Citation: *N. O. v. Minister of Employment and Social Development*, 2014 SSTAD 73

Appeal #: AD-13-14

BETWEEN:

N. O.

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: April 24, 2014

DECISION

[1] The Application for Leave to Appeal is granted.

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, (the "Application"). The Social Security Tribunal received the Application on May 6, 2013.

GROUNDS OF APPLICATION

[3] Counsel for the Applicant submits that the decision of the Review Tribunal is wrong and that the Applicant should be granted leave to appeal the decision because in making its decision:

a. The Review Tribunal erred in law;
b. The Review Tribunal based its decision on erroneous findings of fact.

ISSUE

[4] The sole issue that the Tribunal must decide is whether the submissions contained in the Application for Leave to Appeal satisfies the Tribunal that the appeal has a reasonable chance of success.

THE LAW

[5] The relevant statutory provisions are found in ss. 56(1); 58(2) and 58(3) of the Employment and Social Development Act, (the DESD Act). S. 56 (1) clarifies that there is no automatic right to an appeal granted." Thus there is not automatic right to appeal. An Applicant must seek and obtain leave to bring his or her appeal before the Appeal Division. The obligation imposed by s.58(3) of the DESD Act mandates that "the Appeal Division must either grant or refuse leave to appeal"; the criteria governing the granting or refusal of the leave application being set out in ss.58(2) of the DESD Act. The subsection provides

that “Leave to Appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[6] The test for “reasonable chance of success “ has been articulated as raising “an arguable case.”[1] The test was further expanded by O’Reilly, J., in *Carroll*[2] where he 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] Beyond stating that the Review Tribunal had committed an error of law, Counsel for the Applicant did not expand on the precise nature of the error of law that the Review Tribunal is alleged to have committed. He has filed the Affidavit of H. G., sister to the Applicant, which Affidavit details the Applicant’s medical condition and the deficits in her daily life. However, nowhere do the materials submitted with the Application for Leave to Appeal expressly set out the alleged error of law. The Tribunal cannot guess at the error. Accordingly, the Tribunal considers that with respect to the ground of error of law, the Applicant has not raised an arguable case.

[8] Counsel for the Applicant also submits that the Review Tribunal based its decision on erroneous findings of fact. The particular finding of fact relates to the extent of the Applicant’s English language training. At paragraph 59 of the decision the Review Tribunal states that the Applicant studied English for two years. In her Affidavit, H. G. disputes this finding. Instead, she states that the Applicant “did not take two years of training in English as a second language… [she] only took two summers of training in English as a second language.”

[9] The Review Tribunal made the statement concerning the Applicant’s language training and proficiency in the context of its “real person” analysis of the applicant’s capacity to work and her ability to find other work. As language capability is an important

[1] Calihoo v. Canada (Attorney General), [2000] FCJ No. 612 TD.
[2] Canada (Attorney General) v. Carroll, 2011 FC 1092.

factor in the workplace, in the Tribunal's view, there should be no ambiguity surrounding the Review Tribunal's decision in this regard. The Tribunal finds that it is not sufficient simply to infer that the reference to two years is a typographical error. .

[10] In addition to setting out the test for granting leave to appeal Calihoo 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." On this rationale, The Tribunal finds that the Applicant has raised an arguable case.

CONCLUSION

[11] The Application for Leave to Appeal is granted.

Hazelyn Ross
Member, Appeal Division