Citation: *Y. K. v. Minister of Employment and Social Development*, 2014 SSTAD 276

Appeal No. AD-13-635

BETWEEN:

Y. K.

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: October 1, 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 April 8, 2013. The Review Tribunal had determined that a *Canada Pension Plan* disability pension was not payable to the Applicant, as it found that his disability was not "severe" at the time of his minimum qualifying period of December 31, 2007. The Applicant filed an application requesting leave to appeal (the "Application") with the Tribunal on June 10, 2013, within the time permitted by the *Department of Employment and Social Development* (DESD) *Act.*

ISSUE

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

THE LAW

[4] According to subsections 56(1) and 58(3) of the 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(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 that the Review Tribunal erred as follows:

(a) In not using the "real world context" set out in *Villani v. Canada (Attorney General),* 2001 FCA 248 and

(b) In not properly applying *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

[7] The Applicant submits that he is substantially disabled from full-time, part-time or seasonal duties because of his cumulative injuries. He submits that injuries to his back have manifested in a chronic pain condition. He reports that he experiences frequent debilitating headaches, neck and right hip pain, and numbness in his right foot. He reports that he has also developed anxiety and depression, all of which cause erratic sleep and nightmares. He has sought investigation and treatment from a number of physicians. He takes numerous medications.

[8] The Applicant filed various medical and other records with his leave application, including a July 2010 decision of the Ontario Workplace Safety and Insurance Board (WSIB) and an October 2012 decision of the Workplace Safety and Insurance Appeals Tribunal (WSIAT). The July 28, 2011 report of the family physician and April 26, 2010 report of the psychiatrist were before the Review Tribunal, while the reports dated September 18, 2009 and November 5, 2009 of the family physician and the two decisions of the WSIB and WSIAT do not appear to have been before the Review Tribunal.

RESPONDENT'S SUBMISSIONS

[9] The Respondent has not filed any written 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 for leave to be granted: *Kerth v. Canada (Minister of Development)*, [1999] FCJ No. 1252 (FC).

[11] 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.

[12] 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.

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

[14] 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.

[15] The Applicant submits that the Review Tribunal erred in failing to use the "real world context" set out by the Federal Court of Appeal in *Villani v. Canada (Attorney General),* 2001 FCA 248. However, there are no further submissions beyond this general statement. I do not know what basis the Review Tribunal is alleged to have failed to consider the Applicant`s disability in a "real world context", in that the Applicant has not, for instance, set out what the Applicant`s particular circumstances, if any, I would be required to consider at an appeal.

[16] Similarly, the Applicant has not indicated how the Review Tribunal erred in not properly applying *Inclima.* In that decision, the Federal Court of Appeal held that,

> "an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition."

[17] I am of the view that it is insufficient to merely submit that the Review Tribunal erred in law in not applying or not properly applying various legal authorities, without setting out how the Review Tribunal might have erred in that regard. In *Pantic v. Attorney General of Canada,* 2011 FC 591, the Federal Court dismissed an application for judicial review of the decision of a Review Tribunal. One of the proposed grounds of appeal in those proceedings was that the Review Tribunal had erred in failing to consider objective evidence related to the appellant's symptomology and associated disability. The Federal Court dismissed this ground on the basis that it could not be assessed as "it could not be explained or elucidated with sufficient clarity as to be considered, nor was it advanced in argument". The Federal Court concluded that the ground therefore could not be said to have any reasonable chance of success. I find that to be the case here too.

New Facts

[18] This leave application is not an opportunity to re-hear the merits of the matter. The proposed additional records should relate to the grounds of appeal. The Applicant has not indicated how the proposed additional records and two decisions might fall into or relate to one of the enumerated grounds of appeal. If the Applicant is requesting that we consider these additional records and two decisions, re-weigh the evidence and re- assess the claim in the Applicant's favour, I am unable to do so at this juncture, given the constraints of subsection 58(1) of the DESD Act.

[19] If the Applicant intends to file the additional medical records and two decisions in an effort to rescind or amend the decision of the Review Tribunal, he must now comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations*, and must also file an application for rescission or amendment with the same Division that made the decision. There are strict deadlines and requirements that must be met to succeed in an application for rescinding or amending a decision.

[20] Subsection 66(2) of the DESD Act requires an application to rescind or amend a decision to have been made within one year after the day on which a decision is communicated to a party. In this particular instance, the Applicant was required to have made an application to rescind or amend within one year of having received the decision of the Review Tribunal issued on April 8, 2013. He is now well out of time.

[21] Paragraph 66(1)(b) 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. The Appeal Division in this case has no jurisdiction to rescind or amend a decision based on new facts, as it is only the Division which made the decision which is empowered to do so.

[22] Even if the Applicant was not barred from making an application to rescind or amend, it strikes me that the reports and decisions filed by him would not constitute new facts under section 66 of the DESD Act. Both of the family physician's medical reports and the decisions of the WSIB and WSIAT could have been discovered prior to the Review Tribunal hearing with the exercise of reasonable diligence. In any event, substantively, they do not add anything "new" to the blanket of evidence which was already before the Review Tribunal.

[23] This is not a re-hearing of the merits of the claim. In short, there are no grounds upon which I can consider any additional medical records or decisions, notwithstanding how supportive the Applicant regards them to be.

CONCLUSION

[24] The Application is refused.

Janet Lew

Member, Appeal Division