Citation: *E. B. v. Minister of Employment and Social Development,* 2014 SSTAD 178

Appeal No.: AD-13-183

BETWEEN:

E. B.

Applicant

and

Minister of Employment and Social Development
(formerly Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: HAZELYN ROSS

DATE OF DECISION: July 21, 2014

DECISION

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

INTRODUCTION

[2] By a decision issued February 21, 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 his Minimum Qualifying Period (MQP) date of December 31, 2011, 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"). He submits the Review Tribunal committed a number of errors in reaching its negative decision. Essentially, the Applicant argues the Review Tribunal based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it.

[4] The Applicant contends that he is unemployed because he is disabled and not because he chooses not to be employed as the Review Tribunal inferred at paragraph 35 of its decision. He also contends that the alternative jobs that were suggested to him were unsuited to his medical conditions and, therefore, were not suitable occupations.

[5] Further, the Applicant contends that by reason of his prior history with the CPP he had a legitimate expectation that his current Application for a CPP disability benefit would be approved. He also contends that the Review Tribunal drew incorrect inferences with respect to his retraining programme and his use of an ATV after he had stopped working. The cumulative result of these errors is that the Review Tribunal decision was based on erroneous findings of fact.

[6] The Social Security Tribunal ("SST"), received the Application on May 17, 2013, which date is within the time permitted for filing under ss. 57(1)(b) of the *Department of Employment and Social Development Act* (DESD Act). Therefore, the Application is properly before the SST.

ISSUE

[7] Does the Appeal have a reasonable chance of success?

THE LAW

[8] 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.

[9] 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."

[10] 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.

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

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

ANALYSIS

[13] The main thrust of the Application is that the Review Tribunal erred when it found that the Applicant had made no effort to find and retain alternative work. The Applicant states this is because he is completely disabled within the meaning of CPP ss. 42(2)(a), while the Review Tribunal concluded that he was unemployed because he did not make reasonable efforts to obtain employment.

[14] While relying on the after effect of his accident of 2009, the Applicant demonstrated that he had residual capacity to work doing so until December 2009. Therefore, it is in this context that the Review Tribunal assessed his ability to obtain substantially gainful employment. Taken in this context, the recommendations of the Functional Capacity Evaluation of May 2010 and the Applicant's retraining programme that he completed on June 17, 2011 present significant hurdles to his Application. In its decision, the Review Tribunal observed that the Applicant expressed his unwillingness to pursue any of the recommended alternative forms of

[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.

employment. In fact, he never tried to obtain any of the jobs identified either deeming them unsuitable or himself unsuited. The applicant has addressed his unsuitability for only two of the suggested jobs. Even accepting that his medications may have made him unsuitable for the position of school bus driver or that the requirements of a security guards job was outside his abilities, the Applicant has not addressed why he could not perform the other jobs suggested and, more importantly, why in the face of his retained capacity for work, he sought no other employment. In the circumstances, the Tribunal finds the Review Tribunal did not base its decision on an erroneous finding of fact that it made in a perverse or capricious manner.

[15] Similarly, with respect to the Applicant's complaint about the Review Tribunal assessment of his participation in the retraining programme, the Tribunal finds the Review Tribunal did not err in the manner suggested by the Applicant. The Applicant states he was in pain while he was on the course. However, once again, there was no attempt to find work as a heavy equipment operator, a job the Functional Capacity Evaluation found was in his ability to do. *Inclima*[4] places an onus on Applicant's who demonstrate a residual work capacity to show that their efforts to obtain and maintain employment were unsuccessful by reason of their health condition. The Tribunal agrees that the Applicant failed to meet his onus.

[16] With respect to the Review Tribunal's reference to the Applicant's use of an ATV, the Tribunal finds that the Review Tribunal's reference to the ATV was made to demonstrate that he could manipulate such a vehicle and in the context of his retraining as a heavy equipment operator it was reasonable to expect the Applicant could perform the tasks that would be required.

[17] In light of the above analysis, the applicant has failed to satisfy the Tribunal that the Review Tribunal either failed to properly consider the medical evidence and documentation on file or misapprehended the relevant facts. Further, the Tribunal is not satisfied that there is a reasonable chance of success on appeal.

[4] Inclima v. Canada (A.G.), 2003 F.C.A. 117.

CONCLUSION

[18] Leave to Appeal is refused.

Hazelyn Ross
Member, Appeal Division