Citation: *S. H. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 115

Appeal No. AD-13-195

BETWEEN:

S. H.

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: May 22, 2014

DECISION

[1] The Social Security 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 issued on March 1, 2013. The Review Tribunal 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, 2010. The Applicant filed an application requesting leave to appeal (the "Application") with the Appeal Division of the Social Security Tribunal (the "Tribunal") on May 17, 2013.

ISSUE

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

THE LAW

[4] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development* (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 cited a number of grounds of appeal and allegations of fact, as follows:

(a) The Review Tribunal erred in concluding that the medical evidence did not establish that the Appellant was suffering from a severe disability within the meaning of the legislation and in doing so did not apply the appropriate test.

(b) The Review Tribunal erred in law in not giving sufficient weight to the oral evidence of the Appellant as to the impact of her medical conditions, and failed to give sufficient weight to the evidence and opinions of Dr. Yu dated July 25, 2012 as well as giving sufficient weight to the Appellant's learning disabilities.

(c) The Tribunal erred by stating that the objective medical evidence in the hearing file did not reveal a severe disability. The Review Tribunal's reasons have not given sufficient weight to the subjective evidence of the Applicant on the impact of her disabling conditions. The evidence should be given weight, as they can be determinative: *Osachoff v. The Minister of Human Resources Development (July 7, 1997) CEB&PGR#8684.* The Applicant further submits that subjective experiences of an applicant are important considerations in the adjudication of a claim, and a finding of disability is not conditional on objective evidence. *Laucht v. Minister of Human Resources Development, C.E.B.* & *P.* G.R. *No. 8826, Appeal No. CP20910 (PAB).*

[7] The Applicant also requests a hearing *de novo,* at which time it is anticipated that new evidence would become available as to the continuing deterioration of the Applicant's condition.

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

[10] 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.

[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 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.

[13] If the Applicant is requesting that we consider any additional records or factors, or re-assess the claim and re-weigh the evidence in her favour, I am unable to do this, given the very narrow constraints of subsection 58(1) of the DESD Act. The leave application is not an opportunity to re-hear the claim to determine whether the Applicant is disabled as defined by the *Canada Pension Plan.*

ANALYSIS

[14] The Applicant submits that the Review Tribunal failed to give sufficient weight to the subjective evidence of the Applicant on the impact of her disabling conditions.

[15] 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. . .

[16] 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. It is not inappropriate or improper for 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 – whether objective or subjective -- 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.

[17] Had the Review Tribunal stated that it was restricted to considering the objective medical evidence alone without any consideration of the Applicant's subjective experiences, that would have been a separate issue altogether.

[18] If the Applicant is requesting that we re-assess and re-weigh the medical evidence and decide in her favour, I am unable to do this, as I am required to determine whether any of her reasons to appeal 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 and re-weigh the medical evidence or to re-hear the claim to determine whether the Applicant is disabled as defined by the *Canada Pension Plan.*

CONCLUSION

[19] The Application is refused.

Janet Lew
Member, Appeal Division