Citation: *J. J. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 70

Appeal No. AD-13-874

BETWEEN:

J. J.

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 22, 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 March 14, 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, 2011. The Applicant filed an application requesting leave to appeal (the "Application") with the Appeal Division of the Social Security Tribunal (the "Tribunal") on June 12, 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 submits the following, in support of her Application:

> My progressive left foot, knee and leg pain continues to prevent me from living a normal life. I am unable to financially contribute to our family's needs and we have been impacted with financial hardships. At the time that I was laid off, I was ready and capable of working because I had no other

> alternative. However, after my EI completed, I discussed with my Dr. and my family and I decided to stop giving my feet anymore pain. My medical history in regards to my foot issue has been longstanding.
>
> I noticed that there was no mention in the decision letter that I had attended a Foot Clinic at St. Paul's Hospital in Vancouver. However, I did inform the Review Tribunal during our meeting. I have attended the clinic prior and have also recently attended and had an MRI scan done. My Dr. has written in note in regards to supporting me in that I am unable to work where I have to spend anytime standing and/or walking due to chronic foot problems.
>
> If I were to find a job, where I only would be required to sit, I would gladly do so. However, with my low English ability, it would be very difficult to find such a job. I have a Grade 12 from India. I did not learn English in school. I am able to understand a little bit though since I have been in Canada for over 3 decades.
>
> I don't know how else to explain that I am unable to work any job that requires me to stand and walk. My son helps me at home with majority of the household chores. I continue to be able to cook and wash dishes by sitting on a stool (high chair). I am hoping that my medical response from Dr. Henderson and the Doctor at the foot clinic with (*sic*) lead the way with the evidence you require. I will be sending this information to you within the week, as I have not received a call back from the Foot Specialist. However, I have attached the note from Dr. Henderson. I will also include a copy of the MRI scan notes from the Foot Clinic.

[7] In essence, the Applicant contends that the Review Tribunal erred in that it based its decision on an erroneous finding of fact, and in particular, failed to mention in the decision that she had attended a Foot Clinic at St. Paul's Hospital in Vancouver, B.C.
The Applicant does not state that the Review Tribunal failed to take this fact into consideration in determining whether her disability could be considered severe for the purposes of the *Canada Pension Plan,* and that had it done so, it would have found her disability to be severe. However, I find this implicit in her submissions.

[8] The Applicant attached a note from her family physician in which he confirmed that the Applicant has chronic foot problems and experiences various limitations and restrictions.

RESPONDENT'S SUBMISSIONS

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

ANALYSIS

[10] 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 Development)*, [1999] FCJ No. 1252 (FC).

[11] 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.

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

[13] I am required to satisfy myself that the Applicant's reasons for appeal fall within any of the grounds of appeal and whether any of them have a reasonable chance of success, before leave can be granted.

Erroneous Finding of Fact

[14] 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 or did not make the finding which the Applicant submits the Review Tribunal made or failed to make.

[15] The Applicant submits that the Review Tribunal failed to mention that she had attended at a foot clinic. The only reference to a foot clinic is at paragraph 28 in the decision, where the Review Tribunal noted that a podiatrist deferred a prognosis until she had been seen at the foot and ankle clinic.

[16] While the Applicant rightly points out that the Review Tribunal did not make mention of the fact that she had already attended the Foot Clinic at St. Paul's Hospital in Vancouver, B.C., I am of the view that a Review Tribunal is not required to refer to each and every piece of evidence before it, and it can be presumed that the Review Tribunal considered all of the evidence.

[17] 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 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. . ."

[18] 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. The Review Tribunal was not required to refer to all of the evidence before it, even if the Applicant is of the position that the evidence might have led to a different outcome.

[19] If the fact that the Applicant had attended at a Foot Clinic been so central to her appeal before the Review Tribunal, the Applicant could have obtained a report or the records of the Foot Clinic, even if this might have necessitated an adjournment of the proceedings.

[20] Lost in all this is the fact that the Review Tribunal was aware of the Applicant's issues involving both feet, the pain she endures and the limitations and restrictions she experiences. While the prognosis remained indeterminate, the Applicant had already been diagnosed with chronic foot pain. This information was before the Review Tribunal and yet, this is the information which the Applicant suggests remains forthcoming.

[21] If the Applicant is requesting that we re-assess the evidence and decide in her favour, I am unable to do this, as I am required to determine whether any of the reasons she has cited fall within any of the enumerated 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 evidence or to re-hear the claim to determine whether the Applicant is disabled as defined by the *Canada Pension Plan.*

[22] I am not satisfied that the Applicant has raised an arguable ground or that there is a reasonable chance of success. I refuse the application for leave on this basis.

New Facts

[23] The Applicant attached a note from her family physician in which he confirmed that the Applicant has chronic foot problems and experiences various limitations and restrictions. She also indicated that she anticipated receiving additional medical information and would shortly be forwarding copies to the Tribunal.

[24] At this juncture, I am unable to consider any new medical records or opinions given the very narrow provisions of subsection 58(1) of the DESD Act. If the Applicant intends to file these additional medical records or opinions 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 has no jurisdiction in this case 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. In short, there are no grounds upon which I can consider any additional records or opinions which the Applicant might intend to file.

CONCLUSION

[25] For the reasons expressed above, the Application is refused.

Janet Lew

Member, Appeal Division