Citation: *K. A. v. Minister of Employment and Social Development,* 2014 SSTAD 112

Appeal No. AD-13-41

BETWEEN:

K. A.

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: May 20, 2014

DECISION

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

BACKGROUND

[2] The Applicant seeks Leave to appeal the decision of the Review Tribunal issued to the parties on May 23, 2013. The Review Tribunal determined that a *Canada Pension Plan,* (CPP), disability pension was not payable to the Applicant as it concluded that the Applicant did not meet the severe criterion in paragraph 42(2)(a) of the CPP. In the view of the Review Tribunal the Applicant's participation in a retraining programme for several years after the Minimum Qualifying Period, (MQP), was strong evidence that he had capacity to regularly pursue gainful employment as of the MQP.

[3] The Social Security Tribunal received the Application Requesting Leave to Appeal, ("the Application"), to the Appeal Division on May 29, 2013, which is within the time permitted for filing under the *Department of Employment and Social Development Act* (DESD Act).

ISSUE

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

THE LAW

[5] Subsections 56(1) and 58(3) of the DESD Act provide, "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."

[6] 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."

[7] Subsection 58(1) of the DESD Act sets out the grounds of appeal as being limited to the following situations:

(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.

(d) For our purposes, the decision of the Review Tribunal is considered to be a decision of the General Division.

SUBMISSIONS

[8] The Applicant sets out two major grounds of appeal. First, he submits that the Review Tribunal erred in law in making its decision. His second submission is that the Review Tribunal based its decision on an erroneous finding of fact and without regard for the material before it.

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

ANALYSIS

[10] Although an Application for Leave to Appeal 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).

[11] The Applicant's representative made the following submissions on his behalf. He stated that, with regard to demonstrating the capacity to be retrained by LMR (Labour Market Re-Entry) training courses after the MQP of December 2002, "The courses took an inordinate amount of time to complete and ultimately exceeded his (meaning the Applicant's) physical limitations." He went on to state,

1. The fact is that Mr. K. A. made a reasonable effort to undertake and participate in Vocational Rehabilitation program and failed.

2. The Appellant was found to be a candidate for retraining by WSIB and cooperated however this alone is not an impediment to a finding that the disability at the time was not severe.
3. Therefore we submit that just because the applicant can be retrained does not mean that he has demonstrated the capacity to work.

[12] The second major prong of the Applicant's submissions is that the Review Tribunal erred in law in that they failed to consider the totality of the evidence before them. His representative states,

1. "The Appellant was considered to possibly and without being questioned and in the absence of adequate or sufficient evidence to that effect to be under the influence of Alcohol at the hearing.

2. In fact the Appellant stated that he suffers from side effects of Medication that cause him to be drowsy."

[13] A further submission was that the Review Tribunal did not properly assess the severe criterion. The Applicant's representative alleged that the Review Tribunal erred when it applied the "real world context" requirement to its assessment of the Applicant's disability.

a. "The Appellant submits that she [sic] has only limited ability to perform Activities of daily living and requires assistance from others. The Review Tribunal did not assess any weight to this evidence.

b. The Appellant has had no improvement to his condition and has only worsened overtime.

c. It is unrealistic to expect any employer would hire if they got to know he was injured and knowing that attendance would be irregular, that she [sic] would be in pain and taking medication, especially the requirement to rest for indeterminate periods.

d. In addition it is not reasonable to expect to find a supportive employer with a flexible work schedule or a productivity requirement in today's competitive marketplace. The Appelant [sic] is not reliable and has unpredictable good and bad days". ***(Typed as per original.)***

Does participation in a retraining programme indicate capacity to work?

[14] The Applicant has raised the question of whether participating in a retraining programme can be taken as capacity to work. The Review Tribunal was of the view that, in

the Applicant's case, it was. However, it was held in *Romanin v. MSD*, (November 18, 2004, CP 2159) that "attendance in a retraining school programme is not tantamount to evidence of work capacity… it might be a factor in assessing severity." While the decision is of persuasive value only, the Tribunal is of the view that the Applicant has raised an arguable case with respect to this ground of appeal, as the question of work capacity specifically relates to his pre-MQP capability.

[15] With regard to the question of whether the Review Tribunal erred by making reference to the Applicant being possibly under the influence either of medication or alcohol during the hearing, the Tribunal finds that no error is revealed by the Review Tribunal's comment. The review Tribunal made the comment in the context of clarifying the Applicant's engagement in and participation in the hearing process and thus no error can be inferred. Accordingly, the Tribunal refuses leave on this ground.

[16] With regard to the submission that the Review Tribunal did not properly assess the severe criterion, the Tribunal finds that this submission does not raise an arguable case. The Review Tribunal clearly assessed the medical and other evidence that was before it even where such evidence was dated significantly after the MQP. The Tribunal refuses leave on this ground.

[17] The Applicant has raised two grounds to support the Application. The Tribunal grants leave to appeal on the basis of his argument that attendance in a retraining programme is not tantamount to work capacity.

CONCLUSION

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

Hazelyn Ross
Member, Appeal Division