Citation: *W. F. v. Minister of Employment and Social Development*, 2014 SSTAD 199

Appeal No. AD-14-263

BETWEEN:

W. F.

Applicant

and

Minister of Employment and Social Development
(formerly known as 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: August 12, 2014

DECISION

[1] The Member of the Appeal Division of the Social Security Tribunal (the "Tribunal") refuses the application for leave to appeal.

BACKGROUND

[2] The Applicant seeks leave to appeal the decision of the General Division issued on April 29, 2014. The General Division had determined that a Canada Pension Plan disability pension was not payable to the Applicant, as it found that her disability was not "severe" and "prolonged" at the time of her minimum qualifying period of December 31, 2009. The Applicant filed an application requesting leave to appeal (the "Application") with the Social Security Tribunal on May 31, 2014, within the time permitted under the *Department of Employment and Social Development* (DESD) *Act.*

ISSUE

[3] Does this appeal have a reasonable chance of success such that leave to appeal should be granted?

THE LAW

[4] According to subsections 56(1) and 58(3) of the 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 submits the following:

Breach of Natural Justice

(a) The General Division proceeded with the hearing, in the Applicant's absence, notwithstanding the fact that she was unaware of the date of the

hearing, owing to the fact that the Notice of Hearing was "completely destroyed by rain".

(b) In reference to paragraph 10 of the General Division decision, a Case Management Officer ("CMO") at the Social Security Tribunal contacted the Applicant's spouse by telephone and although was notified by him that the Applicant was prepared to attend the hearing, was advised that it was too late for her to attend.

Erroneous Findings of Fact

(c) The General Division did not fully list all of the individuals in attendance at the hearing, as it listed only the interpreter.

(d) The General Division made erroneous findings of fact. In particular, the General Division made "false" statements at paragraphs 10, 14, 38, 42 to 45 and 49 to 54. At paragraph 7 of its decision, the General Division also stated that the Applicant had refused to return to a hearing before the Review Tribunal in August 2012. The Applicant submits that this is false, as the Applicant required hospitalization then.

Reconsideration of the Medical Evidence

(e) The Applicant has documentation to prove that she is unable to walk without strong pain relief medication and to prove that she is permanently disabled.

Delay

(f) The Applicant had to wait six years for a decision on her application for disability benefits.

RESPONDENT'S SUBMISSIONS

[7] The Respondent has not filed any written submissions.

ANALYSIS

[8] 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).

[9] In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 4, the Federal Court of Appeal found that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success.

[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] The Applicant is required to satisfy me that the reasons for appeal fall within any of the grounds of appeal and that at least one of them has a reasonable chance of success, before I can grant leave.

(a) <u>Breach of Natural Justice</u>

[12] The Applicant alleges that she was unaware of the date of the hearing, as the Notice of Hearing had been "completely destroyed by rain". There might have been some credence to this submission, but for the history behind this claim. This was the fourth occasion whereby the General Division (formerly the Review Tribunal) was forced to deal with the issue of an adjournment of the proceedings. In this particular instance, the General Division

was satisfied that the Applicant had received notice of the hearing, as she had returned a document enclosed with the notice that had been sent to her. I note that a copy of that document is at page 187 of AD2-Part 1 and appears to be in good condition. I find it incredulous that that document could have remained fully intact and in pristine condition, while the Notice of Hearing was allegedly destroyed by rain. I find it incredulous also that, even if the Notice of Hearing had in fact been destroyed and was not legible, that neither the Applicant nor her representative would have immediately contacted the Tribunal and enquired as to what document had been destroyed, to determine what information it might have contained. The Applicant was somewhat familiar with the process, having gone through the scheduling process at least three times previously.

[13] The Applicant alleges that her representative was contacted by a CMO on the hearing date and that he advised the CMO that she was ready to attend the hearing that day. This conflicts with the facts set out in the decision of the General Division. The General Division wrote that there was no contact between the CMO and the Applicant or her representative. I see no basis to reject the facts set out by the General Division. In any event, I am of the opinion that an applicant bears some responsibility to attend a scheduled hearing and failing that, to take timely steps to pursue an adjournment of the proceedings. Neither the Applicant nor her representative suggests that either sought an adjournment of the proceedings, after allegedly learning of the hearing date.

[14] The Applicant has not persuaded me that there is a reasonable chance of success under this ground of appeal.

(b) Erroneous Findings of Fact

[15] For the purposes of this leave application, I do not require that there be an actual demonstrated error on the part of the General Division, but in assessing this ground of appeal raised by the Applicant, the Applicant needs to satisfy me that the General Division made the finding which the Applicant submits the General Division made.

[16] The Applicant submits that the General Division failed to fully list all of the panel members on the General Division. She was not present at the hearing before the General

Division, so could not have known who was in attendance. Likely she assumes that the General Division is structured much like the Review Tribunal had been. Unlike the Review Tribunal, the hearing on April 22, 2014 was before a one-person panel, so the General Division did not fail to list all of the members in attendance. In any event, not only does this issue not qualify as a finding of fact, but nothing turns on this point.

[17] The Applicant submits that the General Division made numerous false statements. While she lists a number of paragraphs, she does not specify within those paragraphs what the errors are, other than at paragraphs 7 and 10.

i. At paragraph 7, the General Division wrote that at the Review Tribunal hearing in August 2012, the Applicant's husband was verbally abusive and then left the hearing with the Applicant, who refused to return. The General Division relied on the August 2012 decision of the Review Tribunal, which states, "The Chairman requested the interpreter talk to the Appellant in an effort to have her return without her husband. This was not successful..." Even if the General Division had not accurately summarized the decision, this does not qualify as a finding of fact upon which the General Division based its decision, and nothing turns on this point.

ii. At paragraph 10, the General Division wrote that there was no contact between the CMO and the Applicant's representative, whereas the Applicant submits that indeed her representative spoke with the CMO. As set out above, I see no basis to reject the facts set out by the General Division. In any event, this does not qualify as a finding of fact upon which the General Division based its decision.

iii. At paragraph 14, the General Division summarized the history of proceedings. This summary of the history does not qualify as a finding of fact upon which the General Division based its decision and nothing turns on this point.

iv. At paragraph 38, the General Division summarized the submissions of the Respondent. The submissions do not qualify as findings of fact.

v. At paragraphs 42 to 45, the General Division summarized the applicable law. This summary of the law does not qualify as a finding of fact.

vi. While there may be some findings of fact in some of the remaining paragraphs cited by the Applicant, the Applicant has not specified what the errors might be. Properly, the Applicant ought to identify the alleged errors, rather than leave me to speculate as to what they might be. In my view, it is insufficient for the Applicant to allege an erroneous finding of fact and suggest that there was no foundation upon which the finding could be made, without referring me also to the evidence that was before the General Division.

(c) Reconsiderations of the Medical Evidence

[18] The Applicant submits that she has documentation to prove that she has a severe disability. The onus of proof lies with an applicant to satisfy the General Division of the severity of one's disability. The General Division in this particular case was left to hear and assess the evidence before it and then come to a decision based on its interpretation and analysis of the evidence. Essentially the Applicant is requesting a re-hearing, but there is no entitlement to a re-hearing of the claim before the Appeal Division. If the Applicant is requesting that we re-assess the claim and substitute our decision for that of the General Division, I am unable to do this, given the very narrow provisions of subsection 58(1) of the DESD Act. The leave application is not an opportunity to re- assess the merits of the claim to determine whether the Applicant is disabled as defined by the *Canada Pension Plan.* The DESD Act requires that I determine whether any of the reasons for appeal fall within any of the grounds of appeal and whether any of them have a chance of success.

[19] It is of no relevance to a leave application that the Applicant experiences significant symptomology and that she faces numerous restrictions and limitations. In a leave application, she must satisfy the Appeal Division that there is a reasonable chance of success on any of the enumerated grounds of appeal. She has not done so.

(d) Delay

[20] The Applicant further alleges that she has waited six years for a decision on her application for disability benefits. That however does not reveal the full story. While the Applicant applied for disability benefits on January 4, 2008 and received a decision from the General Division on May 12, 2014, there were three previous adjournments of hearings that had been scheduled before a Review Tribunal, all of which were occasioned by or on behalf of the Applicant. The three previous hearings were scheduled for October 2009, November 2010 and August 2012. This also does not take into account the time involved in the Minister's decision and reconsideration, or the delays caused by attempts to obtain medical opinions.Even had there been a gap of six years between the filing of her application for disability benefits and the decision of the General Division, the Applicant does not allege that she has suffered any prejudice due to the passage of time.

CONCLUSION

[21] The Applicant has not satisfied me that she has raised an arguable ground or that there is a reasonable chance of success, and as such, the Application is refused.

Janet Lew
Member, Appeal Division