erroneous finding of fact had to have been made in either a perverse or capricious manner or without regard for the material before it.

i) Paragraphs 19, 31 and 33

[17] The representative submits that the General Division made an erroneous finding of fact at paragraphs 19, 31 and 33, when it did not consider that the Applicant would require a sympathetic or benevolent employer. The representative submits that had the General Division done so, it would have necessarily concluded that the Applicant was not competitively employable and therefore disabled for the purposes of the *Canada Pension Plan*.

[18] Paragraphs 19, 31 and 33 read as follows:

> [19] A functional capacity evaluation was performed on September 7, 2010 by Mary Richardson, Occupational Therapist. She concludes the Appellant is employable on a full-time basis, with some physical restrictions, to work in limited and light strength occupations. She said he would be best suited to sedentary work which has limited demands for standing, walking, climbing, crouching or kneeling. He is capable of reaching and handling tasks.
>
> . . .
>
> [31] The Tribunal finds that at his MQP in December 2009, the Appellant was not severely disabled. Although Dr. Zoffman concludes that the Appellant may not be competitively employable from a mental health perspective in September 2009, Drs. Anton and Kelley, and occupational therapist, Mary Richardson, all confirm he is capable of sedentary work suited to his limitations in 2010. There is no further evidence from Dr. Zoffman as to the Appellant's employability.
>
> [33] In May 2010, Dr. Anton found the Appellant to have a partial disability only. In September 2010 Mary Richardson's functional capacity evaluation said he would be best suited to sedentary work on a full-time basis which has limited demands for standing, walking, climbing, crouching or kneeling.

[19] The General Division did not overlook the fact that the Applicant has a number of restrictions and limitations. Yet, the very existence of restrictions and limitations does not necessarily result in an applicant requiring a benevolent or sympathetic employer, depending upon the job demands or responsibilities. The General Division reviewed the medical evidence, the functional capacity evaluation and vocational assessment, and determined that the Applicant was suitable for sedentary occupations, provided that they did not demand much standing, walking, climbing, crouching or kneeling. The medical reports, functional capacity evaluation and vocational assessment provided an evidentiary

basis for the General Division to make findings of fact regarding the Applicant's suitability for employment.

[20] The representative submits that the General Division failed to consider that the Applicant would necessarily require a benevolent employer. However, the representative has not pointed to any evidence that a benevolent employer or other accommodations (beyond the usual or a reasonable scope) were necessarily required, provided that the Applicant pursued employment that was considered suitable for his physical limitations and restrictions.

[21] Essentially the Applicant is seeking a reassessment on the issue of whether he could be found severely disabled, and whether he requires vocational accommodations. As the Federal Court recently held in *Tracey*, 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.

ii) Paragraph 16

[22] The representative submits that the General Division made an erroneous finding of fact at paragraph 16, where it wrote that the Applicant has not had psychological counselling or evaluation by a specialist since 2010. The representative submits that the General Division erred, as it did not consider the fact that the Applicant not only has ongoing symptomology and impairment in connection with his mental health issues, but that he is also receiving ongoing treatment in the form of medications.

[23] Paragraph 16 of the decision of the General Division does not represent findings of fact made by the General Division. They represent the General Division's summary of the documentary evidence and the testimony before it. However, if the General Division misstated and then relied upon that evidence, this could have resulted in an erroneous finding of fact.

[24] Neither the Applicant nor his representative dispute the veracity of the General Division's summary of the Applicant's testimony. Indeed, the representative

acknowledges in the leave application that the Applicant discontinued psychological treatment for post-traumatic stress disorder in 2010, as he could no longer afford treatments and had exhausted funding from the Insurance Corporation of British Columbia. The fact that the Applicant relies on other forms of treatment (in this case, medications) does not thereby render the statement that the Applicant no longer accesses psychological counselling inaccurate or erroneous. I am not satisfied that the appeal has a reasonable chance of success on this ground.

iii) Paragraph 35

[25] The representative submits that the General Division made an erroneous finding of fact at paragraph 35, where it found that the Applicant demonstrated significant intellectual, physical and psychological capacities by successfully completing the retraining program in Graphic Design in 2014. The representative submits that the General Division failed to consider that the Applicant received accommodations, in that the program was extended by two years to allow for the Applicant's limitations.

[26] Paragraph 35 reads as follows:

> [35] The Respondent submits the Appellant's capacity to complete re-training indicates he should also have the capacity for some type of work. The Appellant demonstrated significant intellectual, physical and psychological capacities by successfully completing the re-training program in Graphic Design in 2014.

[27] It is not altogether clear whether the statement that the Applicant "demonstrated significant intellectual, physical and psychological capacities" represents merely the submissions of the Respondent or the General Division's findings of fact. For the purposes of this application, I will regard the statement as a finding made by the General Division.

[28] The evidence regarding the retraining is set out at paragraph 12 of the General Division's decision and reads as follows:

> [12] He testified he has not attempted a return to work since 2007, but he completed re-training for work as a graphic designer. He successfully passed a Graphic and Digital Design Program which he attended from April 2013 to

> September 2014. He said it took about 5 months longer to complete the course due to the effects of his medical condition. He said despite performing an extensive job search, jobs are hard to come by in the field of graphic design, and he has not had success in becoming employed.

[29] The representative submits that the Applicant received an extension of two years to complete the program, yet this conflicts with the evidence set out by the General Division. The representative did not point to paragraph 12 as containing any errors, nor did he attempt to refute the evidence by referring to any of the documentary records which might have verified the representative's submissions. He also did not direct me to any portions in the recording of the hearing to show that the Applicant's evidence might have been other than what the General Division had set out in paragraph 12.

[30] There was an evidentiary basis upon which the General Division could find that the Applicant had successfully completed the retraining program in 2014 and therefore it cannot be said that the General Division based its decision on an erroneous finding of fact made without regard for the material before it.

[31] While the General Division did not indicate in its final analysis that the Applicant took approximately five months longer to complete the course, the Federal Court of Appeal has held that "… a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence": *Simpson v. Canada (Attorney General),* 2012 FCA 82 (CanLII), the Federal Court of Appeal. This presumption is rebuttable, but the fact that the timeframe in question is five months does not materially undercut the eventual finding that the Applicant completed the retraining program and is insufficient to rebut the presumption that all the evidence was considered.

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

iv) Paragraph 37

[33] The representative submits that the General Division made an erroneous finding of fact in finding that the Applicant had not shown that efforts at obtaining and maintaining

employment had been unsuccessful by reason of his health condition. The Applicant's representative submits that the Applicant testified that when looking for work, he found the positions required frequent to continuous standing, so this eliminated numerous potential job opportunities. The representative submits that it was unfair for the General Division to cite "lack of evidence of a failed attempt to work" as the Applicant is "already at a disadvantage in terms of lacking any opportunity to try to work in spite of earnest efforts to search for work".

[34] Paragraph 37 reads as follows:

> [37] The Appellant submits he completed re-training in Graphic Arts, in an effort to become employable in light of his ongoing limitations, but work in that field is hard to come by and he has been unsuccessful. Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.),* 2003 FCA 117). There is no evidence of a failed attempt to return to work.

[35] The evidence regarding the Applicant's job search efforts are set out in paragraph 12 of the decision. The Applicant testified that he had not attempted a return to work since 2007 despite performing an extensive job search. He further testified that work in the graphic design field was hard to come by.

[36] The General Division was not dismissive of the fact that the Applicant had undergone an extensive job search, but in following *Inclima*, the General Division was not limited to examining the extent of the Applicant's job search efforts. Rather, the General Division was also required to examine whether the Applicant had also been unable to maintain employment by reason of his health condition. In this particular case, the Applicant apparently had testified that he had not attempted a return to work since 2007, owing to the fact that he had not been able to locate work. While there was perhaps an element of the Applicant's limitations hindering his efforts in finding suitable work as a graphic designer, the evidence also indicates that the Applicant testified that these types of positions "are hard to come by". This latter consideration however does not erase the

requirement that an applicant show that efforts at both obtaining and maintaining employment had been unsuccessful by reason of his health condition.

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

CONCLUSION

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

Janet Lew
Member, Appeal Division