Citation: *L. S. v. Minister of Employment and Social Development*, 2014 SSTAD 148

Appeal No.: AD-13-157

BETWEEN:

L. 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

DECISION DATE: June 16, 2014

DECISION

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

INTRODUCTION

[2] By a decision issued June 12, 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, 2013, 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 properly weigh the material and evidence that was before it. He makes three specific complaints, namely,

i. The Review Tribunal failed to appreciate the nature and actual facts of the Applicant's accident.

ii. The Review Tribunal improperly placed reliance on the Applicant's receipt of Employment Insurance benefits.

iii. The Review Tribunal neither understood nor appreciated the Applicant's response to the question of why she stopped looking for work.

[4] The Social Security Tribunal, ("SST") received the Application requesting Leave to Appeal (the "Application"), on September 4, 2013, which is 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 Tribunal must decide 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] Ss. 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;

(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.

[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

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

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 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] The general thrust of the submissions that Counsel for the Applicant makes in the Application is that the Review Tribunal committed an error because it failed to give proper weight to the materials and evidence before it. In Counsel's submissions the Applicant suffers from both "organic and non-organic" disabilities, by which he means her disability has both a physical and a mental component. The Applicant and her counsel allege that her medical and psychological conditions combine to render the Applicant permanently disabled within the meaning of the CPP.

[12] The first argument Counsel for the Applicant raises is that the Review Tribunal failed to appreciate the nature and actual facts of the workplace accident that the Applicant suffered. In 2010, the Applicant was involved in a workplace accident that resulted in the loss of part of the middle finger of her left hand when her hand became caught in machinery. The Applicant suffered psychological trauma. She has been diagnosed with Post Traumatic Stress Disorder. An examination of the Review Tribunal Decision shows that it was aware of the injuries; noting them as part of the Applicant's evidence. In fact, the Review Tribunal makes specific reference to the accident and the nature of the Applicant's injury at paragraph 10 of its decision. The decision, however, appears to turn on the absence of any plan on the part of the applicant to seek alternative work or to retrain. In light of the medical evidence on which the Review Tribunal relied on, in particular the fact that her family physician appeared not to have ruled out some type of work for the Applicant, the

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

Tribunal finds that the Review Tribunal's decision does not demonstrate that it failed to appreciate the nature and actual facts of the Applicant's accident.

[13] Counsel for the Applicant also takes issue with the Review Tribunal's reference to the Applicant's Employment Insurance claim. At paragraph 36 of the decision the Review tribunal writes,

> [36] The Appellant did state that she has not attempted to acquire any other jobs and it is noted from the questionnaire that she claimed regular Employment Insurance (EI) benefits from July 2011 to mid-January 2012 for which she would have indicated a readiness and ability to work.

Counsel argues that claiming EI benefits is routine among CPP applicants. He further argues that economic necessity negates any significance that can be drawn from an EI claimant's declaration of readiness and willingness to work. In reality, this is a legal issue with which the Tribunal will not concern itself. Rather the Tribunal will confine its assessment to whether or not the Review Tribunal committed an error when it referenced the Applicant's EI claim. In the Tribunal's view it did not. The Review Tribunal's statements are to be seen in the context of an applicant, who on the one hand is saying she is ready and available for work while on the other has no intention of seeking work. It is this contradiction that the Review Tribunal has highlighted.

[14] Counsel for the Applicant also submits that the Review Tribunal either did not understand or did not appreciate the Applicant's evidence concerning her ability to continue working for her last employer. At paragraph 35 the Review Tribunal states that the Applicant did not provide a clear answer to the question of whether she could have continued her last job, which was a light duty inspection type of job. However, her Counsel submits that it was the Applicant's evidence she could not have continued to work at her former employer as an inspector because of her physical and psychological barriers. He put forward the theory that the Review Tribunal either misunderstood the Applicant's response or was prevented from hearing it by construction sounds.

[15] Earlier in recounting the Applicant's testimony, the Review Tribunal reported the Applicant as stating that her conditions prevented her from being a consistent worker.

> [16] When asked by her solicitor if she could work, the Appellant stated her PTSD condition, nervous condition and anger prevent her from being a consistent worker. She noted she has difficulty controlling her emotions.

[16] Upon considering Counsel's position, the Tribunal is of the view that little turns on the difference between the two interpretations or restatements of the Applicant's testimony for the simple reason that the question of her continued employment in the particular position was rendered moot when the jobs were relocated to Mexico. Even if the Applicant had been physically able to return to the position, it, quite simply, no longer existed and was not available to her or anyone else in Canada for that matter. The Tribunal is not satisfied that the discrepancy, if any, is sufficient to raise an arguable case.

[17] In light of the above analysis, the Tribunal is not satisfied that the Review Tribunal failed to give proper weight to the materials and evidence before it. Clearly, the weight the Review Tribunal ascribed to the evidence and materials is not the weight the Applicant would have given them; however disagreeing with the manner in which the Review Tribunal has weighted the evidence is insufficient to raise an arguable case. 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