Citation: *D. T. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 75

Appeal No. AD-13-786

BETWEEN:

D. 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 25, 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 May 24, 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, 1997 (the "MQP"). The Applicant filed an application requesting leave to appeal (the "Application") with the Appeal Division of the Social Security Tribunal (the "Tribunal") on August 22, 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's representative filed an application in the form of a letter dated August 22, 2013. The Applicant seeks leave to appeal on the grounds that (1) the Review Tribunal did not provide her with a full and fair hearing in that her representative was not provided with the "significant documentary evidence by the Respondent", and (2) the

Review Tribunal committed an error in law by following the decision of *Canada (Attorney General) v. Causey*, 2007 FC 422 and by failing to give the "appropriate weight" to the Applicant's evidence that by December 1997, she was too worn out to return to work or seek any medical attention for herself, as she was caring for her two severely disabled children.

[7] The Applicant's representative submits,

> Since the Review Tribunal Panel gave significant weight to this evidence and since this evidence was the basis for the Panel's denial to benefits, it is my submission that this was an error in law by the Panel to allow this evidence, as it gave the Respondent an unfair advantage and did not allow for an opportunity for me to be provided with this evidence in order to be prepared for this Hearing and to make oral submissions regarding this evidence.
>
> By not providing me with this evidence before the hearing Mrs. D. T.'s right to a full and fair hearing was severely prejudiced.
>
> The representative for the Respondent did not advise me before the hearing that she would be relying upon this documentary evidence in the form of the Federal Court decision Canada (A.G.) v. Causey, 2007 FC 422.
>
> . . .
>
> It is my submission that the Review Tribunal Panel erred in law in stating that in reading Canada (A, G.) v. Causey, 2007 FC 422 that it is directly applicable to Mrs. D. T.'s case and that they had no choice but to follow its direction.
>
> It is my submission that (*sic)* there is an error in law as the Panel did not give the appropriate weight to their acceptance of evidence in Mrs. D. T.'s testimony that by December 1997 she was too worn out to go back to work.
>
> This was due to her taking care of her two severely disabled children. She testified that she did not have time to see any doctors as her children required 24/7 care.
>
> This should have been accepted by the Panel as evidence that the disability was severe at the MQP.

RESPONDENT'S SUBMISSIONS

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

ANALYSIS

[9] 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).

[10] 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.

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

[12] I am required to determine whether any of 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.

Breach of Natural Justice

[13] *Prima facie,* it appears that the Review Tribunal did not afford the Applicant with a full and fair hearing, if it did not provide her or her representative with an adequate opportunity to review any portion of the documentary evidence. However, the "evidence" which the Applicant did not receive appears to have been a copy of *Causey.* Case law is not evidence and a party is entitled to refer to and rely upon case authorities in the course of submissions.

[14] Neither the *Canada Pension Plan* nor the rules of procedure governing Review Tribunals requires a Respondent to provide advance copies of any legal authorities to an applicant. Early disclosure and exchange of documentation – whether evidence or case law -- would doubtless facilitate the expeditious hearing of a matter and therefore should be encouraged.

[15] I do not know whether the Applicant or her representative sought a brief adjournment of the Review Tribunal hearing to review *Causey*, but the Applicant does not suggest that the Review Tribunal refused such requests (if any). Seeking a brief adjournment might have been an option available to the Applicant.

[16] While the Review Tribunal may have followed *Causey*, it could have done so only with the appropriate evidentiary foundation. In other words, the Review Tribunal had to have found that the medical evidence could not support a finding that the Applicant is disabled, before it could even consider *Causey*.

[17] Given that the documentation referred to was case law, the Review Tribunal was permitted to presume that each of the parties was familiar with the law. This would have been so even if one or both parties did not have copies with them at the time of the hearing. As such, it cannot be said that the Review Tribunal failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction.

Error in Law – Weight of the Evidence

[18] The Applicant submits that the Review Tribunal made an error in law by following *Causey* and by failing to given the "appropriate weight" to the Applicant's evidence that by December 1997, she was "too worn out to return to work". The Applicant submits that the Review Tribunal failed to give consideration as to why she was too worn out to return to work.

[19] 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, and either gave too much or insufficient weight to some 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. . ." (my emphasis)

[20] 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.

[21] In this particular case, the Review Tribunal noted that there were no medical records for the relevant time. Indeed, the earliest records before the Review Tribunal start in April 2007 and 2008, and consist largely of a pelvic ultrasound and various lab tests. The Medical Report dated January 1, 2011 of Dr. P. Ziter, family physician, indicates that he first treated the Applicant for her "main medical condition" in 2010, well after the MQP. Dr. Ziter did not offer any opinion on whether the Applicant's disability could be considered severe at the MQP.

[22] The Review Tribunal relied upon the Applicant's oral testimony to determine whether she could be found disabled at the time of her MQP. The Review Tribunal held that,

> Based on the Appellant's evidence, there is no question that she was engaged in extremely heavy care, both mentally and physically for her children, as well as other members of her family. This was all occurring both before, and for a long time after, her MQP.

[23] Clearly, before it considered *Causey,* the Review Tribunal was satisfied that, on the evidence before it, the Applicant did not meet the test of "disabled" as defined by the *Canada Pension Plan.*

[24] While the Applicant's representative submits that the Review Tribunal failed to give appropriate weight to the Applicant's evidence that she was too worn out to return to work or seek medical attention, due to caring for her two severely disabled children, the issue of causation is not a relevant consideration when assessing disability under the *Canada Pension Plan.*

CONCLUSION

[25] I find that there is no arguable ground that the Review Tribunal failed to observe a principle of natural justice or that it made an error in law. The Application is refused.

Janet Lew
Member, Appeal Division