Citation: *S. H. v. Minister of Employment and Social Development*, 2014 SSTAD 217

Appeal No. AD-13-199

BETWEEN:

S. H.

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: Hazelyn Ross

DATE OF DECISION: August 28, 2014

DECISION

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

BACKGROUND

[2] The Applicant seeks leave to appeal the decision of the Review Tribunal issued on February 13, 2013. The Review Tribunal determined that a *Canada Pension Plan, ("*CPP"), disability pension was not payable to the Applicant. It found that, as of her minimum qualifying period date, the Applicant was not disabled within the meaning of the CPP. On or about April 22, 2013 the Applicant filed an application requesting Leave to Appeal (the "Application") with the Pension Appeals Board, (the "PAB"). The Tribunal received the initial Application on April 24, 2013. The Application was perfected on or about November 15, 2013 when the Applicant complied with the Tribunal's request for additional information.

[3] The Applicant was employed by the Zellers Corporation for some seventeen years. She was working as a cashier when she ceased her employment with Zellers. The Applicant complains of multiple joint pains, particularly to her ankle. She also complains of problems with her right hand. She states the pain in her ankle made it difficult for her to walk on a cement floor or to stand for any length of time and that she experiences the pain in both her ankle and hand "as a burning throb." Zellers accommodated the Applicant by providing her with a stress mat on which to stand and a stool on which to sit while performing her duties as a cashier. However, Zellers was not able to offer the Applicant an office position nor did it exempt her from the requirement to wear dress shoes.

[4] The Applicant's last day of work was May 20, 2010. She applied for CPP disability on August 31, 2010. The date of her Minimum Qualifying Period, ("MQP") was agreed as December 31, 2011.

GROUNDS OF THE APPLICATION

[5] The Applicant cites the following as the grounds of the Application. First, she states that she disagrees with the Review Tribunal's decision to deny her appeal. She goes on to

explain that her pain is severe, erratic and debilitating and, since June 2008, continuous. The pain prevents her from comfortably performing activities she once engaged in; it causes her to be afraid to go out by herself because she is afraid that a sudden bout of pain to her ankle could cause her to stumble and fall. As well, the prolonged pain has caused her to be slow; she takes longer to complete tasks; she requires assistance with the activities of daily life, including her personal care. As a result she is now unemployable.

ISSUE

[6] Does this appeal have a reasonable chance of success?

THE LAW

[7] The applicable statutory provisions governing the grant of Leave are ss. 56(1), 58(1), 58(2) and 58(3) of the *Department of Employment and Social Development* ("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.

[8] 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".

ANALYSIS

[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 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 cautioned against deciding, on a Leave Application, whether or not the appeal would succeed.

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[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.

[10] 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.

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

[12] I am required to determine whether any of the Applicant's reasons for appeal fall within any of the grounds of appeal and whether any of them have a reasonable chance of success, before leave can be granted. While an Applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an Applicant ought to set out some basis for his or her submissions which fall into the enumerated grounds of appeal, without having the Appeal Division speculate as to what they might be.

[13] On examining the grounds put forward by the Applicant, the Tribunal finds that she has restated the arguments she made in her Application for CPP disability benefits and before the Review Tribunal. The grounds do not identify any failure by the Review Tribunal to observe a principle of natural justice; nor do they indicate that it otherwise acted beyond or refused to exercise its jurisdiction. The Tribunal also finds that the grounds do not identify any errors in law which the Review Tribunal may have committed in making its decision. What the Applicant has done, however, is to make a number of handwritten annotations to the decision, by way of which she indicates that the Review Tribunal committed certain factual errors in its decision- making.

[14] At paragraph 19 of the decision the Review Tribunal noted that the Applicant's family doctor stated she used Tylenol for pain and at paragraph 29, the Review Tribunal stated that the Applicant uses regular strength Tylenol or Advil for her pain. The Applicant has inserted notes

that dispute both statements. She indicates that the medication and dosage was 400 mg. of Advil; not Tylenol. Also, while at paragraph 29, the Review Tribunal stated she used a knee brace for only 4 ½ weeks, the Applicant's notation is that she discontinued use on the advice of the orthopedic surgeon. As well, the Applicant rebutted the Review Tribunal statement in paragraph 30 that, when questioned regarding other treatments or suggestions to assist with her health issues, she replied that there were none. The Applicant states there were none because her family physician was too pre-occupied with his own disciplinary problems to properly investigate her condition.

[15] The Tribunal interprets these annotations as the identification by the Applicant of erroneous findings of fact made by the Review Tribunal either in a perverse or capricious manner or without regard for the material before it, in coming to its decision. Accordingly, the Tribunal turned its mind as it is required to do to the twin questions of,

a) Whether the Review Tribunal made erroneous findings of fact in its decision making; and

b) Whether the errors are material such as to warrant granting leave to appeal.

[16] With respect to the grounds that the Applicant specifies, the Tribunal finds that stating that she disagrees with the decision of the Review Tribunal and expressing her continued conviction that her health condition(s) renders her disabled within the meaning of the CPP is not a ground of Appeal. Therefore, leave cannot be granted on this basis.

[17] With respect to the factual errors the Applicant alleges the Review Tribunal made, the Tribunal is not persuaded that even if they were made, the errors are of such materiality that it would be necessary to grant leave.

[18] On a reading of the Review Tribunal decision, it is apparent that the main reason or reasons for the decision is based on the absence of medical evidence to support the Applicant having a severe disability, as well as the fact that, despite her medical conditions, the Applicant had worked for several years. Further, the Review Tribunal took into consideration the Applicant's own assessment of her physical capacity; the fact that in 2010 her family physician stated her prognosis for recovery was good; and that in 2009, Dr. Mathoo, the physiatrist, did not recommend any treatment for the numbness in her hand.

[19] The Applicant would make the rebuttal that her family physician did not act with her best interests at heart as he was preoccupied with his own issues, however, this is an argument the Tribunal does not find persuasive as it was open to the Applicant to seek other more receptive medical attention.

[20] The Review Tribunal was required to determine whether the Applicant was disabled on or before her MQP date. It made its determination based on the evidence before it. The Application challenging the decision is deficient in that it does not reveal a ground of appeal. The Tribunal has sought to glean possible grounds from the Applicant's annotations of the Review Tribunal decision. Notwithstanding these efforts, and based on its analysis of the issues before it, the Tribunal is not satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[21] The Application is refused.

Hazelyn Ross
Member, Appeal Division