Citation: *D. S. v. Minister of Employment and Social Development*, 2014 SSTAD 50

Appeal No. AD-13-6

BETWEEN:

D. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Hazelyn Ross

DATE OF DECISION: March 28, 2014

DECISION: LEAVE REFUSED

DECISION

1. The application for leave to appeal is refused.

INTRODUCTION

2. By a decision issued April 12, 2013, a Review Tribunal determined that a Canada Pension Plan disability pension was not payable to the Applicant. The Applicant has filed an Application for leave to appeal the decision of the Review Tribunal, (the "Application"). The Pension Appeals Board, (the "PAB"), received the Application on May 8, 2013 but did not render its decision on the Application. Where an Application for leave to appeal was filed with the PAB prior to April 1, 2013, but where no decision was taken in respect of the application before April 1, 2013, s. 260 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 applies. This Section deems all such Applications to be Applications filed with the Appeal Division of the Social Security Tribunal.[1]

THE APPLICABLE LAW

3. The relevant statutory provisions are found in ss. 56(1), 58(2) and 58(3) of the *Department of Human Resources and Skills Development Act*, (the DHRSD Act). s.56 (1) clarifies that there is no automatic right to an appeal. Thus, an Applicant must seek and obtain leave to bring his or her appeal before the Appeal Division. s.58 (3) of the DHRSD Act mandates that "the Appeal Division must either grant or refuse leave to appeal" while ss.58 (2) sets out on what basis leave to appeal is refused. Leave will be refused where the Appeal Division is not satisfied that the appeal has a reasonable chance of success. The jurisprudence establishes that the test for whether leave should be granted is whether there is an arguable case.[2] The Applicant must raise some

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[1] *Jobs, Growth and Long-term Prosperity Act* S.C. 2012 c. 19,
"Leave to appeal — Social Security Tribunal
260. Any application for leave to appeal filed before April 1, 2013 under subsection 83(1) of the *Canada Pension Plan*, as it read immediately before the coming into force of section 229, is deemed to be an application for leave to appeal filed with the Appeal Division of the Social Security Tribunal on April 1, 2013, if no decision has been rendered with respect to leave to appeal."

[2] *Calihoo v. Canada (Attorney General),* [2000] FCJ No. 612 TD at para. 15.

arguable ground upon which the proposed appeal might succeed.[3] In *Carroll,* O'Reilly J[4] stated that an Applicant "will raise an arguable case if she puts forward new or additional evidence (not already considered by the Review Tribunal); raises an issue not considered by the Review Tribunal; or can point to an error in the Review Tribunal's decision.

ISSUE

4. The only issue to be decided on this Application is whether the Tribunal is satisfied that the appeal has a reasonable chance of success?

ANALYSIS

5. In his Application for Leave to Appeal, the Applicant puts forward the following as the grounds of his appeal:

    (a) the Review Tribunal erred in finding that he was not disabled based on their subjective observations and based on the medical evidence.

    (b) the Review Tribunal "erred in its determination that the Applicant was not disabled on the grounds that it rejected the evidence of the Appellant that his condition amounted to that of severe and prolonged".

6. While it is not for the Tribunal to assess the merits of an Application when considering whether or not to grant Leave to Appeal, the Tribunal must look to the issues raised by the Applicant in his Leave Application to decide whether or not he has raised an arguable case. In this case, the Applicant intends to argue that his "medical condition, the worsening of his health since he stopped working and other factors make it impossible for him to pursue any substantially gainful employment and activities of daily living." He intends to rely on the PAB decision in *Chandler*[5] to establish this

[3] *Canada (Attorney General) v. Zakaria*, 2011 FC 136 at para. 37.
[4] *Canada (Attorney General) v. Carroll*, 2011 FC 1092.
[5] *Chandler v. Canada (Minister of Human Resources)*, November 25, 1996; Appeal CP 4040 [unreported].

point. However, it is not clear to the Tribunal what new or additional evidence, if any, the applicant proposes to rely on in this respect.

7. The Applicant also points to an error of law in the decision of the Review Tribunal in "not making a finding the Appellant's inability to work [sic]." In fact, the Review Tribunal declined to make a finding concerning the applicant's ability to work past May 31, 2007 on the ground that to do so would be "speculative and not based on any evidence in front of the Tribunal." The Applicant argues that this amounts to an error of law on the part of the Review Tribunal. In addition to setting out the test for granting leave to appeal, *Calihoo*[6] also stands for the proposition that "in the absence of significant new or additional evidence not considered by the Review Tribunal, an application for leave may raise an arguable case where the leave decision-maker finds the application raises a question of an error of law, measured by a standard of correctness, or an error of significant fact that is unreasonable or perverse in light of the evidence."

8. In light of the above analysis, the Tribunal is not persuaded that the Review Tribunal's refusal to speculate on the applicant's ability to work constitutes an error of law. Accordingly, the Tribunal finds that the Applicant has failed to raise an arguable case. Accordingly, the Tribunal is not satisfied that the appeal has a reasonable chance of success.

CONCLUSION

9. The Application for Leave to Appeal is refused.

Hazelyn Ross
Member, Appeal Division

[6] Calihoo at para. 22.