Citation: *H. W. v. Minister of Employment and Social Development,* 2014 SSTAD 309

Appeal No. AD-13-175

BETWEEN:

H. W.

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 23, 2014

DECISION

[1] The Application for Leave to Appeal the decision of the Review Tribunal is refused.

INTRODUCTION

[2] By a decision issued January 07, 2013 a Review Tribunal determined that a Canada Pension Plan disability pension was not payable to the Applicant. The Applicant has applied to the Appeal Division of the *Social Security Tribunal*, ("the Tribunal") for Leave to Appeal the decision, ("the Application").

GROUNDS OF THE APPLICATION

[3] The Applicant submits that the Review Tribunal erred in deciding that her physical condition did not constitute a severe and prolonged disability under the *Canada Pension Plan, (*"the CPP*").*

[4] The Applicant submits,

> a) She last satisfied the Minimum Qualifying Period on August 31, 2008.
>
> b) Due to physical injuries and cognitive problems she was incapable of succeeding in a retraining effort; and
>
> c) She has been unable to work in any gainful employment since December 2007.

ISSUE

[5] Does the Application satisfy the Tribunal that there is a reasonable chance of success on appeal?

[6] What is the appropriate MQP?

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 Act* ("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 sets out the applicable test for granting leave and provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[9] Ss.58(1) of the DESD Act sets out the grounds of appeal as being limited to the following:

> (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (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.

[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.

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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

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 reinforced the stricture against deciding, on a Leave Application, whether or not the appeal could succeed.

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

ANALYSIS

[12] The thrust of the Applicant's argument is that the Review Tribunal ought to have found in her favour. In the Applicant's view, her medical and cognitive conditions prevent her from retraining and that she has been disabled since December 2007.

[13] The Applicant through her representative has raised the issue of what is the appropriate MQP. The Applicant's representative submits the MQP is August 31, 2008. The Tribunal notes that the question of the appropriate MQP was raised and considered at the hearing. The decision also reveals that the Applicant was made aware that she could use August 31, 2008 as a prorated MQP date. However, the attendant limitation was that the Applicant would have to have become disabled between January 1, 2008 and August 31, 2008. The Review Tribunal decision notes that it was agreed at the hearing that the appropriate MQP is December 31, 2007. The Tribunal finds it disingenuous of the Applicant's representative to raise the question of the MQP after it was settled. The Tribunal rejects the MQP date as a viable ground of the Application.

[14] The Applicant's medical history begins in July 2003. It shows that she suffered the following medical conditions:

1. Work place related asthma; which condition, according to Dr. Sears, stems from her exposure to cleaning agents;

[3] *Calihoo v. Canada (Attorney General),* [2000] FCJ No. 612 TD para 15.

2. A rotator cuff injury she suffered on December 27, 2006;

3. Headaches that were likely related to an arachnoid cyst on the right side of her head.

[15] At the hearing, the Review Tribunal had before it and presumably considered the medical reports listed under the Medical Evidence section of its decision. It also had a neurologist report and report from a sleep clinic the Applicant attended. The Applicant testified that her current medications were Tylenol 3, which she took once daily; Ibuprofen that on occasion she uses up to 8 per day. She also uses a puffer two to three times per day. It appears that when asked, the Applicant told the Review Tribunal that she would consider surgery if her headaches became severe enough. She also testified that while she was still having trouble sleeping she took no sleep aids. While initially she had injections for her shoulder pain, she was taking no medication or undergoing physiotherapy or any type of treatment for the injured shoulder. The Applicant was, however, taking medication to regulate high blood pressure and had been doing so for about a year and a half prior to the hearing. When asked, the Applicant responded that the blood pressure medication helped to alleviate her headaches. At the time of the hearing the Applicant had ceased smoking for about a year and a half. She continued to see Dr. Sears in relation to her asthma every six months. Her test results reported her condition as normal.

[16] On these facts, the Review Tribunal found that with respect to her work related asthma, the Applicant did not follow Dr. Sears recommendation that she find work where she would not come into contact with the substances that were causing the condition. The Review Tribunal reached a similar conclusion with respect to the rotator cuff injury. It found the Applicant did not continue with a course of injections even though it was her testimony the injections helped and that while she continued to complain of soreness in her shoulder she reported to Dr. Porte that the shoulder was improving and, therefore, there was no need for follow-up.

[17] The Applicant shows a similar pattern of behavior in relation to the arachnoid cyst, although in the Tribunal's view a reluctance to undergo surgery may well be quite reasonable. The Review Tribunal applied *Adamson*[4] in finding that the Applicant had failed to respond to the recommendations of health care advisors and had not made reasonable efforts to do the things necessary to improve her health.

[18] In light of the above, the Tribunal finds that the Review Tribunal committed no error in its finding concerning the Applicant's medical condition and her employability, namely, her ability to obtain a substantially gainful occupation.

[19] The Tribunal reaches a similar conclusion in respect of the Review Tribunal's assessment of the Applicant's retraining efforts and her efforts to find alternate employment. The Applicant's efforts to retrain and to find alternate employment are set out at paragraphs 72 to 74. These paragraphs record the Applicant's testimony as that between April 2008 and July 2009 the Applicant attended an English Second Language course. The hours were from 8:00 a.m. to 1:00 p.m. In a 14 month period, headaches caused the Applicant to miss classes two to three times a month. The Applicant testified that she made two attempts to find alternative work during this period but did not consider returning to a job as a seamstress for fear it would affect her asthma condition. She drives.

[20] In the Review Tribunal's view, the Applicant failed to meet the test in *M.C. v. MHRD*[5], namely that applicants for CPP disability benefits are expected to show meaningful effort to find other employment suitable to their skills and limitations. The Tribunal finds that it was open to the Review Tribunal to reach the conclusion that two attempts to find alternate work in fourteen months and a refusal to find work of which she was capable and which would not affect her medical conditions did not meet the *M.C.* test.

[21] For these reasons, the Tribunal finds the Review Tribunal did not err in its findings. Further, the Tribunal is not satisfied that the appeal would have a reasonable chance of success.

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[4] Adamson v. MHRD (August 1, 2002), CP 13422, (PAB).
[5] M.C. v. MHRD (October 6, 2010), CP 26420 (PAB).

CONCLUSION

[22] The Application for Leave to appeal the decision of the Review Tribunal is refused.

Hazelyn Ross
Member, Appeal Division