Citation: *L. A. v. Minister of Employment and Social Development*, 2014 SSTAD 192

Appeal No. AD-14-366

BETWEEN:

L. A.

Applicant

and

Minister of Employment and Social Development
(Formerly 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 7, 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 15, 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 "prolonged" at the time of her minimum qualifying period of December 31, 2011.

[3] The Applicant filed an application requesting leave to appeal (the "Application") with the Social Security Tribunal on July 21, 2014, within the time permitted under the *Department of Employment and Social Development* (DESD) *Act.*

ISSUE

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

THE LAW

[5] 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".

[6] 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

[7] The Applicant advised in her reasons for appeal that an attempt to return to work in March 2014 failed after six weeks, when her physician "pulled [her] off work to protect [her] health". She advised that her physician applied on her behalf to Health Canada for her "medical retirement".

RESPONDENT'S SUBMISSIONS

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

ANALYSIS

[9] 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).

[10] 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.

[11] 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.

[12] 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.

[13] The facts cited by the Applicant disclose no grounds of appeal for me to consider, as they do not identify any failures by the General Division to observe a principle of natural justice or identify any errors in law or findings of fact which the General Division may have made.

[14] This is not a re-hearing of the claim. 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 reasonable chance of success.

[15] Generally, it is of no relevance to a leave application that, at the time of the hearing (by question and answer) before the General Division, the Applicant was about to engage in a return to work program, and then subsequent to the decision of the General Division, failed in her return to work attempt. In exceptional circumstances, it may be possible to consider new facts or additional records in the context of an appeal, but they must be referable to one of the three enumerated grounds of appeal set out in subsection 58(1) of the DESD Act. The Applicant has not indicated how the new facts and any forthcoming medical records might fall into or relate to one of the enumerated grounds of appeal and as such, there are no grounds upon which I can consider any new facts or forthcoming medical records, notwithstanding how supportive they might be to her application for disability benefits.

[16] If the Applicant has submitted these new facts in an effort to rescind or amend the decision of the General Division, she must comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations*, and she must also file an application for rescission or amendment with the same Division that made the decision (or in this case, the General Division of the Social Security Tribunal). There are strict deadlines and requirements that must be met to succeed in an application for rescinding or amending a decision. Those same sections also set out additional requirements that an Applicant must meet to succeed in an application for rescinding or amending a decision.

[17] Section 66 of the DESD Act also requires an applicant to demonstrate that the new fact is material and that it could not have been discovered at the time of the hearing with the exercise of reasonable diligence. Section 66 of the DESD Act also requires that an

application to rescind or amend be made within one year after the day on which a decision is communicated to the party.

[18] The Appeal Division has no jurisdiction in this case to rescind or amend a decision based on new facts – notwithstanding the fact that the General Division stated that it was premature to find that her disability was indefinite at the time of hearing (by way of a question and answer) - as it is only the Division which made the decision which is empowered to do so.

CONCLUSION

[19] The Applicant has not satisfied me that the appeal has a reasonable chance of success, and accordingly, the Application for leave to appeal is refused.

Janet Lew
Member, Appeal Division