Citation: *N. S. v. Minister of Employment and Social Development,* 2014 SSTAD 151

Appeal No.: AD 13-49

BETWEEN:

N. S.

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 12, 2014

DECISION

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

INTRODUCTION

[2] By a decision issued May 16, 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 of December 31, 2009, the Applicant did not suffer from a severe disability that meets the definition of, contained in CPP ss. 42(2)(a).

GROUNDS OF THE APPEAL

[3] The Applicant seeks Leave to Appeal this decision, (the "Application"). Counsel for the Applicant submits that the Review Tribunal erred by failing to take into consideration the totality of the evidence and material before it in deciding that the applicant was not entitled to a disability pension. In other words that per CPP ss. 58 (1)(c), the Review Tribunal based its decision on an erroneous finding of fact that it made without regard for the material before it.

[4] The Social Security Tribunal, ("SST") received the Application requesting Leave to Appeal, ("the Application"), on July 31, 2013. Thus, the Application was received well within the 90-day time frame permitted for filing under ss. 57(1)(b) of the *Department of Employment and Social Development Act* (DESD Act).

ISSUE

[5] The issue before the Tribunal is whether the appeal has a reasonable chance of success.

THE LAW

[6] 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.

[7] 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."

[8] Ss.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;
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> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

[9] On an Application for Leave to Appeal the hurdle that an Applicant must meet is a first, and lower one 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. In *St- Louis*[2], Mosley, J. stated that the test for granting a leave application is now well settled. Relying on *Calihoo*[3], he reiterated that the test is "whether there is some arguable ground on which the appeal might

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[1] *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC).
[2] *Canada (A.G.) V. St. Louis*, 2011 FC 492
[3] *Calihoo v. Canada (Attorney General),* [2000] FCJ No. 612 TD para 15.

succeed." He also reinforced the stricture against deciding, on a Leave Application, whether or not the appeal could succeed.

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

ANALYSIS

[11] Counsel for the Applicant submits that the Review Tribunal did not properly consider the totality of the evidence that it had before it. He takes the position that the Applicant suffers from both "organic and non-organic" disabilities, which the Tribunal takes to mean that she suffers from both a physical and a mental disability. The Applicant and her counsel allege that her medical and psychological conditions render the Applicant permanently disabled within the meaning of the CPP. In Counsel's submission, the severity of the Applicant's disability is supported by the fact that the Workplace Safety and Insurance Board, ("WSIB"), found her permanently impaired in her right shoulder as well as suffering psychological impairment. Further, counsel submits that the Applicant suffers from a severe and prolonged disability is also supported by the findings of the Centre for Addiction and Mental health, ("CAMH"), whose report is dated September 23, 2008.

[12] The Tribunal takes as given that the Applicant and her Counsel disagree with the Review Tribunal's treatment of the medical evidence and its ultimate conclusion about her eligibility for a CPP disability pension. However, such disagreement alone cannot found an appeal. The applicant's Counsel suggests that only a medical expert can properly interpret the medical reports. For the reasons set out below, the Tribunal is not persuaded of the applicant's submissions and, therefore, is not satisfied that she has raised an arguable case or one that would have a reasonable chance of success on appeal.

[13] First, the Tribunal is satisfied that the Review Tribunal properly considered all of the medical evidence that was before it when it made its decision. In addition to the Applicant's oral testimony, which is set out at pages three to six of the decision, the Review Tribunal

summarised the numerous medical reports on pages six to eleven of the decision. In its analysis, the Review Tribunal went on to reference those medical reports and their conclusions upon which it placed significant weight. There is little or no evidence that the Review Tribunal ignored evidence or 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.

[14] The Review Tribunal stated that it was placing emphasis on the medical reports and investigations dating from 2000 to 2006. It also stated that it was placing weight on the Functional Restoration Programme, the CAMH programme in which the Applicant participated in 2008, which it was entitled to do. With respect, choosing to place more weight on the pre-2007 reports does not equate to ignoring later reports. In fact, it is clear from the decision that the Review Tribunal, having found that the Applicant retained work capacity, was persuaded in its findings by her refusal to obtain and maintain alternative work where this had been offered to her as is required by *Inclima*[4]. This evidence was contained in a later (2008) report. Furthermore, it is well settled that a Tribunal need not refer to each and every piece of evidence that was before it. What is relevant in the case of the Review Tribunal is that it considers the Applicant's medical conditions and the evidence as a whole when making its decision. The Tribunal is not persuaded that it did not do so.

[15] As for Counsel's position that only a medical expert could properly assess the medical reports, the Tribunal is not persuaded of his position and rejects it as a possible ground of appeal. The Tribunal relies on *Calihoo*[5] and the dicta of MacKay, J. at paragraph 20 where, he discusses the very point, namely tribunal knowledge of medical conditions. MacKay, J. writes:

> [20] In review of these concerns in relation to the decision of the Tribunal, without considering the merits of the leave application except to assess whether it raises an arguable case, it is my opinion that:
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> 1. Even if one member of the Tribunal demonstrated little or no knowledge on one of the conditions claimed to affect the applicant, that in itself raises no grounds for finding bias or a lack of impartiality on the part of that one member or of the

[4] *Inclima v. Canada (Attorney General)* 2003 FCA 117.
[5] *Calihoo v. Canada (Attorney General)*, [2000] F.C.J. no. 612.

> three person tribunal. There is no requirement that a member of the tribunal have knowledge of each of the many conditions that underlie a claim for disability benefits. A member's decision is not based on his or her own understanding of medical conditions, but upon his or her assessment of the reports of medical examiners, reports which are provided in the main by the applicant for benefits.

[16] The Applicant has also questioned the refusal to grant a CPP disability benefit where, on similar facts, the WSIB has found impairment. Again, relying on *Calihoo* and on *Halvorsen*,[6] the Tribunal rejects this argument as a ground of appeal. *Calihoo* makes it clear that "it does not simply follow that qualification for a benefit provided under the provincial legislation raised an arguable issue concerning a decision that similar evidence does not qualify for benefit under another statute, in this case the Canada Pension Plan."[7] Similarly, *Halvorsen* makes the distinction between the purposes of the provincial and federal legislation and the different effect on decision-making.

[17] In light of the above analysis, the Tribunal is not satisfied that the Review Tribunal based its decision on an erroneous finding of fact that it made without regard for the material before it. Further, the Tribunal is not satisfied that there is a reasonable chance of success on appeal.

CONCLUSION

[18] Leave to Appeal is refused.

Hazelyn Ross
Member, Appeal Division

[6] *Halvorsen v. Canada (Minister of Human Resources Development* 2004 FCA 377.
[7] *Calihoo* at para. 18.