Citation: *K. T. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 62

Appeal No. AD-13-54

BETWEEN:

K. T.

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: April 10, 2014

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 January 22, 2013. The Review Tribunal had determined that a Canada Pension Plan disability pension was not payable to the Applicant, as it found that his disability was not "severe" at the time of his minimum qualifying period of December 31, 2010.

[3] The Applicant received the decision of the Review Tribunal on February 8, 2013. The Applicant filed an Application Requesting Leave to Appeal (the "Application") with the Appeal Division of the Social Security Tribunal (the "Tribunal") on May 9, 2013, outside the time permitted under subsection 57(1)(b) of the *Department of Employment and Social Development* (DESD) *Act*.

[4] On November 21, 2013, the Tribunal notified the Applicant that his application was late and invited him to request an extension of time to file the Application. The Tribunal also required that he explain why his Application was late. The Applicant had by then moved to a new residential address, so apparently did not receive the Tribunal's letter of November 21, 2013.

[5] On January 16, 2014, the Applicant contacted the Tribunal to advise that he was now acting on his own behalf and since September, had a new mailing address. The Applicant also enquired as to the status of his appeal. On January 21, 2014, the Tribunal re-directed its letter of November 21, 2013 to the Applicant's new mailing address.

[6] The Applicant contacted the Tribunal on February 3, 2014. Efforts to return his call were unsuccessful. The Applicant's new representative contacted the Tribunal on February 10, 2014. On February 26, 2014, the Applicant's new representative provided the Tribunal with the Applicant's undated letter requesting an extension of time. This second representative ceased to act for the Applicant on or about March 13, 2014.

ISSUE

[7] Should the Appeal Division extend the time for filing of the Application?

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

THE LAW

[9] According to subsection 57(2) of the DESD Act, "the Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the appellant".

[10] 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".

[11] 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

Late Filing of Application

[12] The Applicant was advised that his application was late. He learned of this on or about January 22, 2014. He provided a letter on or about February 26, 2014, explaining why his Application had been late. He did not explain why he delayed for more than a month to justify his late application. He explains that his Application is late for the following reasons:

> "You can tell from this letter that I do have an intension (*sic*) to pursue the application to appeal. The matter does disclose an arguable case. The reason for the delay was in fact the lawyer who was taking care of the case at that time and attended the hearing with me. I kept reminding the lawyer about the urgency to submit the Leave to appeal application, but she kept saying that we still have time until she filed it on May 9, 2013 instead of Apr. 22, 2013 or earlier. You can see also in her fax to you that she had mentioned that she is doing it as a courtesy

> from her and not as a representative, which is something I didn't know until my present representative Mr. Riadh Saleh had read it to me on Jan. 16, 2014 because my English is limited, which is another reason for the delay.
>
> There will be no prejudice to any parties as my application is for CPP-D and I feel that my health condition strains me from working, which is something I would love to do to support myself. I have many reports from my doctors supporting my application and explaining my health condition."

[13] From this, I understand that the Applicant relied on who he believed was his legal representative at the time to file the materials in a timely manner. The Applicant had instructed his representative to file the Application on April 22, 2013 or earlier, but she apparently had advised him that the Application could be filed as late as May 9, 2013.

Application for Leave

[14] The Applicant seeks leave to appeal on the following grounds:

1. The Review Tribunal failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; in addition to, or in the alternative,

2. The Review Tribunal erred in law in making its decision, whether or not the error appears on the face of the record; in addition to, or in the alternative,

3. The Review Tribunal 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] The Applicant submits that his appeal has a reasonable chance of success because:

1. He has a prolonged disability and the Review Tribunal failed to give proper weight and due consideration to the medical reports and the objective medical findings of all his physicians and treating health professionals.

2. The Review Tribunal improperly concluded that the Appellant's disability was not severe because the Appellant was not incapable regularly of pursuing any substantially gainful occupation.

3. The Review Tribunal failed to give proper weight and attention to the chronic nature of the Appellant's condition.

4. The Review Tribunal failed to consider the Appellant's testimony and adequately consider the Appellant's personal factors which inhibit him from performing all types of work.

5. The Appellant will advance further detailed evidence as to his education, training and his functional abilities at the qualifying date so that his individual characteristics may be given their proper weight. The Applicant submits that this will show that his disability is severe in that he will not be able to perform substantially gainful work on a regular basis.

RESPONDENT'S SUBMISSIONS

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

ANALYSIS

Late Filing of Application

[17] I need not consider this issue, as I find that the Applicant had indeed filed the Application within 90 days, the time permitted under subsection 57(1)(b) of the DESD Act, despite having been advised otherwise.

Application for Leave

[18] 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 for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

[19] 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.

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

[21] In my view, the Applicant has not adequately or specifically expressed what errors he contends that the Review Tribunal committed. An applicant needs to avoid generalities and clearly set out any errors which the Review Tribunal may have made.

1. The Review Tribunal failed to give proper weight and due consideration to the medical reports and the objective medical findings of all his physicians and treating health professionals.

[22] It is insufficient for the purposes of a leave application to make bald submissions without some basis to support them. For instance, the Applicant submits that the Review Tribunal failed to give proper weight and due consideration to the medical reports and the objective medical findings of all his physicians and treating health professionals, however does not specify which medical reports or objective medical findings were not given proper weight or due consideration.

[23] The Review Tribunal had various medical records before it, including numerous medical reports from his family physician Dr. Fadia Hermiz, consultation reports of Drs. T.R. Shenava and N.R. Malempati, psychiatrists, and diagnostic reports and scans. The Review Tribunal referred to many of these medical records in its sections titled, "Medical" and "Analysis". The Review Tribunal did not list all of the medical records, such as the consultation reports of an otolaryngologist, an operative report dated February 7, 2012, or the Emergency Treatment Record of Windsor Regional Hospital.

[24] The Federal Courts have previously addressed this submission in other cases that Review Tribunals or Pension Appeals Boards have failed to consider all of the medical evidence. In *Simpson v. Canada (Attorney General)*, 2012 FCA 82, the Applicant's counsel identified a number of medical reports which she said that the Pension Appeals

Board ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the Applicant's application for judicial review, the Court of Appeal held that,

> "First, 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. Second, assigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact. . ."

[25] I presume that the Review Tribunal considered all of the evidence before it, even if it did not refer to each and every piece of evidence. The Applicant is permitted to rebut the presumption that a Review Tribunal has considered all of the evidence, but without even referring to any specific reports or records, the Applicant has not attempted to do so here.

[26] In following *Simpson,* it is open to a 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.

[27] If the Applicant is requesting that we re-assess the medical evidence and decide in his favour, I am unable to do this, as I am required to determine whether any of his reasons fall within any of the grounds of appeal and whether any of them have a reasonable chance of success. The leave application is not an opportunity to re-assess the medical evidence or to re-hear the claim to determine whether the Applicant is disabled as defined by the *Canada Pension Plan.*

[28] I am unable to consider granting leave under this ground.

2. The Review Tribunal improperly concluded that the Appellant's disability was not severe because the Appellant was not incapable regularly of pursuing any substantially gainful occupation.

[29] This submission discloses no grounds of appeal for me to consider.

3. The Review Tribunal failed to give proper weight and attention to the chronic nature of the Appellant's condition.

[30] The Review Tribunal made no findings on whether the Applicant's disability is prolonged, as it found it unnecessary to do so, having found that the Applicant's disability was not severe for the purposes of the *Canada Pension Plan*. For the reasons expressed above, I am nonetheless unable to consider granting leave under this ground. Even had the Review Tribunal made findings on the chronic nature of the Applicant's condition, it would have been open to the Review Tribunal to consider and determine what evidence it might have chosen to accept or disregard, and to decide on its weight.

4. The Review Tribunal failed to consider the Appellant's testimony and adequately consider the Appellant's personal factors which inhibit him from performing all types of work.

[31] I might have been prepared to consider this submission had the Applicant specified what testimony or which personal factors the Review Tribunal failed to consider. That said however, it appears to me that the Review Tribunal felt that it was unnecessary to consider the Applicant's personal factors, as it concluded that there was (1) insufficient medical evidence to demonstrate that he suffers from a serious and prolonged disability that renders him incapable regularly of pursuing any substantially gainful occupation and (2) insufficient evidence of employment efforts and possibilities. The Review Tribunal cited *Villani v. Canada (Attorney General)*, 2001 FCA 248 in this regard, at paragraph 47 of its decision.

5. The Appellant will advance further detailed evidence as to his education, training and his functional abilities at the qualifying date so that his individual characteristics may be given their proper weight. The Applicant submits that this will show that his disability is severe in that he will not be able to perform substantially gainful work on a regular basis.

[32] The Applicant ought to have made full submissions about his education, training and his functional abilities at the time of the hearing before the Review Tribunal or at the

very latest, in the Application. That said, even if new or additional evidence had been provided with his Application, I would have been unable to consider any new materials, no matter how supportive they might have been, given the narrow provisions of subsection 58(1) of the DESD Act.

CONCLUSION

[33] Finally, while I recognize that the Applicant relied on his counsel to prepare appropriate submissions on his behalf, at the same time, the Applicant has had custody and stewardship of his appeal at various times and it was open to him to have provided supplementary grounds. He has done so, to a very limited extent, in the letter in which he requested an extension of time for filing of the Application. He referred to his doctors' supporting reports. There is no opportunity before the Appeal Division to re-hear the evidence that was before the Review Tribunal, as an appeal is limited to the three grounds of appeal which I have set out above.

[34] It is insufficient to make a general reference to the evidence that was before the Review Tribunal and to suggest that the Review Tribunal ought to have drawn a separate set of conclusions, as evidence that there was a failure to observe a principle of natural justice, error in law or an erroneous finding of fact.

[35] The Applicant has not cited with any specificity any errors of law or erroneous findings of fact upon which the Review Tribunal might have based its decision, nor how it might have failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction. As the Applicant's reasons disclose no grounds of appeal for me to consider, I am unable to find that the appeal has a reasonable chance of success. The Application is refused.

Janet Lew
Member, Appeal Division