Citation: *L. S. v. Minister of Employment and Social Development*, 2014 SSTAD 301

Appeal No. AD-13-658

BETWEEN:

L. S.

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: October 17, 2014

DECISION

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

BACKGROUND

[2] The Applicant seeks leave to appeal the decision of the Review Tribunal issued on May 06, 2013 and its amended decision issued on June 04, 2013. The Review Tribunal found that, as of her Minimum Qualifying Period, ("MQP"), date of December 31, 2009 the Applicant was, disabled within the meaning of the CPP. Therefore, a *Canada Pension Plan, (*"CPP"), disability pension was payable to her. By its amended decision, the Review Tribunal found that the Applicant was to be deemed disabled as of March 2008 and her disability payments were to commence as of July 2008.

[3] The Applicant disagrees with the Review Tribunal's determination of when disability commenced. She filed an Application for Leave to Appeal the decision of the Review Tribunal with the SST. The SST received the incomplete Application on September 09, 2013. The Application was perfected on or about December 12, 2013 when the Applicant complied with the Tribunal's request for additional information.

GROUNDS OF THE APPLICATION

[4] As stated above, the Applicant is appealing the quantum of disability. The Applicant argues she became disabled in 2001 and her disability pension payments should commence as of 2001 when she made the first application for a disability pension.

[5] In support of her position, the Applicant argues that her representative argued the appeal before the Review Tribunal on February 28, 2013 on the basis that she became disabled in 2001. The Applicant made the further argument that the Review Tribunal took the medical evidence from 2001 into account when deciding the appeal.

[6] The Applicant bolsters her position with the point that the Review Tribunal accepted and relied upon the 2005 opinion of Dr. Ogilvie-Harris that she could not work at all. The clear inference from the Applicant's argument is that the Review Tribunal's acceptance of and

reliance on Dr. Ogilvie-Harris' opinion is also an acceptance that she was disabled at the time she made her application in 2001.

ISSUE

[7] In deciding whether or not to grant leave to appeal, the Tribunal must determine if the Applicant's appeal has a reasonable chance of success?

THE LAW

[8] The applicable statutory provisions governing the grant of Leave are ss. 56(1), 58(1), 58(2) and 58(3) of the 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.

[9] 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

[10] 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.

[11] Subsection 58(1) of the DESD Act states that the only grounds of appeal are the following:

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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.

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, the decision of the Review Tribunal is considered to be a decision of the General Division.

ANALYSIS

[13] The decision whether or not to grant leave turns on a determination of whether there was a subsisting earlier appeal that the Review Tribunal ought to have considered and determined.

[14] At paragraph 3 of its decision the Review Tribunal states, "Ms. Muccilli advised us she intends to argue that the Appellant's previous Application for Disability Benefits, made on July 13, 2001, should be considered today along with the Application filed on June 22, 2009." The Review Tribunal goes on to state, (4) "There was discussion of this issue, in which it was indicated that the information in the prior Application could certainly be taken into consideration. Indeed, the documentation is before us in the Hearing File, although the appeal today is only against the reconsideration decision under the June 22, 2009 application, the time for appeal of the decision in the prior Application having long since expired and no leave to late-file such an appeal having been granted by the Commissioner of Review Tribunals."

[15] The Tribunal record indicates that the Applicant filed an application for CPP disability benefits on May 20, 2001. The application was refused and a letter advising the Applicant of the refusal was sent to her on January 4, 2002. The Applicant was advised that she could request a reconsideration of the decision to refuse benefits. However, a notation in the Tribunal record indicates that the Office of the Commissioner of Review Tribunals did not receive a request for reconsideration of the January 4, 2002 negative decision. The Applicant went on to file a new application for CPP disability benefits on July 22, 2009. November 2, 2009 is indicated as the date the Applicant stopped working.

[16] Having examined the complete SST record, the Tribunal finds as fact that upon receiving the refusal/denial of her application for CPP benefits in July 2002, the Applicant took no further steps in respect of the application. She did not request reconsideration as she was advised she could do. For some 7 years, the Applicant took no further or any step in relation to the 2001 application. Therefore, the Tribunal finds that the 2001 application process came to an end with the 2002 denial.

[17] The Tribunal is not persuaded that the mere fact that the Review Tribunal accepted the neurologist's 2005 report retroactively triggers or breathes new life into the 2001 application. Quite simply, there ceased to be an application to consider once the Applicant accepted the refusal in January 2002 and took no further steps to pursue her application. The process that was initiated in May 2001 ended in January 2002. The Applicant initiated a new application in July 2009. The Review Tribunal found her disabled in relation to this new application, in so doing the Review Tribunal relied on the documents that were in the file for the Applicant. The file included the medical report and opinion of Dr. Ogilvie-Harris.

[18] The legislative provisions namely, CPP paragraph 42(2)(b) states that the date of deemed disability commences no sooner than 15 months prior to the date of the application for CPP disability benefits, in the Applicant's case May 2008. The Tribunal can find no authority that would allow it to find that the Applicant's disability period should be calculated retroactively. Indeed the case law is clear on the issue, for example in *Galay v. Canada (Minister of Social Development) (June 3, 2004) CP 21768 (PAB)* the Pension Appeals Board held that "the words "before the time of making the application" in CPP paragraph 42(2)(b) refer to the time that the application was received by the Minister." And, in *Sarrazin v. Canada (Minister of Human Resources Development) (June 27, 1997), CP 05300,* the PAB expanded on its analysis of the retroactivity of CPP paragraph 42(2)(b). The PAB stated that "Section 42(2)(b) limits the retroactive time to 15 months before the later of (i) the time when a successful application for disability benefits was made, or (ii) when the amendments came into force in June 1992."

[19] Further, in *Baines v. (Minister of Human Resources Development), 2011 FCA 158* (leave to appeal to the Supreme Court of Canada refused), the Federal Court of Appeal made it clear that, "where the claimants initial application was refused seven years before, the fact that a

subsequent application was allowed for the same injury did not permit the tribunal to backdate the award beyond the 15-month statutory maximum to the date of the initial application. The Review Tribunal did not have jurisdiction to reopen the original file, and the PAB could only consider issues within the Review Tribunal's jurisdiction."

[20] The Applicant's case is on "all fours" with *Baines* even with respect to the number of years between the first and second applications for CPP disability benefits. Therefore, the Tribunal finds that *Baines* applies. The Review Tribunal did not commit an error when it limited the retroactive payment of disability benefits to the 15 months immediately before the Applicant made the application in respect of which it found her to be disabled.

[21] Further reliance is placed on the PAB decision in *Meseyton v. Canada (Minister of Social Development) (June 4, 2004) CP 21108 (PAB)*, which decision squarely addressed the question of whether or not retroactivity could apply to a prior unsuccessful application that was not appealed. In *Meseyton,* the PAB concluded that "the fact that the claimant had previously made an unsuccessful application for benefits, failed to appeal the Minister's refusal, did not entitle the claimant to an extension of the 15-month period of retroactivity on his subsequent successful application." Similarly, the Applicant is not entitled to have her disability payments extended to the time of her first unsuccessful application, which she did not appeal.

[22] The above decisions remain good law and guide the process of the successor SST and the decisions of its Appeal Division. Accordingly, the Tribunal finds that the Applicant has not met her onus to satisfy the Tribunal that her appeal would have a reasonable chance of success.

CONCLUSION

[1] The Application for Leave to Appeal is refused

Hazelyn Ross
Member, Appeal Division