Citation: *D. T. S. v. Minister of Employment and Social Development,* 2014 SSTAD 334

Appeal No. AD-13-677

BETWEEN:

D. T. 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: November 17, 2014

DECISION

[1] The Social Security Tribunal (the "Tribunal") refuses leave to appeal.

BACKGROUND

[2] The Applicant seeks leave to appeal the decision of the Review Tribunal issued on July 03, 2013, denying her a disability pension under the *Canada Pension Plan*, ("CPP"). The Applicant claimed to have a severe and prolonged disability arising from her medical and mental health conditions. While the Applicant expressed her Application for Leave to Appeal ("the Application") as an appeal from a reconsideration decision and also used the incorrect form, the Tribunal understands the Applicant to be appealing from the decision of the Review Tribunal.

GROUNDS OF THE APPLICATION

[3] As grounds for the Application, the Applicant states that her medical conditions remain unchanged; that by virtue of her medical and mental health conditions she is rendered incapable regularly of pursuing any substantially gainful employment. The Applicant also relies on the fact that there was a dissenting opinion among the members of the Review Tribunal, with one dissenting Member finding that she was entitled to a CPP disability pension.

ISSUE

[4] The Tribunal must decide whether the appeal has a reasonable chance of success.

THE LAW

[5] 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.

[6] Ss. 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

[7] 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.

[8] Ss.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.

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

[10] In order to grant the Application, the Tribunal is required to be satisfied that the appeal has a reasonable chance of success, however, this necessitates the Tribunal first determining whether any of the Applicant's reasons for appeal fall within any of the grounds of appeal. Only then can the Tribunal assess the chance of success of the appeal.

[11] The Tribunal is not satisfied that the appeal has a reasonable chance of success. The issues the Applicant cites as the basis of her Application do not relate to a ground of appeal or, if they do, the Tribunal finds that on the basis of the evidence that was before the Review Tribunal the appeal would likely not succeed. It is clear that the Applicant disagrees with the Review Tribunal. It is also clear that the Applicant prefers the opinion and findings of the dissenting Review Tribunal member. The dissenting decision notwithstanding, the opinion of

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

the majority is the opinion of the Review Tribunal. Therefore, the Applicant would still have to bring the Application within the parameters of ss. 58(3) of the DESD Act. Mere disagreement with the decision of the Review Tribunal does not, *ipso facto*, point to any failure by the Review Tribunal to observe a principle of natural justice or an error of law, nor does it establish that the Review Tribunal otherwise acted beyond or refused to exercise its jurisdiction. As well, disagreeing with the Review Tribunal decision alone cannot establish that the Review Tribunal made erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

[12] The majority of the members of the Review Tribunal accepted the Applicant's evidence with respect to "her continuing discomfort, disturbed sleep and fatigue issues arising out of her fibromyalgia which makes her return to her former employment unlikely." It was clear that while the majority found the oral evidence presented at the hearing to be consistent with the medical evidence, the majority were unable to find that the medical and oral evidence negated the possibility of the Applicant pursuing regularly any substantially gainful occupation and not simply her former occupation of a University Professor. Regard is had to paragraph 37 of the majority decision which addressed this question as well as to paragraphs 38 through 44 which addressed the Applicant's obligation to seek alternative employment and her failure to do so, as the case law indicates she was required to do.

> [37] In this regard, the oral evidence at the hearing is consistent with the medical evidence contained in the various medical reports. Those medical reports, however, are in very large part focused on the Appellant's ability to return to her previous occupation as a University Professor. Given her demonstrated limitations, the Appellant may well continue to qualify for LTD benefits under the provision of the operative disability insurance policy.

[13] At paragraph 39, the majority of the Review Tribunal observed, "in this regard, the evidence is clear that the Appellant has, to date, made no inquiries or pursued any efforts of any kind with regard to any other employment opportunity outside of the academic environment in which she had been immersed for the major part of her working life and career." Relying on *Donaldson*[2], *Villani*[3], *Klabouch*[4] *and Inclima*[5] the majority of the Review Tribunal found that the

[2] *Donaldson* v. *MHRD* (May 27, 1998), CP 4910 (PAB)
[3] *Villani* v. *Canada (A.G.),* 2001 FCA 248)
[4] *Klabouch v. Canada (MSD),* 2008 FCA 33
[5] *Inclima v. Canada (A.G.),* 2003 FCA 117

failure of the Applicant to seek alternative employment was fatal to her claim for CPP disability benefits.

[14] The opinion of the dissenting review tribunal member is based on his finding that the *viva voce* evidence of the Applicant and her spouse filled in the gaps in the medical reports. Based on their evidence, the dissenting member of the Review Tribunal found that the Applicant was "barely functioning at home". Therefore, he concluded that the Applicant "could not be expected to maintain employment at any level".[6]

[15] The Tribunal finds that the dissenting opinion points to the different views of the evidence and weight accorded to it by the Review Tribunal members. The Tribunal also finds that, based on the evidence before the Review Tribunal, it was open to the majority of the members of the Review Tribunal to come to the conclusion they did. The Tribunal finds that there is no indication of error on the part of the majority of the Review Tribunal. As the decision of the majority is the decision of the Review Tribunal and as the Applicant has not shown how this decision provided a ground of appeal as set out in CPP s. 58, the Applicant has not satisfied the Tribunal that the appeal would have a reasonable chance of success.

CONCLUSION

[16] The Application is refused.

Hazelyn Ross
Member, Appeal Division

[6] Review Tribunal decision, dissenting opinion, at para. 13.