Citation: *N. S. v. Minister of Employment and Social Development*, 2014 SSTAD 294

Appeal No. AD-13-17

BETWEEN:

N. S.

Applicant

and

Minister of Employment and Social Development
(formerly known as 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 14, 2014

DECISION

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

BACKGROUND

[2] The Applicant seeks leave to appeal the decision of the Review Tribunal issued on March 7, 2013. The Review Tribunal had determined that a *Canada Pension Plan* disability pension was not payable to the Applicant, as it found that her disability was not "severe" at the time of her minimum qualifying period of December 31, 2011 (the "MQP"). The Applicant filed an application requesting leave to appeal (the "Application") with the Tribunal on June 5, 2013, 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?

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 seeks leave to appeal on the basis that the Review Tribunal made an erroneous finding of fact without regard for the material before it and then compounded its mistake by making an error in law. In particular, the Applicant submits that:

(a) The Review Tribunal made an error in fact and in law by discounting the Applicant's failures in her return-to-work, stating that she should have looked for less demanding employment. The Applicant submits that this constitutes a misunderstanding of the Applicant's medical condition;

(b) The Review Tribunal made an error in fact in finding that the Applicant retained the capacity to find alternate employment, in contradiction to the medical evidence provided, which she submits indicates that she was not competitively employable. The Applicant explains that she went into "medical retirement" on the advice of her physicians and had been advised that she could not "*maintain sustainable competitive employment … due to her significant fatigue*"; and

(c) The Review Tribunal erred in law in deciding that the Applicant had an obligation to seek employment "more in line with her reduced capacities". The Applicant submits that as she retained no capacity to work, it is an error in law to say that she had an obligation to seek alternate work. She submits that legal authorities will show that it was reasonable for the Applicant not to return to work or seek alternate employment, on the advice of her physicians.

[7] The Applicant submits that when her injuries and limitations are properly explained through documentation, the Tribunal will see the devastating effects the injuries have had on her life, including her ability to work. She submits that her medical condition will show that she is "catastrophically impaired due to a traumatic brain injury", she has attained maximum level of recovery, without any prospect for improvement and she requires assistance in all aspects of her life. She submits that her medical condition makes it impossible for her to return to any form of employment.

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 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.

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

[13] 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.

[14] The Review Tribunal referred to and relied upon the opinion of Dr. Catherine Gow, clinical psychologist, who had prepared neuropsychological evaluations in July and August

of 2005 and consultation reports in July 2009, June 2011 and November 2012. The Review Tribunal wrote,

> [44] It is acknowledged that Dr. Gow canvassed the possibility of the Appellant working in a less cognitively demanding employment situation, be it part-time or fulltime. As the Tribunal pointed out previously however we are not convinced that there was a substantially different level of cognitive abilities required in the Appellant's post-MVA work. Furthermore, the Tribunal notes that in discounting such a possibility the doctor indicated that the Appellant had experienced "… what can best be termed a burnout in her former position, in less than part-time hours". For the reasons set out previously, the Tribunal remains concerned that this opinion is expressed in the context of the Appellant's former employment and does not address the core issue in this case.

[15] The Federal Court of Appeal has stated that an applicant needs to prove not only that she has a serious health problem, but, where 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: *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

[16] Here, the Applicant alleges that the Review Tribunal made an erroneous finding of fact in determining that she was left with residual work capacity, when she claims that the medical evidence overwhelmingly shows that not only does she lack any residual work capacity, but was also advised by her physicians to seek "medical retirement". The Applicant submits that the medical evidence also shows that she could not "maintain sustainable competitive employment … due to her significant fatigue". She notes that even after two years, she was unable to obtain a medical clearance to return to the workforce. The Applicant did not point to any specific medical reports in her leave application which set out this advice to her. Without pointing to any specific medical evidence to support her submissions, generally I would have dismissed the leave application.

[17] The Applicant also submits that the Review Tribunal made an error in law in finding that she was required to find alternate work, when the medical evidence, she alleges, indicates that she did not retain any work capacity or capacity of regularly pursuing substantially gainful occupation. In essence, she submits that the Review Tribunal committed an error in law in its interpretation and application of *Inclima.*

[18] The Applicant's references to the medical evidence are sparse, at best, and ordinarily I would have dismissed the leave application in this regard, but for the fact that the alleged erroneous findings of fact are so closely interwoven with the Applicant's submissions that the Review Tribunal also committed an error of law in requiring that she regularly pursue substantially gainful occupation.

[19] Provided that the Applicant is able to satisfy me that indeed the medical evidence supports her allegations that she did not retain any capacity of regularly pursuing any substantially gainful occupation and therefore may have been under no obligation to find alternate work, then there is a reasonable chance of success on this ground too.

[20] I must be quick to add however that the appeal is not a re-hearing of the matter, and is not intended to be an exercise in which I determine at the outset which experts' opinions I might prefer and how much weight to assign to them. In my view, the Applicant would need to satisfy me of the errors under any of the grounds of appeal, before I can proceed to the assessment contemplated under subsection 59(1) of the DESD Act. It may be that if the Respondent is able to point to any medical evidence which suggests that the Applicant retained some work capacity to regularly pursue any substantially gainful occupation, this could well defeat the Applicant's submissions that the Review Tribunal made erroneous findings of fact and committed an error of law. In other words, while I am prepared to grant leave on the issue that the Review Tribunal made an erroneous finding of fact, in "contradiction to the medical evidence before it", this by no means precludes the Respondent from advancing any submissions that there was in fact medical or other evidence before the Review Tribunal to support the finding which it made.

[21] There are some factual and legal issues which the parties might wish to consider addressing on appeal, particularly as they pertain to how they evidence any capacity:

(a) Dr. Gow's consultation report dated November 21, 2012, appears to suggest that the Applicant retained some overall residual capacity, when she defined "competitively employable" as work exceeding 20 hours a week. Although Dr. Gow was of the opinion that the Applicant is "not competitively employable" and that there were some costs associated with employment

outside the home, this has to be considered against the backdrop that, notwithstanding the Applicant's limitations and the fact that she had some workplace accommodations and strong external supports, she nonetheless had what the Review Tribunal described as an "attempted reintegration at her former place of employment for a period of five years".

(b) The Applicant met the annual year's maximum pensionable earnings for every year following her accident, other than in 2005. Her earnings for those years – even on a part-time basis -- would be considered well above any measurement of what qualifies as substantially gainful employment. (The *Canada Pension Plan Regulations* now define "substantially gainful" to be the equivalent of the maximum amount a person could receive as a disability pension. For instance, anyone earning in excess of $14,836.20 in 2014 would be considered to be engaged in substantially gainful employment).

(c) Whether employment – whether outside the home or home-based – which might be attainable only with workplace accommodations such as flexible hours and with considerable external support to maintain a family and domestic life and general activities of daily living, qualifies as substantially gainful occupation, irrespective of the impact that that employment might have on her overall condition.

CONCLUSION

[22] On balance, the Applicant has satisfied me that there is a reasonable chance of success on the appeal on the grounds which she has set out. Accordingly, the application for leave is granted.

[23] The parties are invited to make submissions also in respect of the mode of hearing.

Janet Lew
Member, Appeal Division