Citation: *V. T. v. Minister of Employment and Social Development,* 2014 SSTAD 150

Appeal No.: AD 13-30

BETWEEN:

V. T.

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: June 11, 2014

DECISION

[1] The application for leave to appeal is granted.

INTRODUCTION

[2] By a decision issued May 2, 2013 a Review Tribunal determined that the Applicant was not entitled to a *Canada Pension Plan, (CPP),* disability pension. In its decision the Review Tribunal concluded that as of her Minimum Qualifying Period, (MQP) date, the Applicant did not suffer from a severe disability that meets the definition of contained in CPP ss. 42(2)(a). The Applicant's MQP was established as December 31, 2011.

GROUNDS OF THE APPEAL

[3] The Applicant seeks Leave to Appeal this decision, (the "Application"). She submits that in its assessment of whether her disability is severe and prolonged, the Review Tribunal made a number of errors.

[4] The Applicant is self-represented. She submitted the Application requesting Leave to Appeal, ("the Application"), to the Social Security Tribunal, ("SST"), within the time permitted for filing under the *Department of Employment and Social Development Act* (DESD Act). However, the hand-written Application was not in the prescribed form such that the Tribunal was left to infer the Applicant's intent from her handwritten notes, which were, in fact, mainly a repeat of earlier pre-hearing submissions, as well as from her comments inserted into the text of the Review Tribunal decision.

[5] Principally, the Applicant contends that the Review Tribunal made factual errors concerning the manner in which she gave her testimony; the number of hours she worked with Greenpeace; and the medical evidence before it. The applicant also argues that it was an error for the Review Tribunal to reject her application for a CPP disability pension, when her private insurer had accepted her claim. She also pleads that she is destitute and that her level of pain is increasing. In the Applicant's view, these combined circumstances form a sufficient basis on which the Application should be granted.

ISSUE

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

THE LAW

[7] The applicable statutory provisions governing the grant of Leave are ss. 56(1), 58(1), 58(2) and 58(3) of the DESD Act. Ss. 56(1) provides, "an appeal to the Appeal Division may only be brought if leave to appeal is granted" while ss. 58(3) mandates that the Appeal Division must either "grant or refuse leave to appeal." Clearly, there is no automatic right of appeal. An Applicant must first seek and obtain leave to bring his or her appeal to the Appeal Division, which must either grant or refuse leave.

[8] Subsection 58(2) of the DESD Act sets out the applicable test for granting leave and provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[9] 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.

[10] On an Application for Leave to Appeal the hurdle that an Applicant must meet is a first, and lower, hurdle than that which must be met on the hearing of the appeal on the merits. However, to be successful, the Applicant must make out some arguable case[1] or show some arguable ground upon which the proposed appeal might succeed.

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[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

[11] In *St-Louis*[2], Mosley, J. opined that the test for granting a leave application is now well settled. Relying on *Calihoo,*[3] Moseley, J. reiterated that the test is "whether there is some arguable ground on which the appeal might succeed." He also reinforced the stricture that on a Leave Application, the PAB [now Appeal Division of the SST] should not decide whether the Applicant could actually succeed.

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

ISSUE

[13] The issue before the Tribunal on this Application is whether the appeal has a reasonable chance of success.

ANALYSIS

[14] The Applicant submits that the Review Tribunal erred in its assessment of the severe criterion as it applied to her. She states that the Review Tribunal erred when it stated in paragraph 18 of its decision that she worked for Greenpeace from "3 p.m. to 9 p.m. upwards of 4-5 days weekly". The applicant states she works 4 hours a day on 3-4 days a week. The difference between the two time periods varies from as little as 12 hours a week to 30 hours a week, depending on the hours used to calculate the Applicant's working week. The Review Tribunal used the Applicant's Greenpeace job to find evidence of residual work capacity. Evidence of work capacity is a significant factor in assessing the severe criterion of disability. It is, therefore, imperative that the Review Tribunal make its decision on correct information.

[15] The applicant also complains that the Review Tribunal erred when it discussed her ability to recall dates. At paragraph 49 the Review Tribunal comments that the Applicant, "was able to recall dates related to she and her fiancé's pending medical appointments; which doctors prescribed which medications; which ones she discontinued and why as well as

[2] *Canada (A.G.) V. St. Louis*, 2011 FC 492
[3] *Calihoo v. Canada (Attorney General),* [2000] FCJ No. 612 TD para 15.

providing a chronology of past employment and attempts to obtain employment after her snowboarding accident." The Applicant submits this is an error as, at the hearing, she read from her notes. She asserts that she has significant problems with her memory that renders her disabled within the meaning of s. 42(2)(a) of the CPP. The Review Tribunal made no mention of the Applicant reading from prepared notes at the hearing. The Tribunal finds that this raises an arguable case as the Review Tribunal might have come to a different conclusion about the Applicant's memory, had it had this information.

[16] With respect to the medical evidence that was before the Review Tribunal and her reasons for not following the prescribed treatment regimes, the Applicant submits she has a reasonable explanation. She submits she discontinued certain prescribed treatments because of the severity of the side effects. She also submits that the Review Tribunal ought to have considered the existence of two dots on an MRI of her brain that was done in 2011.

[17] This information formed part of the file that was before the Review Tribunal; indeed it is clear from the decision that the Review Tribunal considered the information and rejected it as being determinative of a finding of disability. So what remains is the Applicant's assertion that she has a reasonable explanation for discontinuing prescribed medical treatment. Here again the Tribunal finds that the Applicant has raised an arguable case as bearing in mind that this is a low threshold, the Review Tribunal might also have come to a different conclusion concerning the Applicant's failure to follow prescribed medical regimes.

[18] In light of the above analysis and the conclusions reached by the Tribunal, it is appropriate that Leave be granted in this Application.

CONCLUSION

[19] Leave to Appeal is granted.

Hazelyn Ross
Member, Appeal Division