Citation: *M. A. C. v. Minister of Employment and Social Development*, 2015 SSTAD 24

Appeal No. AD-14-565

BETWEEN:

M. A. C.

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: January 7, 2015

DECISION

[1] The Application for Leave to Appeal is refused.

BACKGROUND

[2] The Applicant applied for a *Canada Pension Plan*, ("CPP"), disability pension in January 2011. The Respondent denied the initial application and, on reconsideration, maintained the denial. Subsequently, the Applicant appealed to the Office of the Commissioner of Review Tribunals, the forerunner to the General Division of the Social Security Tribunal. The General Division heard the appeal, which it denied. In denying the appeal, the General Division Member found that while the Applicant, who is now a left leg amputee, may currently suffer from complications arising from his diabetic condition, he was not suffering from a severe and prolonged disability on or before December 31, 1997 or August 31, 1998, the time of his minimum qualifying period, ("MQP") or prorated MQP, respectively.

[3] The Applicant has filed an Application for Leave to Appeal the General Division decision with the Tribunal's Appeal division, ("the Application").

GROUNDS OF THE APPLICATION

[4] The sole ground of the Application is that, in making its decision, the General Division committed an error of law. The error allegedly arose when the General Division accepted information after the hearing was held.

THE LAW

What must the Applicant establish on an Application for Leave to Appeal?

[5] Subsection 58(2) of the *Department of Employment and Social Development Act,* ("DESD Act"), provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success". The case law has established that 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.

[6] 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.

[7] In order to grant the Application, the Tribunal must first determine whether any of the Applicant's reasons for appeal fall within any of the grounds of appeal set out above. Only then can the Tribunal assess the chance of success of the appeal. The Applicant has raised error of law, the second ground of appeal, as the reason for the Application.

ISSUE

[8] If the General Division accepted documents that were submitted to it after the hearing was this an error of law?

ANALYSIS

Did the Tribunal accept materials after the hearing was concluded?

[9] The hearing took place on June 5, 2014 and the General Division Member issued her decision on October 16, 2014. In her decision the General Division Member addressed a number of preliminary matters before discussing the hearing and issuing her decision. The Member noted that the Respondent submitted documents to the Tribunal two days before the hearing and that the Applicant had not received these documents. The Member also noted that the Respondent's

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

documents were in reply to documents the Applicant submitted to the Tribunal on November 15, 2013. After the hearing, the Tribunal sent a copy of the Respondent's late-filed documents to the Applicant. In its cover letter to the Applicant, the Tribunal asked the Applicant to make any reply submissions on or before July 16, 2014. The Tribunal asked the Applicant to respond in writing. As of the date the General Division issued its decision, namely October 16, 2014, the Applicant had submitted no response to the Tribunal.

[10] The Tribunal has considered the circumstances surrounding the alleged error of law. On the facts before it, the Tribunal finds the General Division did not improperly accept and consider documents that the Respondent submitted to the Tribunal after the hearing. It is clear from the decision that the Tribunal received submissions from the Respondent two days before the scheduled hearing. In these circumstances, the Tribunal infers that when the Applicant attended the hearing he would have been made aware that the Respondent had filed the submissions. In fact, on June 4, 2014, the Tribunal wrote to the Applicant advising him that the Tribunal had received additional documents that it was appending to its letter to the Applicant.[2] On June 16, 2014 the Tribunal followed up this letter with another letter in which it advised the Applicant he would have 30 days to reply to the additional documents. It is this June 16, 2014 letter that proves problematic as it refers to documents received after the hearing.

[11] Even if the Respondent did submit documents after the hearing was concluded, the Tribunal is not persuaded that the General Division Member erred in law by accepting these documents. The Tribunal makes this finding because, not only are the Tribunal Regulations silent on the question of post-hearing submissions, the Tribunal is of the view that in the particular circumstances of the Applicant's case he has not been prejudiced by the General Division accepting the documents. The Applicant was given ample opportunity to respond to the late filed submissions, whether filed prior to or after the hearing. Secondly, the Applicant was given a date by which he should file written submissions in reply; namely thirty days to file his written response. Furthermore, the Tribunal advised the Applicant that depending on what issues arose out of his written response the Tribunal might convene a new hearing, albeit one that was limited to issues raised by the Respondent's late submissions and the Applicant's response to those submissions. However, in the three months after the date for receipt of the Applicant's

[2] Tribunal letter to Mr. M. A. C. dated June 4, 2014.

reply submissions had expired, he, the Applicant, never filed a written response to the Respondent's submissions as the Tribunal invited him to do. Therefore, the Tribunal is unable to reconcile the Applicant's failure to respond to the Tribunal or to file reply submissions with his current allegation of error of law. The Tribunal finds that the General Division Member did not err in law in making her decision, whether or not the error appears on the face of the Tribunal Record. The Applicant has failed to satisfy the Tribunal that, if leave is granted, his appeal would have a reasonable chance of success.

CONCLUSION

[12] The Application for Leave to Appeal the decision of the General Division is refused.

Hazelyn Ross
Member, Appeal Division