Citation: *M. C. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 55

Appeal No. AD-13-35

BETWEEN:

M. C.

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 31, 2014

DECISION: LEAVE GRANTED

DECISION

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

INTRODUCTION

[2] On February 15, 2013, a Review Tribunal determined that a Canada Pension Plan disability pension was not payable to the Applicant. On May 21, 2013, the representative for the Applicant filed an application requesting leave to appeal (the "Application") with the Appeal Division of the Social Security Tribunal (the "Tribunal"), 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 prepared a document titled, "Errors and omissions in the Review Tribunal decision" in which she set out a number of grounds of appeal in support of her application for leave to appeal the decision of the Review Tribunal. She classified them generally as "errors and omissions". They include the following, that the Review Tribunal:

i) Asked irrelevant, inappropriate and sexist questions of an intimate nature, which were exacerbated by the fact that her spouse was present.

ii) Miscalculated her minimum qualifying period ("MQP") by failing to consider her earnings and contributions in 2004. The Applicant submits that had the Review Tribunal considered her 2004 contributions to the Canada Pension Plan, it would have extended her MQP to December 31, 2006.

iii) Incorrectly identified her date of birth.

iv) Failed to recognize why she was "absent" from school.

v) Suggested that she had failed to seek further education or retraining, without giving any consideration to her physical limitations.

vi) Failed to consider the implications of her "rather modest income".

vii) Failed to enquire as to what other sources of income she might have had and how she might have been able to care for her child, after employment insurance benefits had ceased.

viii) Overlooked the primary reason she had stopped working and instead, focused on other reasons, despite her responses in the Questionnaire for Disability Benefits at page AD1A-92 of the OCRT file.

ix) Misquoted her, regarding the frequency of times she was able to visit and see family who live in other communities, and the regularity of lengthy trips made by motor vehicle.

x) Impliedly criticized her family physician and in the process, misunderstood why he had prescribed her one of her medications.

xi) Made questionable findings of credibility.

xii) Suggested that she should have provided some evidence of her efforts to obtain additional medical evidence from independent sources. At the same

time, the Applicant also stated that, "In the absence of historical evidence for the Appellant's main medical condition, a record of her secondary condition(s) would be of little value".

xiii) Neglected to state when it found that the Applicant had become disabled when the medical evidence, it is submitted, suggested that her condition was unchanged after 2003.

xiv) Found that she regularly made lengthy trips by motor vehicle, when there was no evidentiary basis for this.

RESPONDENT'S SUBMISSIONS

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

ANALYSIS

[8] 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 Human Resources Development)*, [1999] FCJ No. 1252 (FC).

[9] Subsection 58(1) of the DESD 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.

[10] For our purposes, the decision of the Review Tribunal is considered to be a decision of the General Division.

[11] The Applicant prepared a document titled, "History of the disabling condition", which summarizes and provides an overview as to the Applicant's medical condition and her restrictions and limitations. The leave application is not an opportunity to re-hear the case or to reassess any of the medical evidence as to whether or not the Applicant meets the definition of disabled as set out in the *Canada Pension Plan* and I therefore decline to consider this history, other than to obtain some background, as it discloses no grounds of appeal for me to consider.

(i) Failure to Observe Principle of Natural Justice

[12] The Applicant does not state outright that the Review Tribunal failed to observe a principle of natural justice, but from her submissions, I understand that she contends that she did not receive a fair hearing, owing to what she regards as the irrelevant, inappropriate, sexist and insensitive nature of questioning of an intimate nature. She suggests that this demonstrates that the Review Tribunal was not qualified to assess her credibility or that of any of her witnesses.

[13] A review of the decision indicates that the Review Tribunal found that the Applicant's spouse was unable to testify as to the Applicant's medical condition at the material time, as he did not know her then, so the Review Tribunal did not make any findings of credibility where her spouse was concerned.

[14] The Review Tribunal made findings regarding the Applicant's demeanour, but noted that her claim extended over a period of time in excess of seven years, which could account for her inability to readily respond to questioning. It does not appear that the Review Tribunal made any adverse findings of credibility against the Applicant.

[15] I see no nexus between the line of questioning taken by a Review Tribunal and its qualifications to assess credibility. In any event, the Review Tribunal was acting within its

jurisdiction to assess credibility and I would not interfere with its jurisdiction, absent any compelling reason otherwise.

[16] While I am not confronting myself with the merits of an appeal for the purposes of this leave application, at the same time, I do not believe that the Appeal Division's role is to constrain a Review Tribunal (or General Division of the Social Security Tribunal) in exploring any issues or line of questioning which it might deem to be appropriate, relevant or material at a hearing before it. What may appear as irrelevant, inappropriate, insensitive or even sexist in nature may not be, and may well be justifiable questions, depending upon the circumstances and the nature of the claims being advanced, and the manner in which those questions are raised. Given this, I am not satisfied that these submissions raise a ground upon which the appeal might have a reasonable chance of success and as such, I would not allow the application for leave to appeal on this issue.

(ii) Errors in Law

[17] Although the issue of the calculation of her MQP does not appear to have been raised by the Applicant before the Review Tribunal, on the face of it, an incorrect calculation of the MQP by the Review Tribunal would constitute an error in law and could very well be determinative of the issue as to whether an applicant qualifies for benefits. In this case, the Applicant submits that the Review Tribunal failed to consider earnings and contributions in 2004. However, a review of the earnings history shows that no earnings were declared for 2004. This is buttressed by the fact that she had declared in her Questionnaire for Disability Benefits that she felt she could no longer work as of December 2003 (see page AD1A-92 of the OCRT file), and in her submissions to the Review Tribunal dated November 2012 that her final job was from 2001 to 2003 (see page AD1A-117 of the OCRT file). If the Applicant is requesting that we recalculate her MQP as she had earnings and contributions in 2004 which were not taken into account in the initial calculation, the Record of Earnings must show that there were earnings and contributions in that year if we are to consider granting leave. Here, there is no evidence in the Record of Earnings that she had earnings and contributions for 2004. (Section 97 of the *Canada Pension Plan* presumes any entry in the Record of Earnings to be accurate.) Hence, I am of the view that there is no

reasonable chance of success on this issue. I would have dismissed the leave application had this been the sole ground upon which the appeal was based.

[18] The Applicant submits that the Review Tribunal found that she had modest earnings but failed to consider the implications. The Applicant does not suggest what implications might have arisen from the fact that she had modest earnings, or how this constitutes an error in law. The Applicant has not referred me to any authorities to suggest how this might be an error. It was open to the Review Tribunal to make findings of fact based on the evidence before it. In this case, it may have chosen not to do so or may have found that nothing significant arose from the fact of her modest earnings. I would have dismissed the leave application had this been the sole ground upon which the appeal was based.

[19] The Applicant submits that the Review Tribunal failed to determine her source of earnings. Again, the Applicant does not suggest how this constitutes an error in law, nor even advise as to the significance of this purported failure. It was open to the Review Tribunal to explore any issues which it felt might have been material and germane to the proceedings and the fact that it may not have explored this line of questioning may simply demonstrate that it did not find the issue to be of much or any significance. I would have dismissed the leave application had this been the sole ground upon which the appeal was based.

[20] The Applicant submits that the Review Tribunal neglected to state when it found that she had become disabled when the medical evidence, it is submitted, suggested that her condition was unchanged after 2003. The Applicant did not state what error in law had been made. The Review Tribunal was charged with assessing the evidence before it and coming to a determination as to whether she was disabled by the time of her MQP. Beyond that, it was not required to state when it might have found that she had become disabled, if it occurred sometime after her MQP. Indeed, the Review Tribunal may not have been able to make that determination on the evidence or may not have made that determination, as it was not particularly relevant to the central issue as to whether she could be found disabled by her MQP. I would have dismissed the leave application had this been the sole ground upon which the appeal was based.

[21] The Applicant submits the Review Tribunal suggested that she should have provided some evidence of her efforts to obtain additional medical evidence from independent sources. At the same time, the Applicant also stated that, "In the absence of historical evidence for the Appellant's main medical condition, a record of her secondary condition(s) would be of little value". The Applicant did not state what error in law had been made. If anything, it seems that the Review Tribunal made gratuitous comments that the Applicant's case might have been strengthened had she obtained and provided additional medical evidence. Short of demonstrating how this may have been an error in law, I would have dismissed the leave application had this been the sole ground upon which the appeal was based.

(iii) <u>Erroneous Findings of Fact</u>

[22] For the purposes of this leave application, I do not require that there be an actual demonstrated error on the part of the Review Tribunal, but in assessing this ground of appeal raised by the Applicant, I need to satisfy myself that the Review Tribunal made the findings which the Applicant submits the Review Tribunal made.

[23] On the face of it, the Review Tribunal erred in its finding of the Applicant's date of birth, but the Review Tribunal also indicated the Applicant's present age. It is clear to me that the date of birth is in fact a typographical error. (In any event, nothing turns on the Applicant's date of birth, at least for the purposes of assessing her entitlement to disability benefits.) I would not have allowed the leave application had this been the sole basis for the appeal.

[24] The Applicant submits that the Review Tribunal found that she was frequently absent from school, of her own choosing, when in fact she had been expelled from school. Although I am not assessing the merits of the grounds of appeal for the purposes of this leave application, I query how this might be of any significance or relevance to the central issues and to the determination of whether one's disability qualifies as being severe. It does not appear to me that the Review Tribunal based its decision on the reasons as to why she may have been away from school, though it may have based its decision, in part, on the fact

that she was not attending much or any schooling or undergoing any retraining. Had the submissions regarding her schooling or retraining been framed differently, I might have been able to consider whether this raised an arguable ground and it may have been a ground upon which the appeal might have had a reasonable chance of success.

[25] The Applicant submits that the Review Tribunal's focus on the medical evidence was misplaced, in that it found that she had stopped working in December 2003 due to numbness and weakness in her hands and legs, when there was evidence also that she had stopped working for other reasons. If this ground has merit, that the Review Tribunal erred in its findings on the medical evidence without regard for the evidence before it, then the Review Tribunal may or may not have arrived at a different outcome. As such, I would allow the leave application, as I am of the view that this ground raises a reasonable chance of success.

[26] The Applicant submits that the Review Tribunal misquoted her on her evidence pertaining to the frequency of trips to see family, and the regularity of lengthy trips made by motor vehicle. If this ground has merit, that the Review Tribunal erred in its findings on her functional capability, restrictions and limitations, then the Review Tribunal may or may not have arrived at a different outcome. As such, I would allow the leave application, as I am of the view that this ground raises a reasonable chance of success.

[27] The Applicant interpreted the Review Tribunal's finding that, "no evidence was offered as to whether or not an assessment was done regarding a possible component of fibromyalgia" as criticism of her family physician. In this case, it does not appear that the Review Tribunal was being critical of her family physician, but rather, was making a point that it was unprepared to find that the Applicant has fibromyalgia, in the absence of any testing. Irrespective of whether the Review Tribunal was indirectly critical of medical practitioners, a Review Tribunal is permitted to make findings of fact and to be dismissive of any of the witnesses' evidence or opinions. I would not interfere with a Review Tribunal's jurisdiction in that regard. Here, there were no submissions made that there was an erroneous finding of fact. I would not have allowed the leave application had this been the sole basis for the appeal.

[28] The Applicant submits that the Review Tribunal misapprehended the evidence of her family physician and in particular, failed to recognize why he had prescribed her one of her medications. The Applicant suggests that had the Review Tribunal appreciated that her family physician had recommended a trial of Lyrica, it could have found she has fibromyalgia, which would have supported a finding that she is disabled. There was no evidence otherwise that any medical practitioners had diagnosed her with fibromyalgia. The Review Tribunal would have been acting beyond its jurisdiction had it made a medical diagnosis, irrespective of whether there was any medical foundation or evidence to support it. While a Review Tribunal is expected to make findings of fact based on the evidence before it, making a medical diagnosis goes well beyond this. On this issue, the Applicant has not pointed to a finding of fact made by the Review Tribunal which might be erroneous. I would not have allowed the leave application had this been the sole basis for the appeal.

CONCLUSION

[29] While the Applicant was not successful on each of the grounds set out in her leave application, she has raised some grounds that satisfy me that the appeal has a reasonable chance of success and for that reason, the Application is granted.

[30] This decision granting leave to appeal in no way presumes the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division