Citation: *G. S. v. Minister of Employment and Social Development*, 2014 SSTAD 51

Appeal No. AD-13-18

BETWEEN:

G. 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 February 5, 2013, a Review Tribunal determined that a Canada Pension Plan disability pension was not payable to the Applicant. The Applicant filed an Application for Leave to Appeal the said decision of the Review Tribunal, (the "Application"), which Application the Social Security Tribunal received on the June 5, 2013.

GROUNDS OF THE APPLICATION

3. Counsel for the Applicant submits that the decision of the Review Tribunal is wrong, in that, the Review Tribunal,
    a) Overlooked critical evidence that spoke to the severe and prolonged nature of the Applicant's disability;
    b) Disregarded key evidence;
    c) Exaggerated evidence that it used to support the denial.

4. Counsel for the Applicant also takes issue with the Review Tribunal's assessment of the Applicant's language skills and his efforts to secure less strenuous work. He submitted that the Applicant did not have sufficient English language ability to permit him to find work other than that of a service technician. In addition, counsel for the Applicant argued that the Review Tribunal erred when it interpreted the Applicant's efforts to find lighter work with an ability to perform lighter work. Counsel did not file any new evidence with the Application.

ISSUE

5. The only issue for the Tribunal to decide is whether, without considering the merits of the application, the appeal has a reasonable chance of success.

THE LAW

6. 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.[1] The Applicant must raise some arguable ground upon which the proposed appeal might succeed.[2] In *Carroll,* O'Reilly J[3] 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.

ANALYSIS

7. Counsel for the Applicant argues that the Review Tribunal has erred in its appreciation of the facts. In his submission the Review Tribunal ought to have placed significant weight on the medical reports, and in particular, the medical reports completed by the Applicant's family doctor, as these reports concluded that prior to the MQP date, the Applicant had a severe and prolonged disability within the meaning of the Canada Pension Plan. On his behalf his Counsel also argues that his efforts to find work following his workplace accident ought not to be equated with an ability to do the work, but should be seen in the light of an effort to mitigate his losses. As well, the Applicant's Counsel argued that the Review Tribunal misapprehended the level of the Applicant's English language skills when it found that he had been able to find and maintain employment with the level of skill he had. Counsel submitted that the Review Tribunal erred when it failed to consider that, since coming to Canada, the Applicant had had only one type of job.

---

[1] *Calihoo v. Canada (Attorney General),* [2000] FCJ No. 612 TD at para. 15.
[2] *Canada (Attorney General) v. Zakaria,* 2011 FC 136 at para. 37.
[3] *Canada (Attorney General) v. Carroll,* 2011 FC 1092.

8. The crux of the Applicant's submissions is that the Review Tribunal erred in its appreciation of the medical and other facts. Having reviewed the Application materials, the Review Tribunal decision and the medical reports that were before the Review Tribunal, the Tribunal is not persuaded that Counsel's position can be supported.

9. In assessing the Application, the Tribunal finds that the Review Tribunal not only considered the totality of the medical reports that were before it; it applied the correct test for a severe and prolonged disability which was stated as being "incapable regularly of pursuing gainful employment." As well the Review Tribunal assessed the Applicant as against the real world factors required by *Villani*[4] and considered the Applicant's own testimony as to his English language skills. The Review Tribunal noted that the Applicant described his language ability as fair, belying the arguments .advanced by counsel for the Applicant on the Application. With regards to the Applicant's efforts to obtain alternative employment, the Tribunal is of the view that it was entirely reasonable for the Review Tribunal to impute a belief to the Applicant that he was able to do the work he applied for. In light of the above analysis, 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

10. The Application for Leave to Appeal is refused.

Hazelyn Ross
Member, Appeal Division

[4] *Villani v. Canada (Attorney General)* 2001 FCA 248.