

Citation: *S. H. v. Minister of Employment and Social Development*, 2014 SSTAD 353

Appeal No. AD-13-24

BETWEEN:

S. H.

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: VALERIE HAZLETT PARKER

DATE OF DECISION: December 10, 2014

DECISION

[1] The Tribunal grants leave to appeal to the Appeal Division of the Social Security Tribunal.

INTRODUCTION

[2] On May 14, 2013, a Review Tribunal determined that a *Canada Pension Plan* disability pension was not payable after a hearing was conducted by teleconference (the Applicant resides in Switzerland and did not attend the hearing in person). The Applicant filed a letter requesting leave to appeal (the “Application”) with the Appeal Division of the Tribunal on July 29, 2013.

PRELIMINARY MATTER

[3] Prior to deciding whether to grant leave to appeal I requested that the parties file written submissions with the Social Security Tribunal (Tribunal). The Respondent filed detailed written submissions with the Tribunal on October 31, 2014. The letter requesting submissions was mailed to the Applicant at the address she had provided to the Tribunal. It was returned as undeliverable at that address. The Applicant’s letter requesting leave to appeal included her email address. The letter requesting submissions was also sent to this email address. The Applicant did not file any written submissions with the Tribunal.

ISSUE

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

THE LAW

[5] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act*, (DESD Act) “an appeal to the Appeal Division may only be brought if leave to

appeal is granted” and “the Appeal Division must either grant or refuse leave to appeal”.

Subsection 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.

[6] The decision of the Review Tribunal is considered a decision of the General Division.

[7] 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”.

SUBMISSIONS

[8] The Applicant made numerous arguments in support of the Application. These are broadly categorized as complaints about how her disability claim was processed by Service Canada, alleged bias, complaints about the procedures followed at the hearing, and errors made in the Review Tribunal decision.

[9] The Respondent filed submissions that responded to each argument put forward by the Applicant.

ANALYSIS

Preliminary Matter

[10] All communication was delivered to the email address the Applicant provided on her letterhead. The *Social Security Tribunal Regulations* permit parties to file documents with the Tribunal by email. Therefore, I find that in this case the Tribunal could properly communicate with the Applicant by email since she provided that contact information.

[11] Section 6 of the *Regulations* provides that a party must file with the Tribunal a notice of any change of their contact information without delay. The Tribunal has no further obligation to seek out contact information for parties to matters before it. The Applicant has not advised the Tribunal of any change in her contact information. I am satisfied that the Applicant had notice of the hearing and the request to provide submissions therefor as it was sent to the email address she provided, and not returned.

Leave to Appeal

[12] Although a leave to appeal application is a first, and lower, hurdle to meet than the one that must be met on the hearing of the appeal on the merits, an Applicant must present a ground of appeal that has a reasonable chance of success to be granted leave to appeal: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 4, *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[13] The Applicant put forward numerous arguments as grounds of appeal in the Application.

A. Bias

[14] The Applicant alleged that the Review Tribunal's goal was to dismiss the appeal, not to provide a fair assessment of her situation. She provided no details specifically with respect to this argument. The Respondent did not make any submissions specifically on this. Without some

details to demonstrate how the Review Tribunal was biased, I am not satisfied that this argument has a reasonable chance of success on appeal.

B. Processing of Claim by Service Canada and Hearing Procedures

[15] The Applicant set out a number of complaints regarding how her application for a *Canada Pension Plan* (CPP) disability pension was handled by Service Canada. She wrote that Service Canada lost some of the documents and photographs that she sent to it and that some of her information that was stored on a USB stick was lost. The Respondent argued that the fact that some personal information stored on a USB stick was lost was not relevant to the matter before this Tribunal. In addition, the documents and photographs that were not properly filed with her application for a disability pension were replaced and were properly considered by the Review Tribunal.

[16] I agree with the Respondent's submission that the loss of some of her personal information stored on a USB stick, while unfortunate, is not relevant to the legal issue before me in this case. The loss of this information has no bearing on a determination of whether the Applicant has put forward grounds of appeal with a reasonable chance of success on appeal.

[17] Regarding the documents and photographs, it is unfortunate that they were not properly filed with the Applicant's application for a disability pension initially. These documents were, however, before the Review Tribunal when it held the hearing and rendered its decision. Therefore, I am not satisfied that as a result of the difficulty with these items the Review Tribunal made its decision without regard to all of the material before it. Hence, this argument is not a ground of appeal that may have a reasonable chance of success on appeal.

[18] The Applicant also argued that it was misleading that a government agency would promote programs for people with disabilities and then state that the programs don't exist. While I understand that it can be confusing to apply for different government programs and be provided with different information by different government officers, this is not relevant to the legal issue

that was before the Review Tribunal. Thus, this is not a ground of appeal that may have a reasonable chance of success on appeal.

[19] The Applicant argued, further, that the hearing was confusing and poorly organized. In particular, she submitted that there was no prior agenda for the hearing, she did not know in advance what questions would be asked, and she was not advised of what documentation she should attend the hearing with. In addition, the questions asked by Review Tribunal members did not follow any specific chronology.

[20] The Respondent argued that the agenda for any hearing is the evidence of the parties, and that Review Tribunal members were at liberty to ask questions in any order to determine whether a claimant is disabled under the CPP. The Applicant's disagreement with the conduct of the hearing is not a breach of natural justice or procedural fairness.

[21] I find that while the Applicant was entitled to present her entire case and to know the case she had to meet, she was not entitled to have an agenda at the hearing or to be specifically advised of what documents the Review Tribunal would focus its questions on. In addition, Review Tribunal members are not restricted in the order in which they question a witness or what questions they may ask. The Applicant did not allege that she was not able to present her evidence, or was otherwise denied procedural fairness as a result of the way the hearing was conducted. The Review Tribunal decision contains a thorough summary of the oral and documentary evidence. Therefore, this argument is not a ground of appeal that may have a reasonable chance of success on appeal.

[22] In addition, the Applicant argued that because of technological difficulties she had trouble hearing questions asked by Review Tribunal members, and may have answered some questions incorrectly as a result. The Applicant provided no examples of when this may have occurred. The Review Tribunal decision summarized the Applicant's testimony, including details regarding her condition and treatment. It did not outline any inconsistencies between the testimony and the written evidence. I am not persuaded that the Applicant did not receive a full

and fair hearing as a result of teleconferencing difficulties. This argument is not a ground of appeal that may have a reasonable chance of success.

C. Errors in the Decision

[23] The Applicant also made numerous allegations of errors made by the Review Tribunal in its decision, claiming that her testimony was misquoted, misinterpreted and important sections omitted. The Respondent countered each of these arguments, often with examples to support its response. My findings are set out below after reviewing the Application and the Respondent's submissions:

- a) The Applicant clarified that in addition to buying mandatory health insurance in Switzerland where she lives she incurred significant cost for treatment of her injury. This was reflected in the Review Tribunal decision, so no error was made in this regard. This argument is not a ground of appeal that may have a reasonable chance of success on appeal.
- b) The Applicant argued that the decision did not reflect that it took her six months of therapy to be able to close her fist after the injury. While the specific amount of time it took for her to regain each type of use of her hand may not be specified in the decision, it was clear that the Applicant's recovery has been long and arduous, with slow progress. Therefore, I am not persuaded that the Review Tribunal made an error that has a reasonable chance of success on appeal based on this argument.
- c) The Applicant argued, in addition, that the Review Tribunal decision "skipped over" her testimony that it took her approximately two years to learn to print with her left hand, and writing or typing are arduous tasks. In *Simpson v. Canada (Attorney General)*, 2012 FCA 82 the Federal Court of Appeal stated clearly that the Review Tribunal decision need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all of the evidence. Therefore, the omission of some details of the

Applicant's testimony in the written decision is not a ground of appeal that has a reasonable chance of success on appeal.

- d) The Applicant argued that the Review Tribunal, when it reviewed the photographs she provided (and replaced when they were not filed with her claim), commented on her manicure rather than the inability to complete certain motions as shown in the photographs. This is not reflected in the Review Tribunal decision, and no determination was made based on the Applicant's ability to manicure her nails. Although such comments may have been insensitive, they do not demonstrate that the Review Tribunal erred. This argument does not have a reasonable chance of success on appeal.
- e) The Applicant, further, argued that she was seeking funding to retrain to teach English and complained that this was described as a "dream job" by the Review Tribunal. Whether teaching English was a "dream job" or not is an irrelevant consideration; what was relevant was the Applicant's capacity to work. The Review Tribunal decision made no comment about any position being a "dream job" so this argument presents no ground of appeal with a reasonable chance of success.
- f) The Applicant provided a detailed submission about her efforts to eliminate pain management medication from her treatment regime, and wrote that she is never completely pain free, which was not specified in the Review Tribunal decision. The Review Tribunal decision provides a concise history of treatment for the Applicant. Again, not every detail of this evidence needs to be included in the decision. I find that this argument does not disclose a ground of appeal that may have a reasonable chance of success on appeal.
- g) The Applicant argued further that she had been advised by Service Canada that she should not answer any questions about her marriage or other personal matters. At the hearing she was asked about this and was not prepared to provide adequate answers. The Respondent argued that these were proper questions to be posed to the Applicant to determine the impact, if any, of her physical disability on her mental health. The Review

Tribunal decision did not reference these questions or the answers given. I cannot therefore conclude that the decision was based on this information or that any error was made in so doing. Hence no ground of appeal with a reasonable chance of success is disclosed by this argument.

- h) In addition, the Applicant argued that her evidence regarding “awakened function” in her nerves demonstrated that prior to this she had no nerve function from the injury to her hand. She claimed that this was misinterpreted by the Review Tribunal. Again, the Review Tribunal decision summarized the Applicant’s evidence, including the severity of her hand injury and its slow partial recovery. The Review Tribunal made no error in this regard, so this is not a ground of appeal that may have a reasonable chance of success on appeal.
- i) The Respondent acknowledged in its submissions that the Review Tribunal decision erred when it stated that Dr. Schnyder recommended retraining when this recommendation was made by Dr. Meuli-Simmen and Dr. Eyer. The Applicant made this same argument. Although this was an error of fact in the Review Tribunal decision, it was not made in a perverse or capricious manner, nor made without regard to the material before it. The error was also not material to the outcome of the appeal. Therefore, it is not a ground of appeal that has a reasonable chance of success on appeal.
- j) The Applicant also sought relief on compassionate grounds. This is not a ground of appeal with a reasonable chance of success. The Tribunal was created by statute. It has no power to grant relief to any claimant, except as permitted by the CPP. It is not possible to award a CPP disability pension to a claimant based on compassion or discretion, no matter how tragic their circumstances.
- k) The Applicant submitted that she indicated on her Disability Questionnaire when she applied for a CPP disability pension that she planned to look for work in the future, however, this was done long past her Minimum Qualifying Period, and before she underwent a final surgery. The Review Tribunal decision did not mention this, and so I

cannot conclude that this was given any significant weight in their deliberations. The Review Tribunal considered all of the evidence presented, including the medical evidence and the Applicant's testimony. It is not for the Tribunal when deciding whether to grant leave to appeal to reweigh the evidence and render a different decision. Therefore, this is not a ground of appeal that has a reasonable chance of success.

- l) The Applicant disputed how the Review Tribunal phrased her part time work endeavours, and argued that it suggested that the Applicant continued to work. Upon reading the decision, I did not come to this conclusion. This is not a ground of appeal that may have a reasonable chance of success on appeal.
- m) The Applicant argued that her two part time work experiences demonstrated that she was willing to work in any position within her work capacity. The Review Tribunal decision clearly considered this evidence. This argument does not point to any error made by the Review Tribunal and so does not have a reasonable chance of success on appeal.
- n) The Applicant argued, further, that she was seeking retraining for work. The Respondent argued that this also demonstrated her capacity to work and therefore the Review Tribunal was correct to find that she was not disabled. These arguments do not point to any error made in the Review Tribunal decision. Therefore no ground of appeal that may have a reasonable chance of success on appeal is disclosed by this argument.
- o) The Applicant repeated her position that she is disabled by the serious injury to her hand that required lengthy and intensive treatment. The nature of her injury and her lengthy course of treatment is not disputed by the Respondent, and was acknowledged in the Review Tribunal decision. This does not raise any ground of appeal that may have a reasonable chance of success on appeal.
- p) The Applicant queried why the Review Tribunal asked her questions regarding her efforts to work in a call centre and other jobs. She then explained the difficulties she has faced as a foreign woman trying to find work in Switzerland with her physical limitations. The

test for disability under the CPP relates to a claimant's ability to work in any substantially gainful occupation. Therefore, it was not improper for the Review Tribunal to question the Applicant about all of her work efforts. This is not a ground of appeal that has a reasonable chance of success on appeal.

- q) The Respondent argued that the difficulties that the Applicant has faced as a foreign female attempting to find work is an irrelevant consideration for the Review Tribunal, relying on the Federal Court of Appeal decision in *Rice v. Canada* (2002 FAC 47). I accept that this is a correct statement of the law. The Review Tribunal made no error in considering this principle in making its decision. Hence, this does not establish a ground of appeal that may have a reasonable chance of success on appeal.
- r) The Applicant argued, in addition, that she disclosed that in four years she had worked for fifteen days. She argued that although she worked at an inbound call centre in Canada she would not be able to do so in Switzerland and that she would not be able to work on a full time basis due to her injury, cannot work in cold temperatures, could not work regularly and has other work restrictions apart from being a foreign citizen. The Respondent argued that for a claimant to be found disabled under the CPP it is their incapacity to work that must be regular, not the work. It also argued that the Applicant would be able to perform the temporary work she obtained for longer if it was offered to her, and that the evidence suggested that she had capacity to work in a call centre. The Review Tribunal concluded that this evidence demonstrated that the Applicant had some capacity to work. The decision did not, however, draw any conclusion about whether the work the Applicant was capable of is substantially gainful. This is an error that gives rise to a ground of appeal that may have a reasonable chance of success on appeal.
- s) Finally, the Applicant argued that the Review Tribunal verbally confirmed that her disability was prolonged but omitted this from the decision. The Review Tribunal decision made no finding on this issue, and also stated that it did not consider that the Applicant had a prolonged condition. There was no recording or transcript of the hearing, so the Applicant's allegation cannot be verified. The contradiction in the

Review Tribunal's conclusion regarding whether her disability was prolonged may be an error. Therefore this argument raises a ground of appeal that may have a reasonable chance of success on appeal.

CONCLUSION

[24] The Application is granted because the Applicant has raised arguments that may have a reasonable chance of success on appeal.

[25] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[26] Pursuant to section 42 of the *Social Security Tribunal Regulations* the parties have 45 days from the granting of leave to appeal to file submissions with the Tribunal. These submissions may address legal issues, and the form of hearing of the appeal.

Valerie Hazlett Parker
Member, Appeal Division