Citation: *A. W. v. Minister of Employment and Social Development*, 2014 SSTAD 298

Appeal No.: AD-13-158

BETWEEN:

A. W.

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: HAZELYN ROSS

DATE OF DECISION: October 16, 2014

DECISION

[1] The application for leave to appeal is refused.

INTRODUCTION

[2] By a decision issued June 2, 2013, a Review Tribunal determined that the Applicant was not entitled to a *Canada Pension Plan, ("CPP"),* disability pension. In its decision, the Review Tribunal concluded that as of her Minimum Qualifying Period, ("MQP"), date of December 31, 2005, the Applicant did not suffer from a severe disability that meets the definition contained in CPP ss. 42(2)(a).

GROUNDS OF THE APPEAL

[3] The Applicant seeks Leave to Appeal this decision, (the "Application"). Counsel for the Applicant submits the Review Tribunal erred in law by misapplying the case of *MNHW v. Dupuis*, (July 1985) CCH 8502.

[4] In support of his contention, Counsel for the Applicant contends

a. the Review Tribunal failed to appropriately analyse a number of factors in the instant case in paragraph 39 of its decision. He sets out the factors as

- The Applicant suffered from burnout
- The courses were not "reasonably demanding"
- The applicant was taking a diminished course load

Counsel for the Applicant argues that not every course of study can be said to be the equivalent of substantial gainful employment.

b. The Review Tribunal improperly interpreted the fact that the Applicant maintained some aspect of schooling.

Counsel's argument is that the fact that the Applicant continued to pursue studies is not an indication that she could maintain employment. Counsel contends that the Applicant "broke

down" and developed significant depression, all of which demonstrates her level of impairment and inability to work.

c. The Review Tribunal improperly isolated the Applicant's skills and education.

Her counsel submits that the Applicant's skills and education are of secondary importance given her debilitating psychological state and physical impairments.

d. The Review Tribunal found the Applicant credible.

Counsel did not put forward any argument in respect of this submission. However, the Tribunal infers that he is making the submission that a finding that the Applicant was a credible witness ought to equate with a positive outcome.

[5] The Applicant's Counsel states that if the Application is successful, the Applicant intends to argue that the Review Tribunal failed to have proper regard to the material and evidence before it.

[6] The Social Security Tribunal, ("SST"), received the Application on September 4, 2013. Adjusted for the Public Holiday of Labour Day, the SST received the Application one day outside of the time permitted for filing under ss. 57(1)(b) of the *Department of Employment and Social Development Act* (DESD Act). Ss. 57(1)(b) prescribes as follows,

57. *Appeal time limit*- (1) An application for leave to appeal must be made to the Appeal Division in the prescribed form and manner and within,

b. in the case of a decision made by the Income Security Section, 90 days after the day on which the decision is communicated to the appellant.

However, s. 57 also provides that the Appeal Division may extend the time limit for an Application up to a maximum of one year. In the present circumstance where the breach is negligible, the Tribunal is of the view that *Gatellaro*[1] can be applied. In particular, the Tribunal finds that the Applicant has demonstrated a continuing intention to pursue the Application and, further, there is no prejudice to the other party in allowing a one-day extension of the time for filing the Application.

[1] *Canada (Minister of Human Resources Development) v. Gattelaro,* 2005 FC 833. Namely that the applicant demonstrates a continuing intention to pursue the Application.

ISSUE

[7] Does the Appeal have 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 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."

[10] 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;
>
> (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] 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[2] or show some

[2] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

arguable ground upon which the proposed appeal might succeed. In *St-Louis*[3], Mosley, J. stated that the test for granting a leave application is now well settled. Relying on *Calihoo,*[4] 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.

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

ANALYSIS

[13] In the Application the Applicant's Counsel has repeated all of the arguments he made in submissions at the hearing. He makes one novel argument and that is that the Review Tribunal has improperly applied case law. He amplified his argument in his submission to argue that the Applicant's course load did not reach the status of "reasonably demanding" referred to in *MNHW v. Dupuis, (July 1985), CCH 8502*.

a) <u>Did the Review Tribunal err when it found that the Applicant's course load was "reasonably heavy"?</u>

[14] The Review Tribunal has summarized the Applicant's testimony about her courses in the "Evidence" section of its decision. It appears that between January 2004 and October 2007 the Applicant completed an accounting diploma and a number of other academic courses. Her course load and the number of classroom hours per week varied; ranging from as little as four hours to as much as 30 hours per week. At one point her course load included a co-op placement and reached between 30 to 40 hours a week. According to the review Tribunal, it was the evidence of the Applicant that for some portions of the time, the Applicant found her course load heavy. At paragraph 15, the Review Tribunal gives the Applicant's testimony as,

> 15 "The Appellant testified that in September 2004 she started a business admin accounting course which involved taking two courses and having approximately four

[3] *Canada (A.G.) V. St. Louis*, 2011 FC 492
[4] *Calihoo v. Canada (Attorney General),* [2000] FCJ No. 612 TD para 15.

hours of classroom time a week. The Appellant stated that it was a very big workload and that she was able to complete these courses."

And at paragraph 25, the Review Tribunal writes "the Appellant testified that in May 2007 she was taking a very heavy finance course." In light of these statements by the Applicant, the Tribunal finds that the Review Tribunal's finding that she was carrying a reasonably demanding course load is not unreasonable.

b) <u>Did the Review Tribunal improperly interpret the fact that the Applicant maintained some aspect of schooling?</u>

[15] A second main submission made by Counsel for the Applicant is that the Review Tribunal improperly interpreted the fact that the Applicant maintained some aspect of schooling. Counsel argues that the fact that the Applicant continued to pursue studies is not an indication that she could maintain employment. He states that the fact that the Applicant "broke down" and developed significant depression demonstrates her level of impairment and inability to work. The Tribunal finds that the Applicant did not suffer a "break down" until October 2007, which is almost two years after the MQP. Therefore, the breakdown cannot be indicative of the applicant's residual capacity to work on or before the MQP.

[16] It appears from the evidence that in 2005 the Applicant was attending with Dr. McBride for counselling. The Review Tribunal states that her evidence was that she saw Dr. McBride on a weekly or bi-weekly basis and they worked on coping strategies and stress management. In light of what appears to have been her earlier testimony that her heavy course load and coop placement was stressful and that she was finding it difficult to concentrate and focus, the Tribunal infers that the visits to Dr. McBride and the coping strategies and stress management were related to those issues and not to a "break down" in the manner proposed by counsel.

c) <u>Did the Review Tribunal improperly isolate the Applicant's skills and education?</u>

[17] Another major submission that the Applicant's Counsel makes is that the Review Tribunal improperly isolated her skills and education. The Tribunal is not persuaded of this view, given that education and skill level are two of the factors that a Tribunal is required to consider when assessing the severe prong of the definition of disability. Likewise, the Tribunal is not persuaded of counsel's submission that the Applicant's skills and education are of secondary importance given her debilitating psychological state and physical impairments. In the tribunal's view, they go towards assessing whether or not the applicant could pursue any substantially gainful occupation.

[18] The now 50 years old Applicant was 41 years old at the MQP. She completed Grade 12. Her post-secondary education includes a 5-year course qualifying her as a medical laboratory technologist. She worked in this field until about December 2003. Her last job was that of a laboratory technologist. She stopped working because of a repetitive strain injury to her right hand. The Applicant has also completed 3 years of study in business accounting. *Villani* provides that an Applicant's education and training is one of the factors a Tribunal must consider when making its assessment of whether or not the Applicant's disability is severe and prolonged.

[19] It is clear from the decision that the Review Tribunal considered the Applicant's education and training and made a finding that at the MQP she retained residual capacity to work. Having made this finding, the Review Tribunal proceeded to assess the Applicant's conditions in the context of her ability to pursue the demands of her course load. The Applicant and her Counsel may not agree with the result, however, the Tribunal finds that Counsel's submissions do not form a rational basis for granting leave.

[20] The Tribunal also finds that there is no evidence that the Review Tribunal failed to take into account that the Applicant suffered "burn out" or that her course load diminished. The Review Tribunal specifically states at paragraph 43 that it accepted that the demands of juggling school and a coop placement as well as dealing with the Workplace Safety and Insurance Board and maintaining her family life as well as the demands the Applicant made upon herself added to her psychological conditions. Notwithstanding this finding the Review

Tribunal was not persuaded that the Applicant's condition rose to the level of severe required by CPP s. 42(2)(a).

d) <u>The Review Tribunal found the Applicant credible</u>

[21] With respect to the submission that the Review Tribunal found the Applicant to be a credible witness, the Tribunal is of the view that such a finding is not incompatible with a finding that her disability is not severe in that, at the date of the MQP she was not incapable regularly of pursuing any substantially gainful occupation. The Review Tribunal has an obligation to consider the totality of the evidence including the objective medical evidence, employment evidence and possibilities[5] which, in the circumstances of this case, the Tribunal finds it did.

[22] In light of the above analysis, the Tribunal is not satisfied that the Review Tribunal either failed to properly consider the medical evidence and documentation on file or misapprehended the relevant facts. Further, the Tribunal is not satisfied that there is a reasonable chance of success on appeal.

CONCLUSION

[23] Leave to Appeal is refused.

Hazelyn Ross
Member, Appeal Division

[5] *Grenier v. Canada (Minister of Human Resources Development)* 2001 FCT 1059.