Citation: *M. S. v. Minister of Employment and Social Development*, 2014 SSTAD 204

Appeal No: AD-14-227

BETWEEN:

M. S.

Appellant

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: VALERIE HAZLETT PARKER

DATE OF DECISION: August 15, 2014

DECISION

[1] Leave to appeal to the Appeal Division of the Social Security Tribunal is granted.

INTRODUCTION

[2] On July 19, 2013, a Review Tribunal determined that a Canada Pension Plan disability pension was not payable. The Applicant filed an application for leave to appeal (the "Application") with the Appeal Division of the Social Security Tribunal (the "Tribunal") on April 30, 2013.

ISSUE

[3] The Tribunal must decide whether the appeal has a reasonable chance of success.

THE LAW

[4] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development (DESD) 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(1) of the DESD Act states that the only grounds of appeal are 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.

[6] The decision of the Review Tribunal is considered a decision of the General Division

[7] 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".

SUBMISSIONS

[8] The Applicant submitted in support of the Application that:

a) The Review Tribunal erred by misinterpreting or discounting evidence that was before it, including evidence regarding the effect of the Applicant's limitations on his ability to work;

b) The Review Tribunal erred when it concluded that the Applicant's disability was not prolonged;

c) The Review Tribunal failed to consider opinion evidence of qualified health professionals that the Applicant was not gainfully employable and failed to give such opinion evidence appropriate weight.

[9] The Respondent made no submissions.

ANALYSIS

[10] 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 in order for leave to be granted: *Kerth v. Canada (Minister of Development)*, [1999] FCJ No. 1252 (FC).

[11] In addition, the Federal Court of Appeal concluded that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 4, *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[12] The Applicant argued, first, that leave to appeal should be granted because the Review Tribunal did not give appropriate weight to evidence that was presented at the hearing. With this argument, he essentially asks this tribunal to reweigh the evidence that was put before the Review Tribunal. This is the province of the trier of fact. The tribunal deciding whether to grant leave to appeal ought not to substitute its view of the persuasive value of the evidence for that of the Review Tribunal who made the findings of fact – *Simpson v. Canada (Attorney General)*, 2012 FCA 82. Therefore, this argument does not raise grounds of appeal that have a reasonable chance of success on appeal.

[13] The Applicant also argued that the Review Tribunal erred in the decision it reached. This argument does not allege that the Review Tribunal breached any of the principles of natural justice, made an erroneous finding of fact, or erred in law. Section 58 of the DESD Act provides that leave to appeal may only be granted on these narrow grounds. Therefore, this argument also does not have a reasonable chance of success on appeal.

[14] Further, the Applicant argued that the Review Tribunal failed to consider all of the medical evidence before it, or to give this evidence appropriate weight. For the reasons set out above, leave to appeal cannot be granted based on the assertion that different weight ought to have been given to the medical evidence. However, although the Review Tribunal decision states that it considered all of the evidence, it did not refer to the medical reports written after the MQP that made reference to the Applicant's condition at or before that date. The decision also did not apply the factors set out in the *Villani v. Canada (A. G.)*, 2001 FCA 248 decision to the facts of this case. The decision only listed what factors were to be considered. It is incumbent on the General Division to apply the law to the facts of the case before it. Thus the Applicant may have an arguable case on appeal on this basis.

[15] Finally, the Review Tribunal decision did not refer to the cumulative effect of the Applicant's medical conditions on his capacity to work. While each medical condition may not be severe on its own, the cumulative effect of these conditions may have rendered the Appellant disabled under the CPP. This may also be an error that raises an arguable case on appeal.

CONCLUSION

[16] For these reasons the Application is granted.

[17] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Valerie Hazlett Parker
Member, Appeal Division