Citation: *J. S. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 48

Appeal No. AD-13-761

BETWEEN:

J. S.

Applicant

and

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: March 27, 2014

DECISION: LEAVE REFUSED

DECISION

[1] The Tribunal refuses leave to appeal to the Appeal Division of the Social Security Tribunal.

BACKGROUND & HISTORY OF PROCEEDINGS

[2] The Applicant seeks leave to appeal the decision of the Review Tribunal of May 23, 2013. The Review Tribunal had determined that a Canada Pension Plan disability pension was not payable to the Applicant, as it found that her disability was not "severe" at the time of her minimum qualifying period of December 31, 2007. The Applicant filed an application requesting leave to appeal (the "Application") with the Appeal Division of the Social Security Tribunal (the "Tribunal") on August 8, 2013, within the time permitted under the *Department of Employment and Social Development* (DESD) *Act.*

ISSUE

[3] Does the appeal have a reasonable chance of success?

THE LAW

[4] According to subsections 56(1) and 58(3) of the DESD Act, "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal".

[5] Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success".

APPLICANT'S SUBMISSIONS

[6] The Applicant advised in her letter of August 1, 2013 that she was appealing the decision of the Review Tribunal, largely on the grounds that medical information presented at the Review Tribunal hearing of March 14, 2013 was "given little attention". She submits that the Review Tribunal should have adjourned the hearing, so it could review and fully

consider the medical information. The documentation presented at the hearing totalled 106 pages and consisted of photographs, income statements, lists of medications, an authorization from Health Canada, personal and medical chronologies, data from Statistics Canada, handwritten submissions, including a comparative analyses prepared jointly by the Applicant and her spouse, and various medical records and reports, covering the period from October 17, 1990 to July 23, 2012.

[7] The Applicant also submits that she was disadvantaged when her family physician retired two weeks prior to the hearing before the Review Tribunal, as she had been relying on her family physician to assist throughout the Review Tribunal process.

[8] The Applicant also submits that her physician was inattentive to her in the past few years. From this, I infer that the Applicant is of the position that her family physician did not comprehensively address the Applicant's medical problems, whether by failing to properly document her medical issues, or by failing to make appropriate referrals to specialists in a timely manner or at all.

[9] In her submissions for leave, the Applicant reviewed her medical history and described the investigations and treatments that she had undergone. She described how her various medical conditions have impacted her and how they have restricted and limited her from participating in numerous activities.

[10] The Applicant enclosed additional records with her letter of August 1, 2013, which included consultation reports of various specialists and diagnostic reports.

[11] The Applicant submitted a letter on or about August 28, 2013, enclosing a letter dated August 20, 2013 from Canada Revenue Agency which advised that the Minister of National Revenue had reconsidered and determined that she was, after all, eligible for the Disability Tax Credit for the years 1994 to 2018.

RESPONDENT'S SUBMISSIONS

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

ANALYSIS

[13] Although a leave to appeal application is a first, and lower, hurdle to meet than the one that must be met on the hearing of the appeal on the merits, some arguable ground upon which the proposed appeal might succeed is needed in order for leave to be granted: *Kerth v. Canada (Minister of Development)*, [1999] FCJ No. 1252 (FC).

[14] Subsection 58(1) of the DESD Act states that the only grounds of appeal are 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] For our purposes, the decision of the Review Tribunal is considered to be a decision of the General Division.

[16] The Applicant requests that we re-assess the medical evidence and decide in her favour. I am unable to do this, as I am required to determine whether any of her reasons fall within any of the grounds of appeal and whether any of them have a reasonable chance of success.

Assistance of Family Physician

[17] If there is to be a breach of the principles of natural justice such as to justify granting leave, the Applicant has to show that the breach was committed by the Review Tribunal. Even if she feels that she was unable to fully present her case without her physician's assistance does not mean that the Review Tribunal did not afford the Applicant a full and fair hearing. The fact that the Applicant was unable to rely on the assistance of her

retired family physician is unfortunate, but not a basis for appeal and I am therefore unable to consider this submission.

Disability Tax Credit

[18] Similarly, while the Minister of National Revenue has determined that the Applicant qualifies for a disability tax credit, this is irrelevant to the determination of whether she qualifies for a Canada Pension Plan disability pension and is therefore not a basis for appeal.

[19] The Review Tribunal is not bound by any determinations made by the Minister of National Revenue. Even if the Minister of National Revenue had determined that she qualified for the disability tax credit prior to the hearing before the Review Tribunal, the *Canada Pension Plan* strictly defines disability and the Applicant would have still been required to prove that she is disabled for the purposes of the *Canada Pension Plan.*

"New Facts"

[20] Although the Applicant filed additional medical records with her letter of August 1, 2013 in support of her leave application and appeal, I am unable to consider any new materials, given the narrow provisions of subsection 58(1) of the DESD Act. I am unable to consider any new materials, even any which might have shed some light on what the Applicant's condition might have been at the time of her minimum qualifying period. In any event, I note that the Review Tribunal had already considered a number of medical records, including consultation reports, which addressed the Applicant's various medical concerns. The Review Tribunal referred to and reviewed some of the medical records in its Analysis section.

[21] Even if I were permitted to review any additional medical records, the Applicant has not stated why she has filed these additional records. She has not indicated how the additional opinions or records fall into any of the grounds of appeal.

[22] If the Applicant has filed the medical report in an effort to rescind or amend the decision of the Review Tribunal, she must comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations*, and she must also file an application for rescission or amendment with the same Division that made the decision (or in this case, the General Division of the Social Security Tribunal). There are additional requirements that an Applicant must meet to succeed in an application for rescinding or amending a decision. Section 66 of the DESD Act also requires an applicant to demonstrate that the new fact is material and that it could not have been discovered at the time of the hearing with the exercise of reasonable diligence. 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. This is not a re-hearing of the merits of the claim. In short, there are no grounds upon which I can consider the additional medical opinions or diagnostic reports, even if they were to bolster the evidence that was before the Review Tribunal.

Documentation Filed at Review Tribunal Hearing

[23] The Applicant does not state outright that the Review Tribunal failed to observe a principle of natural justice or that she did not receive a fair hearing, but she feels that materials which she filed with the Review Tribunal at the hearing should have been "used at the tribunal" and that the Review Tribunal should have paid more attention to the documentation. She submits that the Review Tribunal should have adjourned the proceedings to review and consider the new information.

[24] There is no indication that the Applicant sought or required an adjournment for herself, which is what might be contemplated if she alleges a breach of the principles of natural justice.

[25] The Review Tribunal marked the 106 pages collectively as Exhibit A-01. The Review Tribunal did not have to adjourn the proceedings as it had all of the records available for review and consideration at any time following the hearing, in its deliberations and ultimately in coming to a decision. The lack of an adjournment in this particular circumstance does not qualify as a breach of the principles of natural justice.

[26] The Applicant does not specify how she feels the materials should have been "used at the tribunal". There is no indication that she was stopped from being able to rely on or refer to the documentation in the course of her submissions.

[27] Given these considerations, I am not persuaded that the Applicant did not receive a full and fair hearing or that the Review Tribunal failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction.

[28] Finally, while the Applicant feels that the Review Tribunal should have given greater consideration to Exhibit A-01, it was open to the Review Tribunal to sift through the relevant facts, assess the quality of the evidence, determine what evidence, if any, it might choose to accept or disregard, and to decide on its weight. A Review Tribunal is permitted to consider the evidence before it and attach whatever weight, if any, it determines appropriate and to then come to a decision based on its interpretation and analysis of the evidence before it. The Applicant has not suggested that the Review Tribunal committed any errors in law or based its decision on an erroneous finding of fact without regard for the material before it.

CONCLUSION

[29] The Applicant has not cited any grounds of appeal and the leave application is therefore refused.

Janet Lew
Member, Appeal Division