Citation: *A. L. v. Minister of Employment and Social Development,* 2014 SSTAD 310

Appeal No. AD-13-151

BETWEEN:

A. L.

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 27, 2014

DECISION

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

INTRODUCTION

[2] By a decision issued June 4, 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 his Minimum Qualifying Period, ("MQP"), date of December 31, 2012, the Applicant did not suffer from a severe disability that meets the definition of, contained in CPP paragraph 42(2)(a).

GROUNDS OF THE APPEAL

[3] The Applicant seeks leave to appeal this decision, (the "Application"). Through his Counsel, he submits that the Review Tribunal made a number of errors in its assessment of whether his disability is severe and prolonged.

[4] The Social Security Tribunal, ("the Tribunal") received the Application on August 27, 2013. Counsel for the Applicant put forward the following as grounds of the Application:

a) The Review Tribunal made factual errors in relation to the Applicant's injuries.

b) The Review Tribunal failed to properly weigh the Applicant's physical disability.

c) The Review Tribunal erred in drawing negative inferences about the Applicants demeanour and his residual capacity to work.

d) The Review Tribunal failed to appreciate the medical and oral evidence in concluding that the Applicant's disability was not severe.

ISSUE

[5] Does the appeal have a reasonable chance of success?

THE LAW

[6] 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.

[7] 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."

[8] Subsection 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
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> (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.

[9] On an Application for leave to appeal the hurdle that an Applicant must meet is a first, and lower, hurdle 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.

[10] In *St-Louis*[2], Mosley, J. was of the view 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

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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

arguable ground on which the appeal might succeed." He also reinforced the stricture that on a Leave Application, the PAB [now Appeal Division of the Tribunal] should not decide whether the Applicant could actually succeed.

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

ANALYSIS

a) <u>The Review Tribunal made factual errors in relation to the Applicant's injuries.</u>

[12] The first point that Counsel for the Applicant makes is that the Review Tribunal misapprehended the Applicant's physical conditions. He states that the Review Tribunal referred to the wrong parts of the Applicant's body when describing his medical condition. At paragraph 8 of its decision, the Review Tribunal writes,

> "The Appellant's counsel advised the Tribunal that he would show the Tribunal that his client was deserving of a Canada Pension Disability pension due to his bad right knee, a difficult elbow and painful lower back. He stated his client's most recent employment had been provided by the good graces of a kind employer."

[13] Counsel for the Applicant submits that the Review Tribunal erred in referring to the Applicant's right knee when it is his left knee that is affected. That the Review Tribunal failed to identify which elbow is affected. It is the right elbow. Undoubtedly, the Review Tribunal was in error when it identified the bad knee as the right knee. However, the error has to be assessed in relation to its impact on the decision of the Review Tribunal. In the very next paragraph of its decision, the Review Tribunal relates the Applicant's evidence and references his left knee. The Review Tribunal continued to make reference to the Applicant's left leg and knee throughout its decision. With respect to the Review Tribunal not identifying the affected elbow, it is clear from the decision that the Review Tribunal was well aware that it

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

was the Applicant's right elbow that was affected. Paragraph 22 of the decision notes that, "an x-ray report of October 1, 2012 for the right elbow noted no soft tissue bone or joint abnormality and on the same day similar findings for right wrist x-ray." The relevant body parts are correctly referenced in paragraphs 23 and 24, which cover the submissions made by Counsel and by the Respondent's representative. Accordingly, the Tribunal finds that notwithstanding the error in paragraph 8, the Review Tribunal decision is not significantly impacted as it is clear from the decision as a whole that it had the proper understanding of the Applicant's medical conditions. Leave will not be granted on this basis.

[14] The Review Tribunal did consider the totality of the evidence before it: what Counsel for the Applicant seems to be implying is that on the evidence before it, the Review Tribunal ought to have come to a different conclusion; one which favoured the Applicant. However, it is clear that the Review Tribunal reached its conclusion fully aware of the fact that the Applicant "has had a serious back condition". Further, it is clear that, in reaching its conclusions the Review Tribunal considered the evidence relating to all of the Applicant's medical conditions. The Tribunal is not persuaded that the Review Tribunal ought to have arrived at different conclusions about the medical evidence or that its conclusions were not reasonable.

b) The Review Tribunal failed to properly weigh the evidence concerning the Applicant's physical and mental disability: The Review Tribunal failed to appreciate the medical and oral evidence in concluding that the Applicant's disability was not severe.

[15] These two objections are appropriately dealt with together. Under these heads. Counsel for the Applicant makes a number of statements concerning the proper interpretation of the medical evidence. Among these is that the Applicant was receiving various forms of treatment for his knee, elbow, back and depressive conditions both prior to and after the MQP. He also states that the Review Tribunal failed to appreciate the whole of the medical recommendations concerning the Applicant staying active. Counsel submits that these recommendations were limited by the condition that the Applicant stay as active as he can. These statements are more in the nature of argument rather than an explanation of how the

Review Tribunal erred. Moreover, all of the medical evidence to which Counsel refers was before the Review Tribunal and was, demonstrably, considered in its decision. The Review Tribunal based its decision on the Applicant's testimony that he made no attempt to find alternate work since 2010; made no attempt to update or upgrade his skills and followed what he described as a "sedate" lifestyle, that is, a non-active lifestyle. Based on the foregoing, the Tribunal is not satisfied that the Review Tribunal committed an error of fact, made without regard to the material before it.

c) <u>The Review Tribunal erred in drawing negative inferences about the Applicants demeanour and his residual capacity to work.</u>

[16] Counsel for the Applicant raised these two objections. At paragraph 28, the Review Tribunal described the Applicant's demeanour as "guarded". Counsel submits that the Applicant was intimidated by the process. The Tribunal accepts that persons appearing before any Tribunal for the first time may well be nervous, however, the Review Tribunal had first-hand opportunity to observe the Applicant and to draw conclusions about his demeanour even as a person new to the process. The Tribunal is not satisfied that this objection raises an arguable case.

[17] Nor is the Tribunal satisfied that the Review Tribunal incorrectly and unfairly drew an inference that light jobs would be available to the Applicant "at this time" as Counsel for the Applicant contends. Leaving aside for the moment the question of whether the Review Tribunal applied the correct test, the Tribunal is not persuaded that the Review Tribunal unfairly drew an inference that light jobs would be available to the Applicant "at this time" because the Tribunal is not persuaded that the Review Tribunal was making a statement other than that there was no evidence before it on which it could conclude that the Applicant could not then find a light job.

[18] The Tribunal agrees with Counsel for the Applicant that the correct test is at the date of the MQP and not "at this time". The Tribunal finds that "at this time" implies at the date of the hearing. The hearing took place on March 12, 2013. The Applicant's MQP date is December 31, 2012; the hearing took place on March 12, 2013.

[19] Even where a Tribunal accepts that an Applicant has a disability, it must still find that the disability rises to the level that can be described as "severe" and "prolonged" within the meaning of the CPP. [See *Canada (Minister of Human Resources Development) v. Angheloni*, 2003 FCA 248; also *Gorgiev v. Canada (Minister of Human Resources Development)*, 2005 FCA linking "severe" to a determination of whether the claimant is able to perform any substantially gainful employment and not simply to the diagnosis.]

[20] Taking all of the above into consideration, the Tribunal is not satisfied that the appeal would have a reasonable chance of success.

CONCLUSION

[21] Leave to Appeal is refused.

Hazelyn Ross
Member, Appeal Division